

[Cite as *Cincinnati v. State Emp. Relations Bd.*, 2009-Ohio-2834.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CITY OF CINCINNATI, OHIO, : APPEAL NO. C-080819
Respondent-Appellant, : TRIAL NO. A-0711489
vs. : *DECISION.*
STATE EMPLOYMENT RELATIONS :
BOARD, :
Plaintiff-Appellee, :
and :
FRATERNAL ORDER OF POLICE, :
QUEEN CITY LODGE NO. 69, :
Complainant-Appellee. :

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 17, 2009

Richard Cordray, Ohio Attorney General, and *Anne Light Hoke*, Assistant Ohio Attorney General, for Plaintiff-Appellee,

Stephen S. Lazarus, *Kimberly A. Rutowski*, and *Hardin, Lefton, Lazarus & Marks, LLC*, for Complainant-Appellee, and

John P. Curp, Cincinnati City Solicitor, *Augustine Giglio*, Assistant Cincinnati City Solicitor, and *Jonathan J. Downes*, *Benjamin S. Albrecht*, and *Downes, Hurst & Fishel, LLP*, for Respondent-Appellant.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Judge.

{¶1} This case involves fallout from Cincinnati voters' approval of Issue 5 in 2001. Issue 5 succeeded in allowing the city manager to appoint the police chief and assistant chiefs and to remove them from the classified civil service. That issue was the subject of this court's previous case.¹ But all but one of the assistant chiefs remain in the bargaining unit of the union.

{¶2} The Fraternal Order of Police, Queen City Lodge No. 69 ("the Union") filed an unfair labor practice ("ULP") charge with the State Employment Relations Board ("SERB") against the city of Cincinnati ("the City"). The charge was based on the City's insistence that the assistant chiefs be removed from the bargaining unit. The City took the issue to "impasse," requiring conciliation. (The conciliator ruled for the Union.)

{¶3} SERB determined that the City had committed a ULP. The City appealed to the Hamilton County Common Pleas Court. A magistrate affirmed SERB's decision, and the trial court adopted the magistrate's decision. The City, having lost before four successive times before four tribunals, appeals. We make it zero for five and affirm.

I. Charter Amendment Leads to Litigation

{¶4} The Union is the exclusive bargaining agent for members of the Cincinnati police department. From 2000 through 2003, the City and the Union had a collective bargaining agreement ("CBA") that governed certain police officers' terms of employment with the City. In 2001, Cincinnati voters passed Issue 5, which

¹ *State Emp. Relations Bd. v. Queen City Lodge, Fraternal Order of Police*, 174 Ohio App.3d 570, 2007-Ohio-5741, 883 N.E.2d 1083, ¶¶23-27

was a Cincinnati City Charter amendment that removed guaranteed civil service commission appeal protection for assistant police chiefs and allowed them to be appointed by the city manager. The charter amendment did not specify whether assistant police chiefs should be removed from the Union's bargaining unit—for assistant police chiefs, Issue 5 only dealt with classified versus unclassified service, hiring, residence at the time of hiring, and promotion.

{¶5} In 2004 and 2005, the City and the Union negotiated a new CBA. The City proposed removing all references to assistant-police-chief positions from the CBA, including the "Recognition Clause." This clause mandated that the City recognize the Union as the exclusive bargaining agent for city police officers. Further, this clause prohibited the City from negotiating, meeting, or conferring with any entity other than the Union for the purpose of changing the terms of the CBA and barred the City from adopting any policy that conflicted with the CBA. The recognition clause placed the assistant-police-chief position in a Union bargaining unit.

{¶6} Throughout the bargaining process, the City maintained its position that the assistant-police-chief positions should be removed from the recognition clause and from the CBA as a whole. The City and the Union reached an impasse—all negotiations were exhausted with no prospect of reaching an agreement. Then, as mandated by R.C. 4117.14(D)(1), the City and the Union proceeded to conciliation. The conciliator sided with the Union.

{¶7} The Union filed a ULP charge against the city. SERB ruled that the City had bargained in bad faith by taking to impasse its proposal to remove the assistant-police-chief positions from the bargaining unit; thus, the City had committed a ULP.

II. Assignments of Error

{¶8} The City appealed to the trial court. The trial court adopted a magistrate’s decision that the City had committed a ULP. The City now appeals the trial court’s judgment. It argues that the trial court erred by (1) upholding SERB’s order contrary to R.C. 4117; (2) permitting a deemed-certified bargaining unit to exist in perpetuity; and (3) deferring an opinion concerning the relevance of Issue 5 to the appeal.

III. Composition of Bargaining Unit is Not a Mandatory Subject of Bargaining

{¶9} Courts must give deference to SERB’s interpretation of R.C. Chapter 4117.² “SERB’s findings are entitled to a presumption of correctness.”³ We may reverse only if SERB’s decision was unreasonable or if it conflicted with Chapter 4117.⁴

{¶10} The City argues that its proposal to remove assistant police chiefs was a mandatory subject of bargaining. Under R.C. 4117.08(A), “all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative.”

{¶11} The City contends that R.C. 4117.08(A)’s use of the phrase “the continuation, modification, or deletion of an existing provision of a collective bargaining agreement” made its proposal to modify the recognition clause a

² *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, paragraph two of the syllabus.

³ *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St.3d 210, 214, 1994-Ohio-397, 638 N.E.2d 522.

⁴ *State Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 353, 1994-Ohio-189, 643 N.E.2d 1113.

mandatory subject of bargaining. The Union and SERB argue that this phrase is modified by “all matters pertaining to wages, hours, or terms and conditions of employment.” Further, SERB noted in its decision that nothing in the CBA made the composition of the bargaining unit a mandatory subject of bargaining.

{¶12} SERB was created to administer and enforce R.C. Chapter 4117.⁵ Thus, courts must defer to SERB’s interpretation of R.C. 4117.08(A). SERB’s interpretation of R.C. 4117.08(A) has already been noted. And a clause that simply recites which police positions are a part of the bargaining unit is not a matter that pertains to “wages, hours, or terms and conditions of employment.” Taking the City’s argument to its extreme would mean that the Union and the City would be required to bargain over each and every clause in the entire CBA, and make the above-quoted language superfluous. We agree with SERB that the recognition clause, which defines the composition of the bargaining unit, is not a mandatory subject of bargaining.

IV. Three Methods of Altering a Bargaining Unit

{¶13} In its brief, SERB has outlined the three methods for altering the composition of a bargaining unit: (1) when another employee union challenges the standing union and is successful;⁶ (2) by agreement of the union and the employer to alter the unit;⁷ or (3) by a clause in the CBA that specifies a grievance procedure to be used to alter the bargaining unit’s composition.⁸

⁵ *Lorain City School Dist. Bd. of Edn.*, *supra*, at 260.

⁶ *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Employees v. Cincinnati*, 69 Ohio St.3d 677, 1994-Ohio-367, 635 N.E.2d 361, syllabus.

⁷ *State ex rel. Brecksville Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 74 Ohio St.3d 665, 1996-Ohio-310, 660 N.E.2d 1199, syllabus.

⁸ *Ohio Council 8, AFSCME v. State Emp. Relations Bd.*, 88 Ohio St.3d 460, 2000-Ohio-370, 727 N.E.2d 912, syllabus.

{¶14} The City contends that SERB, the magistrate, and the trial court erred by refusing to recognize a fourth method for altering a bargaining unit. First, it argues that R.C. 4117.08 requires the parties to bargain over the “modification, or deletion of an existing provision of a” CBA. We have already rejected that argument.

{¶15} Second, the City argues that R.C. 4117.05(B) should mean that because the original CBA had expired, the City had the right to bargain over any subject, including the composition of the bargaining unit. Not so. R.C. 4117.05 only pertains to the procedure that unions must follow to become the exclusive bargaining representative for an employee unit. It has no bearing on the composition of the unit. We decline the invitation to judicially create a fourth method for changing a bargaining unit’s composition. The legislature is free to enact one; but it has not done so.

V. Forcing Bargaining to Impasse Was an Unfair Labor Practice

{¶16} The City argues that the trial court erred when it adopted SERB’s order, which determined that the City had committed a ULP when it brought to impasse the attempt to remove assistant police chiefs from the bargaining unit. SERB and the trial court correctly determined that the City had committed a ULP.

{¶17} SERB determined that the City had violated R.C. 4117.11(A)(1)—“Interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Chapter 4117”—and R.C. 4117.11(A)(5)—“Refus[ing] to bargain collectively with the * * * exclusive representative.” “Bargaining collectively” is defined by R.C. 4117.01: “to perform the mutual obligation of the public employer * *

* and the representatives of its employees to negotiate in good faith * * * with the intention of reaching an agreement.”

{¶18} We agree that the City violated the statute. The parties were not required to bargain over the composition of the bargaining unit, and by taking its proposal to conciliation, the City attempted to change the unit’s composition by a method other than the only three methods available.

{¶19} In this case, were the City’s position correct, a conciliator would have decided whether assistant police chiefs should be removed from the bargaining unit. To have a conciliator decide this issue is clearly not one of the three accepted methods of changing the composition of a bargaining unit. And it makes no sense—could a conciliator remove employees from a union? Thus, it was reasonable for SERB to determine that the City was not negotiating in good faith with the intention of reaching an agreement, and SERB’s decision did not conflict with any statute. We overrule the City’s first assignment of error.

VI. Existing in Perpetuity

{¶20} The City argues in its second assignment of error that the trial court erred by permitting the bargaining unit to exist in perpetuity.

{¶21} The trial court’s decision did not ensure that the bargaining unit would exist in perpetuity. As we have noted, there are three ways to alter a bargaining unit. It is possible that another union could challenge the FOP and be successful.⁹ The Union and the City could agree to a change.¹⁰ And the City is free to bargain with the Union about procedures to alter the composition of the unit.¹¹

⁹ *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Employees v. Cincinnati*, supra.

¹⁰ *State ex rel. Brecksville Edn. Assn., OEA/NEA*, supra.

¹¹ *Ohio Council 8, AFSCME v. State Emp. Relations Bd.*, supra.

{¶22} Because the trial court's decision did not have the effect of ensuring that the bargaining unit would exist in perpetuity, we overrule the City's second assignment of error.

VII. Issue 5

{¶23} Finally, the City argues that the trial court erred by not considering the effect of Issue 5 on the composition of the bargaining unit. The magistrate refused to consider the effect of Issue 5 because the Ohio Supreme Court had accepted for appeal our decision in *State Emp. Relations Bd. v. Queen City Lodge, Fraternal Order of Police*¹² The trial court adopted the magistrate's decision.

{¶24} Ultimately, the Ohio Supreme Court dismissed the appeal;¹³ thus this court's decision stands. This court had determined that the charter amendment did not conflict with any portion of the CBA, and that the city manager had the power to appoint the chief and the assistant chiefs.¹⁴

{¶25} The City argues that Issue 5 mandates that assistant police chiefs be removed from the bargaining unit because that position (for new hires) is now an unclassified position, and because civil service employees who work in unclassified positions work at the pleasure of the employer. Thus, the City contends, assistant police chiefs do not have the right to bargain over such issues as salary or disciplinary and firing procedures because they serve solely at the City's pleasure.

¹² 117 Ohio St.3d 1423, 2008-Ohio-969, 882 N.E.2d 444.

¹³ *Queen City Lodge No. 69, FOP v. State Emp. Relations Bd.*, 120 Ohio St.3d 1221, 2009-Ohio-255, 901 N.E.2d 229.

¹⁴ *State Emp. Relations Bd. v. Queen City Lodge, Fraternal Order of Police*, supra, ¶¶23-27.

{¶26} The City is correct that Issue 5 converted newly hired assistant police chiefs from classified to unclassified positions.¹⁵ And the city manager can now directly hire people for these positions. We held that the implementation of Issue 5 did not conflict with the CBA and was a valid exercise of the City’s voters’ power. But because the CBA does define the bargaining unit to include these positions, state law regulating collective bargaining—a higher law—supersedes Issue 5.¹⁶

{¶27} Issue 5 removed assistant chiefs from the classified civil service. Classified employees are entitled to certain protections that unclassified employees do not receive.¹⁷ But nothing in the statutes or the case law prohibits unclassified employees from belonging to a union or from being part of a bargaining unit.

{¶28} In *State ex. rel. Hunter v. Summit Cty. Human Resource Comm.*, the Ohio Supreme Court stated that “unclassified employee[s] [are] appointed at the discretion of the appointing authority and serve[] at the pleasure of such authority.”¹⁸ But that case did not involve an employee who was a part of a bargaining unit and thus is not applicable to the case at hand. Furthermore, this court has reviewed Ohio case law and can find no case law that would support the City’s position.

VIII. Still in Bargaining Unit but not in Classified Civil Service

{¶29} It may seem an anomaly that newly appointed assistant police chiefs will not receive the protections afforded to classified employees but will remain in the Union and be subject to the provisions of the CBA. Issue 5 removed all civil-service provisions including hiring and promotion. But Issue 5 makes no mention of

¹⁵ Cincinnati City Charter, Article V, Section 5.

¹⁶ See *State Emp. Relations Bd. v. Queen City Lodge, Fraternal Order of Police*, supra, ¶29-41.

¹⁷ *Baldwin v. Cincinnati*, 1st Dist. No. C-050292, 2005-Ohio-6994, ¶6.

¹⁸ 81 Ohio St.3d 450, 453, 1998-Ohio-614, 692 N.E.2d 185.

their exclusion from the bargaining unit and thus has no effect on the bargaining unit's composition. And even if it did, Cincinnati voters could not override state law on this issue.

{¶30} The conciliator, SERB, the magistrate, and the trial court all got it right, and we affirm the trial court's judgment that so held.

Judgment affirmed.

HENDON, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry this date.

