

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

**CASE NUMBER 2002-UPL-10-0677**

**ORDER  
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich: September 8, 2005.

On October 17, 2002, Queen City Lodge No. 69, Fraternal Order of Police ("Union" or "Intervenor") filed an unfair labor practice charge against the City of Cincinnati ("City" or "Respondent") alleging that the City violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5). On February 27, 2003, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that the City violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs.

On April 10, 2003, a complaint was issued. On April 16, 2003, the Union filed a motion to intervene, which was granted in accordance with Ohio Administrative Code Rule 4117-1-07(A). On August 19, 2003, following a hearing on May 23, 2003, the Administrative Law Judge issued a Proposed Order in which she recommended that the Board find that the City had violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs, i.e., its promotion processes.

The City filed timely exceptions, to which the Complainant and the Intervenor filed responses. The City also filed a motion for oral argument, which the Board granted on January 8, 2004. The Board heard oral arguments on March 19, 2004. During the period following oral argument, the City and the Union separately filed notices of additional authority with the Board.

After reviewing the complaint, answer, findings of fact and evidence, legal briefs, and all other filings in this case, the Board amends the Administrative Law Judge's Finding of Fact #10 to add the following language: "On January 15, 2004, Arbitrator Hyman Cohen denied the grievance. (S. 18, Jt. Exh. 7; City's Motion to Supplement Record filed January 29, 2004)"; amends Conclusion of Law No. 3 to read as follows: "3. The City of Cincinnati did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs by failing to promote Captain Gregoire to a vacancy in the position of Assistant Police Chief"; adopts the Administrative Law Judge's Findings of Fact and Conclusions of Law as amended, dismisses the complaint, and dismisses the unfair labor practice charge with prejudice.

It is so ordered.

DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.

/s/ Carol Nolan Drake  
CAROL NOLAN DRAKE, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code § 4117.13(D), by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 21st day of September, 2005.

/s/ Donna J. Glanton  
DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

**Case No. 2002-ULP-10-0677**

**OPINION**

GILLMOR, Vice Chairman:

This matter comes before the State Employment Relations Board (“Board” or “Complainant”) upon the issuance of a Proposed Order, the filing of exceptions to the Proposed Order by the Respondent, City of Cincinnati (“City”), the filing of responses to exceptions by the Intervenor, Queen City Lodge No. 69, Fraternal Order of Police (“Union”), and the Complainant, and the oral arguments presented to the Board by the parties. For the reasons that follow, we find that the Respondent did not commit an unfair labor practice in violation of Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs when it did not promote Captain Gregoire to a vacancy in the position of Assistant Police Chief.

**I. BACKGROUND**

The City is a charter municipality with home-rule authority as provided by the Ohio Constitution. The Union is the exclusive representative for two bargaining units

collectively comprising all sworn members of the City's police division. The City and the Union were parties to a collective bargaining agreement ("CBA") governing the supervisors' unit effective December 10, 2000 through December 31, 2002, containing a grievance procedure that culminates in final and binding arbitration.

On August 1, 2001, the City Council passed an emergency ordinance placing on the November 6, 2001 ballot a 2001 Charter Amendment modifying Article V of the City Charter (the "Charter Amendment"). On November 6, 2001, the Charter Amendment passed with a majority of votes. Under the terms of the Charter Amendment, a person who holds a position in the classified civil service that becomes unclassified under the terms of the Charter Amendment shall be deemed to hold a position in the classified civil service until he or she vacates the position, after which time the position shall be filled as an unclassified position. The position of Assistant Police Chief became unclassified under the Charter Amendment, and, under its terms, future vacancies would be filled through appointment by the City Manager.

Before the Charter Amendment passed, all promotions to vacancies in the classification of Assistant Police Chief were made from the civil service promotional eligibility list following the "Rule of 1." Under the "Rule of 1," if a vacancy exists in a municipal police department above the rank of patrol officer and an eligibility list exists, the municipal civil service commission shall immediately certify the name of the person with the highest rating, and the appointing authority shall appoint that person within thirty days from the date of certification, pursuant to O.R.C. § 124.44.

On September 10, 2002, Assistant Police Chief (Lieutenant Colonel) Ronald J. Twitty submitted a notice of intent to retire within 90 days. Assistant Police Chief Twitty's retirement was effective December 7, 2002. During the time period from September 10, 2002 to December 7, 2002, Assistant Police Chief Twitty was on paid administrative leave.

The Union filed Grievance #29-02 regarding whether Captain Stephen R. Gregoire should be placed in the vacancy created by Assistant Police Chief Twitty's retirement. Captain Gregoire was the person with the highest rating on the promotional eligibility list for Assistant Police Chiefs.

In November 2002, the Union filed a motion for a preliminary injunction in the Court of Common Pleas, Hamilton County, Ohio. On December 4, 2002, the parties to the common pleas court action filed an agreed judgment entry ("Entry"). In the Entry, the parties agreed to extend the expiration date for the promotional eligibility list for Assistant Police Chiefs pending the final resolution of both this unfair labor practice case and Grievance #29-02, unless the parties mutually agree otherwise. The Entry also set forth a procedure the parties agreed to follow should the City decide to conduct a search and fill an Assistant Police Chief vacancy other than through the promotional eligibility list.

The City and the Union met to negotiate a successor collective bargaining agreement to the Agreement that expired on December 31, 2002. The City and the Union proceeded to fact finding and, subsequently, to binding conciliation. The conciliator issued the award on July 2, 2003. The City had not filled the vacancy in the position of Assistant Police Chief created by Assistant Police Chief Twitty's retirement.

On January 29, 2004, the City filed a motion to supplement the record; the City provided a copy of the Arbitrator's Opinion, AAA No. 52 390 00595 02, rendered by Arbitrator Hyman Cohen, Esq., on January 15, 2004, denying the Union's grievance (Grievance #29-02). Arbitrator's Opinion, *City of Cincinnati and Queen City Lodge No. 69 Fraternal Order of Police*, AAA No. 52 390 00595 02, issued 1-15-2004 ("Arbitrator's Award"). Arbitrator Cohen found that Section 22 of the CBA – specifically the "voluntary cessation" language – is not applicable to the facts of this grievance. On February 17, 2004, the Union filed a motion to supplement the record to include the

parties' post-hearing briefs from the grievance arbitration and the arbitrator's decision. The motions were unopposed and were granted by the Board on March 11, 2004.

On March 18, 2004, the City filed a Notice of Citation of Additional Authority, which contained a copy of the common pleas court's decision in *Oak Hills Local School Dist Bd of Ed v. SERB*, 2004 SERB 4-14 (CP, Hamilton, 2-23-04). On January 5, 2005, the Union filed a Notice of Citation of Additional Authority, which contained a copy of the appellate court decision in *Oak Hills Edn. Assn. v. Oak Hills Local School Dist. Bd. of Edn.*, 158 Ohio App.3d 662, 2004-Ohio-6843, 2004 SERB 4-59 (1<sup>st</sup> Dist Ct App, Hamilton, 12-17-2004). On February 28, 2005, the Union filed a Notice of Citation of Additional Authority, which included the Report and Recommendations issued by the fact finder, Michael Paolucci, on February 25, 2005, in SERB Case Nos. 2004-MED-08-0741 and 04-MED-08-0742. On March 7, 2005, the Union filed a Notice of Citation of Additional Authority, which included City Ordinance 74-2005 in which it voted to approve the fact-finder's report in SERB Case Nos. 2004-MED-08-0741 and 04-MED-08-0742. On June 14, 2005, the Union filed a Notice of Citation of Additional Authority, which contained the Conciliator's Opinion and Award of June 7, 2005, SERB Case Nos. 2004-MED-0741 and 2004-MED-0742, in which the City proposals to remove the newly appointed Assistant Police Chiefs from the Bargaining Unit were rejected.

## **II. DISCUSSION**

### **A. The Unfair Labor Practice Charge Was Timely Filed**

In its exceptions, the City alleges that the Administrative Law Judge erred in determining that the unfair labor practice charge was both timely filed and ripe for review. O.R.C. § 4117.12(B) establishes a ninety-day period in which the charge must be filed. In *In re City of Barberton*, SERB 88-008 (7-5-88), *aff'd sub nom. SERB v. City of Barberton*, 1990 SERB 4-46 (CP, Summit, 7-31-90), the Board set forth the following two-prong test to be utilized in determining when the statute of limitations begins to run:

To begin rolling of the ninety-day period, two conditions must be present. The first is the acquired knowledge, or constructive knowledge, by the Charging Party of the alleged unfair labor practice which is the subject of the charge. The second is the occurrence of actual damage to the Charging Party resulting from the alleged unfair labor practice.

The Union filed its unfair labor practice charge on October 17, 2002, apparently based upon its belief that under the Agreement, the City was required to fill the vacancy being created by Assistant Police Chief Twitty's then-upcoming retirement within thirty days of September 10, 2002, the date on which he submitted his notice of intent to retire. The City's refusal to appoint Captain Gregoire to fill the vacancy was the first instance since the passage of the Charter Amendment that the City had sought to apply the Charter Amendment's terms to the bargaining-unit members.

The unfair labor practice charge may have been prematurely filed since the effective date of Assistant Police Chief Twitty's retirement was not until December 7, 2002. But the unfair labor practice charge was not filed *after* the expiration of the limitations period, and it most certainly was ripe for review when SERB issued the complaint in this case on April 10, 2003. Thus, the City's timeliness and ripeness arguments are denied.

**B. Captain Gregoire Did Not Have A Contractual Right To The Promotion**

The Agreement does not specify the promotional process for Assistant Police Chiefs. The parties stipulated that they have historically followed the "Rule of 1" when filling promotional vacancies. The "Rule of 1" is set forth in the state civil service law under O.R.C. § 124.44.

Article VII, Section 22 of the Agreement, entitled "Terminal Benefits," mentions the filling of vacancies. This provision does not describe the promotion process itself. Instead, the provision discusses the process whereby a bargaining-unit member must

retire due to illness or injury but elects to remain on the payroll until his or her leave balances are exhausted rather than taking a lump-sum payment. It also describes when a position becomes vacant, stating:

Upon the effective date of the officer's actual voluntary cessation of the duties of said position, such position shall immediately become vacant and shall immediately be filled from the existing promotional eligibility list for that officer's rank, or shall be filled through the competitive promotional examination process mandated by state civil service law.<sup>1</sup>

The foregoing provision in Article VII, Section 22 of the Agreement was at issue in Grievance #29-02, which eventually went to arbitration. After outlining the events that led to Assistant Police Chief Twitty's retirement, Arbitrator Cohen stated: "The phrase 'actual voluntary cessation of duties of such position' in Section 22 implies a choice with respect to relinquishing the duties of the position. There is nothing in the evidentiary record to infer that Twitty had such a choice." See Arbitrator's Award, p. 10. On this issue, the arbitrator found:

In summing up this aspect of the dispute between the parties, the evidentiary record establishes that there was no "actual voluntary cessation" by Twitty of the duties of his position to warrant that the position of Assistant Police Chief "shall immediately become vacant and shall immediately be filled from the existing promotional eligibility list for that officer's rank" as required by the Forced Retirement provisions of Section 22 of the Labor Agreement.

Id at p. 13. In the Conclusion of the Arbitrator's Award, Arbitrator Cohen held: "There is no question that the Grievant [Captain Gregoire] has an exemplary background, service with the City, and character. However, the interpretation of the applicable terms of Section 22 of the Agreement governs this dispute. Accordingly, the grievance is denied." Id at p. 24. Thus, Captain Gregoire had no contractual right to the promotion.

---

<sup>1</sup> Joint Exhibit 27, pp. 30-31.

**C. Captain Gregoire Did Not Have A Statutory Right To The Promotion**

The next question is whether Captain Gregoire had a statutory right to the position under O.R.C. § 124.44, which provides as follows:

No position above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. Promotion shall be by successive ranks so far as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. No competitive promotional examination shall be held unless there are at least two persons eligible to compete. Whenever a municipal or civil service township civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, such commission shall allow the persons holding positions in the then next lower rank who are eligible, to compete with the persons holding positions in the rank lower than the position to be filled. An increase in the salary or other compensation of anyone holding a position in a police department, beyond that fixed for the rank in which such position is classified, shall be deemed a promotion, except as provided in section 124.491 of the Revised Code. Whenever a vacancy occurs in the position above the rank of patrolman in a police department, and there is no eligible list for such rank, the municipal or civil service township civil service commission shall, within sixty days of such vacancy, hold a competitive promotional examination. After such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification. If there is a list, the commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating, and the appointing authority shall appoint such person within thirty days from the date of such certification.

No credit for seniority, efficiency, or any other reason shall be added to an applicant's examination grade unless the applicant achieves at least the minimum passing grade on the examination without counting such extra credit.

The City asserts that as a Charter City it is not covered by state civil service law. “Express charter authorization is necessary to enable municipalities to adopt ordinances or administrative rules that will prevail over statutory provisions in case of conflict.” *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441, 633 N.E.2d 524, Syllabus.

O.R.C. § 4117.10(A) provides in relevant part as follows:

An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or *where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.* (emphasis added)

In *State ex rel. Bardo v. City of Lyndhurst* (Ohio 1988) 37 Ohio St.3d 106 (“*Bardo*”), the Ohio Supreme Court addressed the application of O.R.C. § 124.44 to the promotion of a police officer to a vacant lieutenant position in a city with home rule powers under the Ohio Constitution. The Court stated, at 110, the following:

Although the Constitution gives municipalities the authority to adopt home rule, local self-government, the exercise of those powers by the adoption of a charter should clearly and expressly state the areas where the municipality intends to supersede and override general state statutes. Accordingly, we hold that express charter language is required to enable a municipality to exercise local self-government powers in a manner contrary to state civil service statutes.

The Court in *Bardo* found that the Lyndhurst Charter did not contain a clear and express exercise of the home rule powers specifically authorizing the civil service commission to adopt rules with regard to certification of names from promotion lists. As a result, neither the commission's rules nor the charter superseded the requirements of O.R.C. § 124.44 as to certification of candidates from eligibility lists. Consequently, when a vacancy in a position arose under that statutory section, the highest-ranked employee on the current eligibility list was entitled to a writ of mandamus compelling the city to appoint him to the vacancy.

The record in this case does not indicate that the City exercised its home rule powers in this area before the passage of the Charter Amendment on November 6, 2001. The parties stipulated that before the passage of the Charter Amendment, "all promotions to vacant positions within the classification of Assistant Police Chief were made from the promotional eligibility list pursuant to the Rule of 1."<sup>2</sup> Thus, the City's argument would fail if the vacancy occurred before November 6, 2001.

Establishing the date of a vacancy is also important under O.R.C. § 124.44:

No positions above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. Promotion shall be by successive ranks so far as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. \* \* \* Whenever a vacancy occurs in the position above the rank of patrolman in a police department, and there is no eligible list for such rank, the municipal or civil service township civil service commission shall, within sixty days of such vacancy, hold a competitive promotional examination. After such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest

---

<sup>2</sup> Stipulation 15.

rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification. If there is a list, the commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating, and the appointing authority shall appoint such person within thirty days from the date of such certification.

Under the "Rule of 1," within approximately 30 days from the date of the vacancy, the person with the highest rating on the promotional eligibility list is to be appointed to the vacancy. A Promotional Eligibility List for Assistant Police Chief (Lieutenant Colonel) was approved and posted by the Cincinnati Civil Service Commission on October 24, 2001, with an expiration date of October 23, 2002.<sup>3</sup> The record does not contain a promotional eligibility list for any period after October 23, 2002.

The Agreement does not specifically state when a vacancy occurs. Article VIII of the Agreement is titled "Publication of Assignment" and "Availability." It states in part: "When a new assignment or vacancy in an existing assigned area becomes available by reason of promotion, retirement, resignation, or transfer, notice of such assignment availability shall be forwarded to all units within ten (10) days of creation of the new assignment or vacancy and conspicuously posted."

In the Proposed Order, the Administrative Law Judge found that the vacancy appeared to have begun, consistent with the language cited above from Article VII, Section 22 of the Agreement, on September 10, 2002, when Assistant Police Chief Twitty submitted his letter and went on paid administrative leave. But the Administrative Law Judge did not have the benefit of the Arbitrator's Award that interpreted this provision.

If the vacancy occurred when Assistant Police Chief Twitty submitted his retirement on September 10, 2002, the promotional eligibility list was still in effect. The

---

<sup>3</sup> Jt. Exh. 7; Transcript 149-150.

civil service commission was required to immediately certify the name of the person having the highest rating, and the appointing authority was required to appoint that person within thirty days from the date of such certification. If the vacancy occurred when Assistant Police Chief Twitty's retirement was effective, which was December 7, 2002, then the City had exercised its home rule powers through the Charter Amendment.

In the absence of language in the Agreement defining when a vacancy occurs, we must revert to the state civil service law if the municipality has not exercised its home rule powers on this point. In *McCarter v. City of Cincinnati* (Ohio App. 1 Dist., 11-25-1981) 3 Ohio App.3d 244, 444 N.E.2d 1053, 3 O.B.R. 276, the City of Cincinnati claimed that under the home rule and civil service provisions of the Ohio Constitution – Sections 3 and 7, Article XVIII, and Section 10, Article XV, Ohio Constitution, respectively – the appointing authority can determine whether or when a vacancy occurs, and that in the absence of any ordinance establishing a specific complement of police captains, a vacancy does not occur upon the retirement of an incumbent captain until the city manager decides that the position is to be filled. The court disagreed with this argument. Instead, the court held:

We have no difficulty in affirming the trial court's conclusion that the retirement of Captain Stout created a vacancy that had to be filled in accordance with R.C. 124.44. Among other conceivable circumstances creating a vacancy, a vacancy in public office occurs when a position that has been established and occupied becomes vacant (by reason of the death, retirement, dismissal, promotion or other permanent absence of the former incumbent). Ballantine's Law Dictionary 1331 (3 Ed. 1969).

\* \* \*

We hold that a vacancy in that position was created by the retirement of the incumbent during the continuance of the position, without the necessity of any further action whatsoever. The vacancy occurred even though the city manager as appointing authority did not "declare" it to be in existence. There is no requirement for certification of a vacancy in the police department under R.C. 124.44, as there is under R.C. 124.48 in the case of a vacancy in the fire department.

In *Bardo* and later in *Zavisin v. City of Loveland* (1989), 44 Ohio St.3d 158, 541 N.E.2d 1055, the Ohio Supreme Court cited with approval *McCarter v. City of Cincinnati*, supra. Therefore, the vacancy in the present case occurred upon the retirement of Assistant Police Chief Twitty, which was effective December 7, 2002, and after the Charter Amendment was approved on November 6, 2001.

**D. The Charter Amendment Does Not Conflict With The Provisions Of The Collective Bargaining Agreement**

The next question to be addressed is whether the Charter Amendment, approved on November 6, 2001, was in conflict with the parties' collective bargaining agreement. In the case, *Jurcisin v. Cuyahoga Cty. Bd. of Elections* (1988), 35 Ohio St.3d 137, appellants Paul Jurcisin and the Cleveland Police Patrolmen's Association ("CPPA") sought an injunction, prior to the election, in the Cuyahoga County Common Pleas Court, against the submission of the proposed charter amendment to the voters.

In *Jurcisin*, the proposed charter amendment sought to establish a police review board to investigate complaints of police misconduct and to recommend disciplinary action. The trial court declared the unofficial election results null and void, enjoined the certification of the election results by the board of elections, and enjoined the amendment from becoming part of the charter, ruling that under O.R.C. § 4117.10(A), the amendment would conflict with the city's collective bargaining agreements with the appellant CPPA and was therefore void. Upon appeal, the Eighth District Court of Appeals held that no conflict existed between the charter amendment and the collective bargaining agreements. It further noted that O.R.C. § 4117.10(A) does not invalidate laws that conflict with provisions of a collective bargaining agreement. Instead, the statute provides that, in the event of a conflict between a law and a particular collective bargaining agreement, the agreement rather than the law governs the relationship between that particular bargaining unit and the employer.

In upholding the decision of the Court of Appeals, Chief Justice Moyer stated:

Appellants argue that the grievance procedures contained in the collective bargaining agreements are in conflict with the police review board process. Under R.C. 4117.10(A), where a law conflicts with a wage, hour, or term and condition of employment provision (such as grievance procedures) found in a collective bargaining agreement entered into pursuant to R.C. Chapter, 4117, the collective bargaining agreement, prevails over the conflicting provisions of the law.

In his analysis, Chief Justice Moyer compared the management rights clauses in both contracts and determined that this was not a case of an attempt by a public employer to “disregard the terms of their collective bargaining agreements whenever they find it convenient to do so.” *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn. (1986)*, 22 Ohio St.3d 80, 84, 22 OBR 95, 99, 488 N.E. 2d 872, 876. Rather, this case involved the proper exercise of management powers created by the city charter and recognized in the collective bargaining agreements.

The facts support the conclusion that the City of Cincinnati’s Charter Amendment did not conflict with the collective bargaining agreement or O.R.C. § 4117.10(A). The agreement between the parties contains a Management Rights article similar to the one found in *Jurcisin*. Under Article II, Management Rights, the following language exists:

The FOP recognizes that, except as provided in this labor agreement, the City of Cincinnati retains the following management rights as set forth in Ohio Revised Code Section 4117.08(C) 1-9:

1. To determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology and organizational structure;
2. To direct, supervise, evaluate or hire employees;
3. To maintain and improve the efficiency and effectiveness of governmental operations;
4. To determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

5. To suspend, discipline, demote or discharge for just cause, or lay-off, transfer, assign, schedule, **promote** or retain employees; (Emphasis added)
6. To determine the adequacy of the work force;
7. To determine the overall mission of the employer as a unit of government;
8. To effectively manage the work force;
9. To take actions to carry out the mission of the public employer as a governmental unit.

With respect to these management rights, the City of Cincinnati shall have the clear and exclusive right to make decisions in all areas and such decisions, except as otherwise provided in this Agreement, shall not be subject to the grievance procedure.

The City is not required to bargain on subjects reserved to the management and direction of the City in Revised Code Section 4117.08 except as affect wages, hours, terms and conditions of employment and the continuation, modification, or deletion of this collective bargaining agreement. The FOP may raise a legitimate complaint or file a grievance based on this collective bargaining agreement.

In the Proposed Order, the SERB Administrative Law Judge stated: "The Agreement does not specify the promotional process for Assistant Police Chiefs." (Proposed Order, page 4) Additionally, the Agreement contains, within Article XIII, an Integrity of Agreement clause, that states:

This contract represents complete collective bargaining and full agreement by the parties with respect to rates of pay, wages, hours of employment or other conditions of employment which shall prevail during the term hereof and any matters or subjects not herein covered have been satisfactorily adjusted, compromised or waived by the parties for the life of this Agreement. During the term of this Agreement neither the City nor the FOP will be required to negotiate on any further matters affecting these or any other subjects set forth in the Agreement.

Finally, the Agreement also contained Article XX, Abolishment of Promoted Positions, which vested the City Manager with authority to abolish any promoted positions in the police division in accord with Section 124.37 of the Revised Code or any successor statute. While the abolishment of promoted positions is not the issue in this case, the

inclusion of this Article within the parties' collective bargaining agreement is further indication of the understanding between the parties that the City of Cincinnati, through its City Manager, maintained authority in determining, establishing, and setting the maximum number of authorized positions for a specific promoted rank in the police division. It would appear, therefore, that the subsequent Charter Amendment, which included language that the "city manager shall appoint the police chief and assistant police chiefs to serve in said unclassified position," does not conflict with the express terms in the contract. See also *Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St.3d 658, 1991 SERB 4-87 ("*Ohio Council 8*").

**E. The City Did Not Commit An Unfair Labor Practice**

The City is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (A)(5), which provide in relevant part as follows:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code\*\*\*;

\* \* \*

(5) Refuse to bargain collectively with the representative of its employees recognized as the exclusive representative \*\*\* pursuant to Chapter 4117. of the Revised Code[.]

The ultimate issue before the Board is whether the District engaged in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) by failing to appoint Captain Gregoire to the vacant Assistant Police Chief position. Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-004 (4-8-96). A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89).

Essentially, the City advances the argument that it is duty-bound to protect and advance the cause of its voting public (the “People,” as they are referred to in the City’s post-hearing brief), and, thus, to fill Assistant Police Chief vacancies through the process it would use for unclassified employees, rather than through the classified civil service process. Unless otherwise provided, a public employer maintains the authority to determine matters of inherent managerial policy as outlined in O.R.C. § 4117.08(C). O.R.C. § 4117.08(C)(5) lists as a managerial prerogative the promotion of employees. The change in the method of filling the promotional position of Assistant Police Chief, however, impacts the terms and conditions of employment of bargaining-unit employees, who formerly were the exclusive candidates for such promotional opportunities. See generally *Devenish v. Columbus* (1991), 57 Ohio St.3d 163, 1991 SERB 4-7.

The employer is required to bargain with an exclusive representative on all matters relating to wages, hours, or terms and other conditions of employment under O.R.C. § 4117.08(A). *In re City of Broadview Heights*, SERB 99-005 (3-5-99); *In re Ottawa County Riverview Nursing Home*, SERB 96-006 (5-31-96). Thus, if a given subject involves the exercise of inherent managerial discretion and also materially affects any of these factors, a balancing test must be applied to determine whether the subject is a mandatory or permissive subject of bargaining. *SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (1995) (“*Youngstown*”); see also *In re City of Akron*, SERB 97-012 (7-10-97).

If a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion, the following factors must be balanced to determine whether it is a mandatory or permissive subject of bargaining: (1) the extent to which the subject is logically and reasonably related to wages, hours, terms and conditions of employment; (2) the extent to which the employer’s obligation to negotiate may significantly abridge its freedom to exercise those managerial

prerogatives set forth in and anticipated by O.R.C. § 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and (3) the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter. *Youngstown*, supra at 3-76 – 3-77.

Examining the first prong, the promotional process in the City's police department was a term or condition of employment of bargaining-unit employees. Examining the second prong, the City operates a police department, and its essential mission is enforcing the criminal laws of the City and the State of Ohio. The record reflects that the operation of the City's Police Department has been the subject of intense debate through the news media, citizen committees, and City Council meetings, among other venues. The record does not contain any evidence demonstrating that inherent discretion in filling vacancies in the position of Assistant Police Chief is necessary to achieve the police department's essential mission. Indeed, the intensity of the debate, on both sides of the issue, would indicate otherwise, as would the parties' longstanding use of the procedure set forth in the state civil service law. Examining the third prong, the mediatory influence of collective bargaining would have been the ideal mechanism for the City to negotiate for and attempt to achieve its articulated interest in making the voice of the "People" part of the collective bargaining agreement, and for the Union to articulate its interest in retaining a term and condition of employment enjoyed by bargaining-unit members. The three-prong analysis reveals that, on balance, the promotional process for Assistant Police Chiefs is a mandatory subject of collective bargaining.

Management decisions that are found, on balance, to be mandatory subjects must be bargained before implementation, upon notice by the employer and timely request by the employee organization, except where emergency situations render prior

bargaining impossible. *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (9-20-2001) (“*Toledo*”); *Youngstown*, supra. The *Toledo* decision states the controlling legal principle:

Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement after bargaining the subject to ultimate impasse as defined in *Vandalia-Butler*:

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement becomes effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow [*In re*] *Franklin County Sheriff* [SERB 90-012 (7-18-90)], and assure consistency in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test as stated above.

*Toledo*, supra at 3-29.

The City argues that the Union waived its right to bargain. “[W]aiver of a statutory right to bargain \* \* \* must be established by clear and unmistakable action by the waiving party.” *Youngstown*, supra at 3-81. The record does not contain clear and unmistakable action by the Union that it waived its right to bargain. The Union asserted its position that changes could not be made without bargaining, and the City’s response was disagreement with this position, followed by unilateral implementation of the Charter Amendment when the City refused to fill the Assistant Police Chief vacancy.

This case does not involve the “exigent circumstances” exception under *Toledo*. The City argues that the Charter Amendment was enacted by a higher-level legislative

body. Thus, the City argues, it must follow the terms of the Charter Amendment, and in so doing, the City is complying with the second exception set forth in *Toledo*. The Union and the Complainant argue that the City Council is a same-level legislative body, rather than a higher-level legislative body.

O.R.C. § 4117.10(B) defines the term “legislative body” to include “the general assembly, the governing board of a municipal corporation, school district, college or university, village, township, or board of county commissioners or any other body that has authority to approve the budget of their public jurisdiction.” O.R.C. § 4117.14(C)(6)(b) provides: “As used in division (C)(6)(a) of this section, ‘legislative body’ means the controlling board when the state or any of its agencies, authorities, commissions, boards, or other branch of public employment is party to the fact-finding process.” The term “higher-level legislative body” is not defined in the Ohio Revised Code. As a result, SERB can define the term as long as the definition is consistent with the objectives of Ohio Revised Code Chapter 4117.

The Charter Amendment was enacted by the vote of the majority of the City’s voters in the election. Although the City Council voted to authorize the placing of the Charter Amendment on the ballot, it was not the City Council that enacted the change. Instead, the electorate was responsible for the change. When the voters decide an issue at the ballot box, they are acting as a “higher-level legislative authority” to the City Council under the second exception to the bargaining requirement set forth in *Toledo*. This situation is not comparable to one party holding back an issue from bargaining and then springing it on the other party after the collective bargaining agreement has been ratified by both parties. A review of the record does not support a finding that the City was engaged in trickery or gamesmanship with the Union. The City was attempting to implement the change approved by a higher-level legislative body, the voters, after the agreement became effective. While the agreement was silent on the promotional process, such a change impacted a past practice between the parties. In *Toledo*, we extended the two-part test to issues not covered in the provisions of a collective

bargaining agreement, but which require mandatory midterm bargaining. See *In re Southeast Local School Dist Bd of Ed*, SERB 2002-003 (5-14-2002).

The Ohio Supreme Court's decision in *Ohio Council 8* is instructive as it explains the interplay between local laws and collective bargaining agreements. In *Ohio Council 8*, supra at 662, 1991 SERB at 4-88 – 4-89, the Ohio Supreme Court explained as follows:

The Collective Bargaining Act, most specifically R.C. 4117.10(A), \* \* \* provides, in pertinent part:

"\* \* \* Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district pursuant to section 5705.41 of the Revised Code, and the minimum standards promulgated by the state board of education pursuant to division (D) of section 3301.07 of the Revised Code prevail over conflicting provisions of agreements between employee organizations and public employers. \* \* \*"

This provision lists laws which prevail over a conflicting provision in a collective bargaining agreement. "Under the principle of statutory construction that inclusion of a list of items will exclude other items not on the list, the remaining thousands of state and local laws which may conflict with the contracts, do not prevail over those contracts." [citations omitted] R.C. 4117.10(A) simplifies contract administration by eliminating concern over whether an agreement is "contrary to law," and encourages honesty and good faith in collective bargaining by requiring the parties to live up to the agreement they make.

R.C. Chapter 4117, of which R.C. 4117.10(A) is a part, is a law of a general nature which is to be applied uniformly throughout the state. *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44, v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 22 OBR 1, 488 N.E.2d 181. As such, it prevails over any inconsistent provision in a municipal home-rule charter by virtue of Section 3, Article XVIII of the Ohio Constitution. [citations omitted] We have also recognized that R.C. Chapter 4117 prevails over home-rule charters because it was enacted pursuant to Section 34, Article II of the Ohio Constitution. [citations omitted] Thus, the

language in R.C. 4117.10(A) is applicable to collective bargaining agreements executed by a home-rule city. *By virtue of this provision, where the agreement conflicts with any local law, including the charter itself, the agreement prevails unless the conflicting local law falls into one of the specific exceptions listed in the statute.* (emphasis added)

In *Ohio Council 8*, the Ohio Supreme Court established that a local law, such as the Charter Amendment, does not prevail over the terms of a previously agreed-upon collective bargaining agreement. Conversely, the City was *not* required to change the terms of the Agreement to conform to the Charter Amendment because the Agreement does not specify the promotional process for Assistant Police Chiefs. Since the Agreement did not speak specifically to promotions, the *Ohio Council 8* decision is not controlling over the parties on this issue. Therefore, the second exception to the bargaining requirement set forth in *Toledo* excuses the City's unilateral implementation.

### **III. CONCLUSION**

For the reasons above, we find that the unfair labor practice charge was both timely filed and ripe for review; Captain Gregoire had no contractual right to the promotion; Captain Gregoire had no statutory right to the promotion; the Charter Amendment does not conflict with the provisions of the collective bargaining agreement; the change in the promotional process for Assistant Police Chiefs is a mandatory subject of collective bargaining; the second exception to the bargaining requirement set forth in *Toledo* – legislative action taken by a higher-level legislative body after the collective bargaining agreement became effective – excuses the City's unilateral implementation; and the City of Cincinnati did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed the terms and conditions of employment for Assistant Police Chiefs when it did not promote Captain Gregoire to a vacancy in the position of Assistant Police Chief. Therefore, the complaint is hereby dismissed, and the unfair labor practice charge is dismissed with prejudice.

DRAKE, Chairman, and Verich, Board Member, concur.