

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

CASE NUMBERS 2005-ULP-03-0126 & 2005-ULP-09-0482

**ORDER
(OPINION ATTACHED)**

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:
November 29, 2007.

On March 3, 2005, and September 1, 2005, the Queen City Lodge No. 69, Fraternal Order of Police (the "Union" or "Intervenor") filed unfair labor practice charges against the City of Cincinnati (the "City" or "Respondent"), alleging that the City violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1), (A)(2), (A)(3), and (A)(5). On July 15, 2005, in Case No. 2005-ULP-03-0126, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that the City violated O.R.C. §§ 4117.11(A)(1), (A)(2), and (A)(5), but not (A)(3), by attempting to remove Assistant Police Chiefs from a deemed-certified bargaining unit. On December 15, 2005, in Case No. 2005-ULP-09-0482, SERB found probable cause to believe that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the terms and conditions of employment for members of a deemed-certified bargaining unit. SERB consolidated the two unfair labor practice charges for purposes of issuing a complaint and holding an evidentiary hearing.

On July 10, 2006, a complaint was issued. On October 10, 2006, the parties submitted the case for decision on Joint Stipulations of Fact and Joint Exhibits in lieu of evidentiary hearing. Subsequently, all parties filed post-hearing briefs. On March 20, 2007, the Administrative Law Judge issued a Proposed Order in which she recommended that the Board find that the City had violated O.R.C. §§ 4117.11(A)(1) and (A)(5), but not (A)(2), by unilaterally changing the terms and conditions of employment for Assistant Police Chiefs.

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

June 7, 2007. On October 30, 2007, the City filed a notice of citation of supplemental authority. The Board heard oral arguments on November 8, 2007, and allowed for the filing of supplemental briefs addressing the supplemental authority. On November 20, 2007, Counsel for Complainant filed a motion to expedite the production of the transcript from the oral argument or in the alternative a continuance of the filing deadline for the supplemental briefs. On November 27, 2007, Counsel for Complainant filed a motion to withdraw the motion to expedite. Also, on November 27, 2007, all of the parties filed supplemental briefs.

After reviewing the complaint, answer, findings of fact and evidence, legal briefs and supplemental briefs, and all other filings in this case, the Board adopts the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Proposed Order, finding that the Respondent violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5), but not O.R.C. § 4117.11(A)(2), when the Respondent insisted to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit and unilaterally negotiated individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the Union. The Board also grants Counsel for Complainant's motion to withdraw its motion to expedite.

The City of Cincinnati is hereby ordered to do the following:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit and by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the union, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Refusing to bargain collectively with the exclusive representative of its employees by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit and by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the union, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Rescind the individual employment contracts with Assistant Police Chiefs Cureton and Demasi and afford these employees the wages, hours, and terms and conditions of employment set forth in the current collective bargaining agreement between the City and the Union;

- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Queen City Lodge No. 69, Fraternal Order of Police work, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Cincinnati shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

/s/ _____
CRAIG R. MAYTON, CHAIRMAN

TIME AND METHOD TO PERFECT AN APPEAL

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal 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, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal within fifteen days after the mailing of the State Employment Relations Board's order. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, this 30th day of November, 2007.

/s/ _____
DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice to Employees. We intend to carry out the order of the Board and to abide by the following:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit and by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the Queen City Lodge No. 69, Fraternal Order of Police, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Refusing to bargain collectively with the exclusive representative of its employees by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit and by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the Queen City Lodge No. 69, Fraternal Order of Police, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Rescind the individual employment contracts with Assistant Police Chiefs Cureton and Demasi and afford these employees the wages, hours, and terms and conditions of employment set forth in the current collective bargaining agreement between the City of Cincinnati and the Queen City Lodge No. 69, Fraternal Order of Police;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Queen City Lodge No. 69, Fraternal Order of Police work, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Cincinnati shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

SERB v. City of Cincinnati, Case Nos. 2005-ULP-03-0126 & 2005-ULP-09-0482

BY

DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for sixty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

Case Nos. 2005-ULP-03-0126 & 2005-ULP-09-0482

OPINION

MAYTON, Chairman:

This matter comes before the State Employment Relations Board (“the Board” or “SERB”) upon the issuance of a Proposed Order on March 20, 2007, and the filing of exceptions to the Proposed Order by the Respondent, City of Cincinnati (“the City”), responses to the exceptions by Complainant SERB and the Intervenor, Fraternal Order of Police, Queen City Lodge No. 69 (“the FOP”), and the oral arguments presented by the parties to the Board. For the reasons that follow, the Board finds that the City violated Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-03-0126 by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit, that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-09-0482 by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the FOP, and that the City did not violate O.R.C. § 4117.11(A)(2).

I. BACKGROUND

The City is a charter municipality with home-rule authority as provided by the Ohio Constitution. The FOP is the deemed-certified, exclusive representative for a bargaining unit comprising all sworn members of the City's Police Division.

The City and the Union were parties to a collective bargaining agreement effective December 10, 2000 through December 31, 2002, containing a grievance procedure that culminates in final and binding arbitration. The FOP and the City were also parties to a collective bargaining agreement effective December 22, 2002 through December 18, 2004. The FOP and the City are parties to a collective bargaining agreement effective December 19, 2004 through December 2, 2006 ("successor CBA").

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, if a person holds a position in the classified civil service and that position becomes unclassified under the terms of the Charter Amendment, such person shall be deemed to hold a position in the classified civil service until he or she vacates the position; after that time the position shall be filled as an unclassified position. In this case, the position of Assistant Police Chief became unclassified under the Charter Amendment; under the Charter Amendment's terms, future vacancies would be filled through appointment by the City Manager. The Charter Amendment, also referred to as Issue 5, did not state that Assistant Police Chiefs should be removed from the deemed-certified bargaining unit.

In 2004, the FOP and the City began negotiations for the successor CBA. During negotiations, the City proposed removing all references to Assistant Police Chief from the

agreement, including the recognition clause. On November 15, 2004, the City posted a Job Opportunity for the “unclassified appointment” to the position of “Assistant Police Chief (Executive Officer)” and a second position of “Assistant Police Chief.” The Assistant Police Chief (Executive Officer) position is not a bargaining unit position.

On January 4, 2005, the FOP forwarded a letter to Ursula McDonnell, the City’s Supervising Human Resources Analyst, copying Jonathan Downes, the City’s Chief Negotiator, indicating, among other things, that “[i]t is the FOP’s position that the composition of the Bargaining Unit is under the exclusive jurisdiction of SERB and the City may not take that matter to impasse. The FOP was unwilling to proceed to impasse on any of those issues.”

In the January 2005 submissions to the fact-finder, the FOP objected to the City taking bargaining-unit composition to impasse. In its January 12, 2005 submission to the fact-finder, the City proposed to delete the Lieutenant Colonel/ Assistant Police Chief from the Bargaining Unit, stating, in part:

The City proposes removing references to “Assistant Chiefs” from all sections of the Supervisors’ collective bargaining agreement. The City proposes removing the positions of “Assistant Chiefs” from the Supervisors’ bargaining unit altogether. Numerous compelling reasons exist for removing the Assistant Chiefs from the bargaining unit. The most compelling reason for removing the Assistant Chiefs from the bargaining unit is that it is the will of the electorate of the City. Second, the Assistant Chiefs are managerial, executive positions properly excluded from the bargaining unit. (See Jt. Exh. 1, Tab 6(A))

On February 25, 2005, the fact finder issued a report and recommendation. The fact-finding report was rejected by the FOP.

In its May 2005 submission to the Conciliator, the FOP objected to the City taking bargaining-unit composition to impasse. In its May 13, 2005 submission to the Conciliator, the City proposed grandfathering into the bargaining unit the current Assistant Police Chiefs, but removing all Assistant Police Chiefs appointed pursuant to Issue 5 from the bargaining unit, stating in part as follows:

With respect to Definitions, Article 1, Recognition, and Article 7, Section 32, Assistant Police Chiefs, the Employer proposes removing the Assistant Chief classification from the bargaining unit for employees hired or promoted to the classification after the effective date of Charter Amendment Issue 5. This proposal is necessary due to the passage of Charter Issue 5 placing the classification of Assistant Chief in the unclassified service. It is the position of the City for this Conciliation that the individuals currently serving the rank of Assistant Chief would continue to be "covered by" this Agreement (i.e. grandfathered). Once the positions in the rank of Assistant Chief become vacant, the positions would no longer be included in the bargaining unit.

The parties proceeded to conciliation, and on June 7, 2005, a conciliation award and opinion was issued. As it relates to the City's proposal to remove references to the Assistant Police Chiefs from the Supervisors' Agreement, the Conciliator awarded the FOP's position maintaining current language.

On June 22, 2005, the City announced the appointment of Captain Michael Cureton to the position of Assistant Police Chief. On July 7, 2005, the FOP filed a grievance alleging a violation of various contract provisions with regard to Assistant Police Chief Cureton's appointment to the position of Assistant Police Chief, as well as an allegation that "the agreement between Captain Cureton and the City of Cincinnati changes and/or conflicts with and/or is different from the Labor Agreement by and between the parties in the areas set forth above." Assistant Police Chief Cureton's appointment was not made from a Civil Service List for the rank of Assistant Police Chief.

On June 23, 2005, the City announced the appointment of Captain James Whalen to the position of Assistant Police Chief (Executive Officer). Assistant Police Chief Whalen's appointment was not made from a Civil Service List for the rank of Assistant Police Chief.

As a result of a lawsuit filed by Vincent Demasi, et. al., against the City of Cincinnati, et. al., in Court Case No. A0502426, the City appointed Mr. Demasi to the position of Assistant Police Chief on November 21, 2005, pursuant to the November 21, 2005 settlement agreement. On November 22, 2005, the court signed an Agreed Entry Approving Settlement and Dismissing Action. The FOP was not a party to this lawsuit or settlement agreement.

The FOP filed a grievance alleging a violation of various contract provisions with regard to Assistant Police Chief Demasi's appointment to the position of Assistant Police Chief, as well as an allegation that "the agreement between Captain Demasi and the City of Cincinnati changes and/or conflicts with and/or is different from the Labor Agreement by and between the parties in the areas set forth above." The grievance was assigned Grievance No. 27-05, and was scheduled to be arbitrated on August 30, 2006. In a letter dated November 28, 2005, the FOP requested that Assistant Police Chief Demasi's appointment be included in the unfair labor practice charge in Case No. 2005-ULP-09-0482.

Assistant Police Chiefs Cureton and Whalen each accepted the City's offer letters, which list certain wages and benefits. The offer letters also stated, in part: "The position of Assistant Police Chief is an unclassified position within the City of Cincinnati and, as a result, acceptance of this offer will result in your being considered an at-will employee." Assistant Police Chief Demasi and the City agreed, as part of a settlement of the lawsuit, Court Case No. 0502426, "to appoint Mr. Demasi to the rank of Assistant Police Chief in the Cincinnati Police Department with his terms and conditions of such appointment to

Assistant Police Chief being set forth in a letter attached to the settlement agreement and incorporated by reference,” which stated, in part: “The position of Assistant Police Chief is an unclassified position within the City of Cincinnati and, as a result, acceptance of this offer will result in your being considered an at-will employee.” The City did not negotiate with the FOP over the City’s offer letters to Assistant Police Chiefs Cureton or Whalen. The City did not negotiate with the FOP over the City’s settlement with Assistant Police Chief Demasi.

The Charter Amendment, Issue 5, states in part, “[t]he positions of police chief and assistant police chief shall be in the unclassified civil service of the city and exempt from all competitive examination requirements. The city manager shall appoint the police chief and assistant police chiefs to serve in said unclassified positions.” The Charter Amendment, Issue 5, states in part, “[t]he incumbent officers in the police chief and assistant police chief positions at the effective date of this Charter provision, shall remain in the classified civil service until their positions become vacant after which time their positions shall be filled according to the terms of this section.”

On October 25, 2004, in City Proposal #2, the City first proposed removing the Assistant Police Chief classification from Article 1, Recognition, of the parties’ Supervisors’ Agreement. During the fact-finding hearing, representatives of both the City and the Union met with the fact-finder and agreed to submit their positions/proposals regarding Issue 5 to the fact-finder based upon the parties’ written submissions without any testimony and/or other oral presentations. The fact-finder’s Report and Recommendation recommended maintaining current language in Article 1, Recognition, of the Supervisors’ Agreement.

At the Cureton arbitration hearing before Arbitrator Mollie Bowers, the Union explicitly stated to Arbitrator Bowers that it was not pursuing at the arbitration hearing the portion of the original grievance which dealt with the appointment of Mr. Cureton to the

classification of Assistant Police Chief, and Arbitrator Bowers did not consider the appointment process when issuing her award regarding the grievance. On April 7, 2006, the arbitrator issued an award granting the grievance. The City moved to vacate the award in the Hamilton County Court of Common Pleas, and the Union moved to confirm the award. On February 5, 2007, the common pleas court denied the City's motion to vacate and granted the Union's motion to confirm.

The FOP had notice of Mr. Demasi's lawsuit against the City, but did not intervene in the matter. The City took no action to add the FOP as a party to the litigation.

Assistant Police Chiefs Demasi or Cureton did not file a grievance alleging any denial of a provision or benefit contained in the parties' CBA. Both Assistant Police Chiefs Demasi and Cureton were still employed by the City, and neither Assistant Police Chief had been disciplined by the City, when the parties submitted this matter for decision on Joint Stipulations of Fact and Joint Exhibits in lieu of evidentiary hearing. The FOP did not file a grievance or unfair labor practice charge contesting the \$13,000 payment to another bargaining-unit member as a result of, or concerning the promotions of other bargaining-unit employees subject to, the Agreed Entry Approving Settlement and Dismissing Action, Case No. A0502426.

On March 3, 2005, the FOP filed an unfair labor practice charge, Case No. 2005-ULP-03-0126, with SERB. On July 15, 2005, SERB determined that probable cause existed for believing the City had committed or was committing an unfair labor practice in Case No. 2005-ULP-03-0126, authorized the issuance of a complaint, and referred the matter to an expedited hearing.

On September 1, 2005, the FOP filed another unfair labor practice charge, Case No. 2005-ULP-09-0482, with SERB. On December 15, 2005, in Case No. 2005-ULP-09-

0482, SERB determined that probable cause existed for believing that the City had committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). SERB consolidated Case Nos. 2005-ULP-03-0126 and 2005-ULP-09-0482, authorized the issuance of a complaint, and referred the matters to hearing. On October 20, 2005, SERB vacated the direction to an expedited hearing in Case No. 2005-ULP-03-0126 and directed the matter to a hearing.

On August 29, 2006, the City filed a Complaint for Declaratory Judgment in the Hamilton County Court of Common Pleas. The case was assigned Case No. A0607369. In the Complaint, the City asked the court to determine the rights, duties, and obligations of the City and the FOP pursuant to the court entry referenced in paragraph no. 26 thereof. The City also requested a permanent injunction to enjoin the FOP from proceeding to arbitrate Grievance No. 27-05. When the parties filed the Joint Stipulations, the court had not ruled in Case No. A0607369. On December 29, 2006, the court issued an Entry Denying Plaintiff's Complaint for Declaratory Judgment in Case No. A0607369.

II. DISCUSSION

A. History of deemed-certified bargaining-unit changes

Deemed-certified bargaining units are established through a provision in the uncodified law, Section 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367 [hereinafter Section 4(A)], which provides in relevant part as follows:

Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised

Code. Notwithstanding any other provision of this act, any employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative.

In *Ohio Council 8, AFSCME v. Cincinnati*, 69 Ohio St.3d 677, 1994 SERB 4-37 (1994) ("*Ohio Council 8*"), the Ohio Supreme Court rejected an employer's unilateral attempt to alter the composition of a deemed-certified bargaining unit. The Court struck down an administrative rule, former Ohio Administrative Code Rule 4117-5-01(F), because it authorized adjustments or alterations to deemed-certified collective bargaining units absent a challenge by another employee organization and subsequent certification of an exclusive representative, which is forbidden by Section 4(A).

In *State ex rel. Brecksville Ed. Assn. v. SERB*, 74 Ohio St.3d 665, 1996 SERB 4-1 (1996) ("*Brecksville*"), the Ohio Supreme Court found that *Ohio Council 8* applied only to unilateral employer petitions. The Court also held at 667, 1996 SERB at 4-3, that Section 4(A) does not deprive SERB of jurisdiction to consider a petition jointly filed by an employer and an exclusive bargaining representative requesting SERB to amend the composition of a deemed-certified bargaining unit:

First and foremost, we note that the language of Section 4(A) of Am.Sub.S.B. No. 133 does not expressly protect the *composition* of the bargaining unit. [emphasis in original]. Section 4(A) provides that the deemed certified unit shall remain deemed certified until challenged by another organization. It does not exclude, expressly or otherwise, SERB jurisdiction under the facts of this case; nor does it preclude the addition of a group of employees to an existing bargaining unit *where no one opposes the action*. [emphasis added].

In *In re Groveport Madison Local School Dist Bd of Ed*, SERB 98-011 (07-23-98) ("*Groveport Madison*"), we were faced with a unilateral filing by the deemed-certified

exclusive representative that was opposed by the employer, and we held:

In light of *Ohio Council 8* and *Brecksville*, we decline to act favorably on a unilateral attempt by either the employer or the exclusive representative to alter the composition of a deemed-certified bargaining unit when such an attempt is opposed by the other party. In *Brecksville*, the Court declared that cooperative solutions are the express objective of Ohio's Public Employee Collective Bargaining Law. [footnote omitted] To allow an exclusive representative to unilaterally initiate alterations to the composition of a deemed-certified bargaining unit over an employer's objections would not promote cooperative solutions and would be contrary to Section 4(A)'s express objective. Further, since *Ohio Council 8* already prevents an employer from unilaterally initiating changes in a bargaining-unit's composition to which it previously agreed, then allowing an exclusive representative to do so is inherently inconsistent and would create an imbalance in these bargaining relationships. Consequently, the Request for Recognition in the present case must be dismissed. Of course, the dismissal of this Request for Recognition does not prevent the Employee Organization from representing these employees in a separate bargaining unit.

In *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO v. State Emp. Relations Bd.*, 88 Ohio St.3d 460, 2000-Ohio-370, 2000 SERB 4-13, Syllabus ("*AFSCME*"), the Ohio Supreme Court held: "A deemed certified employee representative and an employer may resolve disputes concerning bargaining unit composition through their collective bargaining agreement's grievance procedure." The Court recognized the Public Employees' Collective Bargaining Act [O.R.C. Chapter 4117] "acknowledges that certain employers and bargaining groups have long histories, predating the Act, of resolving differences through collective bargaining and through dispute resolution mechanisms such as arbitration." *Id.* at 463, 2000 SERB at 4-14. In addressing its decisions in both *Ohio Council 8* and *Brecksville*, the Court stated that "historic relationships should be allowed to agree *between themselves* about the makeup of bargaining units, or to *choose the best method of resolving differences* in that regard. (emphasis added)" *Id.*

It is against this backdrop that the City asks SERB to create a fourth method of change to deemed-certified units by allowing a party to use the statutory dispute resolution procedures of fact finding and conciliation to modify to composition of the deemed-certified bargaining unit. We find that this request is contrary to the express objective of Section 4(A) and the Ohio Supreme Court's direction. The Court allowed changes as a result of the parties agreeing "between themselves" or as the result of a collective bargaining agreement's grievance procedure. Until the parties "choose the best method of resolving differences" in their collective bargaining agreement to be the fact-finding or conciliation processes, we cannot recognize these statutory procedures for this purpose.

B. CINCINNATI I

1. SERB's Opinion and Order:

In *In re City of Cincinnati*, SERB 2005-006 (9-21-2005) ("*Cincinnati I*"), the FOP filed an unfair labor practice charge against the City alleging that the City violated O.R.C. §§ 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, all of which occurred after the voters enacted the 2001 Charter Amendment. After a hearing before a SERB Administrative Law Judge, the Board ultimately found that the Cincinnati did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5), dismissed the complaint, and dismissed with prejudice the unfair labor practice charge. The FOP appealed to the Court of Common Pleas of Hamilton County, which reversed the Board. *Queen City Lodge No. 69, Fraternal Order of Police v State Emp. Relations Bd.*, Court Case No. A0508286 (CP, Hamilton, 8-25-2006).

2. The Common Pleas Court's Decision:

The Common Pleas Court assigned the case to a Magistrate; after he issued his Decision and objections were filed to it, the Common Pleas Court found the objections to the Magistrate's Decision were not well taken, accepted and adopted the Magistrate's

Decision as its own without further elaboration, thereby setting aside SERB's order and remanding the matter to SERB for further adjudication consistent with the Magistrate's Decision.

The Magistrate found that the Charter Amendment directly modified the grievance procedures in the CBA when it recategorized the APC position as employment at will, thereby eliminating the protection of the grievance procedure. The Magistrate also found that the Charter Amendment modified the CBA's promotion procedures. As a result, the Magistrate found that SERB erred in holding that the Charter Amendment did not conflict with the CBA.

The Magistrate then looked at whether the conflict constituted an unfair labor practice. The Magistrate found that SERB correctly determined that the midterm changes in APC promotion procedures required collective bargaining. The Magistrate stated that the City's passing of the ordinance placing the Charter Amendment on the ballot constituted an unfair labor practice unless the ordinance fell within one of the two SERB-created exceptions under *Toledo*.

The Magistrate then reviewed SERB's finding that the voters constituted a "higher-level legislative body" under the second exception in *Toledo*. The Magistrate found SERB's definition was inconsistent with the Ohio Revised Code. The Magistrate then found that the City, by enacting the ordinance that put the Charter Amendment on the ballot, "put in motion a process which ultimately modified the existing CBA without the negotiation by and agreement of the Union." As a result, the Magistrate found the City did not have clean hands and the course of action "contradicts the spirit of, and is inconsistent with, the objectives of Chapter 4117 of the Revised Code."

3. The Court of Appeals' Decision:

On appeal, the 1st District Court of Appeals reversed the common pleas court and upheld the Board's order. *State Emp. Relations Bd. v Queen City Lodge No. 69, Fraternal Order of Police*, 2007-Ohio-5741 (1st Dist Ct App, Hamilton, 10-26-2007). The Court of Appeals determined that the common pleas court improperly reviewed SERB's decision de novo and did not properly defer to SERB's findings that were supported by substantial evidence in the record.

The Court of Appeals agreed with SERB's interpretation of the CBA article dealing with "Terminal Benefits." The Court of Appeals found that the record demonstrated that SERB reviewed the CBA and, relying upon the finding of its administrative law judge, concluded the CBA did not specify the promotional process for APCs. The parties had stipulated to the fact that past promotions were governed by the Rule of 1. The Court of Appeals reasoned that if there had been a provision in the CBA governing promotions, like the lower court found, then the parties would not have needed to stipulate to this fact. "Essentially, what the [lower] court did here was to substitute its judgment for that of SERB. That was improper."

Although the CBA contained a Management-Rights provision, the Court of Appeals found that SERB properly concluded that the City would ordinarily be required to bargain over the promotion process for APCs. The lower court agreed with SERB that the *Toledo* decision was the controlling precedent governing midterm bargaining, which contains exceptions involving "exigent circumstances" or legislative actions by a "higher-level legislative body."

SERB had found that the voters constituted a "higher-level legislative body," which encompassed a "higher-level legislative body," under the second exception in *Toledo*. SERB had based its determination on the fact that the term "higher-level legislative body or authority" was not defined in the Ohio Revised Code, but instead was an agency-created

concept. The Court of Appeals held: “SERB itself created the term. Thus, as SERB correctly noted, it could define the term as long as the definition was consistent with the objectives of R.C. Chapter 4117.” Id at ¶32, Slip Op. at p. 12.

SERB had relied on the fact that the City’s electorate enacted the Charter Amendment, not the city council, in determining that these circumstances fit the second exception in Toledo. The Court of Appeals stated that “a city council cannot agree to a collective-bargaining agreement, then pass an ordinance abrogating it. But that is not what happened here.” Id at ¶33, Slip Op. at p. 12.

The Common Pleas Court had found SERB’s definition was inconsistent with the Ohio Revised Code for two reasons. The Court of Appeals saw nothing wrong with SERB’s interpretation of a “higher-level legislative authority.” The Court of Appeals noted that “if the citizens of Cincinnati, in passing a charter amendment, are not a ‘higher-level legislative authority,’ then any charter amendment could never affect future collective bargaining. On its face, that is impossible—both the city and any union could simply ignore the charter, which is the highest authority in city governance.” Id at ¶37, Slip Op. at p. 14. The Court of Appeals, unlike the lower court, perceived no difference in whether the amendment was put on the ballot by council or by individuals gathering signatures; “either way, the voters have the last word.” Id.

The Court of Appeals found that the lower court’s reversal of SERB’s reasonable legal interpretation of what constituted a “higher-level legislative authority” was erroneous. The Common Pleas Court had failed to defer, applied the wrong standard of review, and abused its discretion.

C. The unfair labor practice charges

O.R.C. § 4117.11 provides 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* * *;

(2) [D]ominate * * * or interfere with the formation * * * of any employee organization[;]

* * *

(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 primary issue is whether the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1), (A)(2), and (A)(5) when the City utilized the statutory impasse proceedings in an attempt to remove Assistant Police Chiefs from a deemed-certified bargaining unit.

Section 4117.01(G) defines “to bargain collectively” as follows:

“To bargain collectively” means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. * * *

The duty to bargain includes the duty to bargain in good faith. Good-faith bargaining is determined objectively using a “totality of the circumstances” test. *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).

1. The City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it attempted to remove Assistant Police Chiefs from the supervisory bargaining unit during conciliation.

A review of all of the evidence reveals that the City refused to bargain in good faith during conciliation with the FOP. During negotiations for the successor CBA, the City rejected a tentative agreement ("TA") that would have provided for a newly negotiated agreement and continued to include the Assistant Police Chiefs in the deemed-certified bargaining unit. During fact finding under O.R.C. § 4117.14, the City continued to propose to remove any and all references to APCs from the Agreement. The fact finder rejected these arguments and recommended affirmation of the TA. The FOP rejected the fact-finder's report.

After the rejection of a fact-finding report, O.R.C. § 4117.14 provides in relevant part as follows:

(D) If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the:

(1) Public employees, who are members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special police officers appointed in accordance with sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional facilities, shall submit the matter to a final offer settlement procedure pursuant to a board order issued forthwith to the parties to settle by a conciliator selected by the parties. The parties shall request from the board a list of five qualified

conciliators and the parties shall select a single conciliator from the list by alternate striking of names. If the parties cannot agree upon a conciliator within five days after the board order, the board shall on the sixth day after its order appoint a conciliator from a list of qualified persons maintained by the board or shall request a list of qualified conciliators from the American arbitration association and appoint therefrom.

(2) Public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code[.]

After the rejection of the fact-finding report, the parties moved to conciliation under O.R.C. § 4117.14(D)(1). At conciliation, the City continued to propose that the Assistant Police Chiefs be removed from the bargaining unit. It is at this point that the City engaged in bad faith bargaining. The City's proposal was rejected by the conciliator, who wrote as follows: "The Fact-Finder's recommendation stands. The language in the most recent CBA stays and the FOP's position to maintain the current language in the Definition and Recognition section of the contract is ordered."

An objective review of the City's conduct results in the determination that the City violated O.R.C. §§ 4117.11(A)(1)¹ and (A)(5) by insisting to impasse on its proposal to remove the Assistant Police Chiefs from the bargaining unit. Citing Section 4(A), SERB has held that a deemed-certified representative cannot be displaced except by a competing employee organization. *In re Univ of Cincinnati*, SERB 85-022 (5-24-85). SERB also has rejected several attempts by unions to unilaterally petition for the modification of a deemed-certified bargaining unit. *In re Groveport Madison Local School Dist. Bd. of Ed.*, SERB 98-011 (1998). See also, *In re Urbana City School Dist. Bd. of Ed.*, SERB 98-012 (1998). In *In re Cuyahoga County Human Services Dept*, SERB 98-008 (4-30-98) ("*Cuyahoga*"), SERB set forth the standard under which employees can be severed from deemed-certified

¹ The O.R.C. § 4117.11(A)(1) allegation is a derivative violation of O.R.C. § 4117.11(A)(5) in this instance. *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) at n.14.

bargaining units, holding that absent evidence of substantial changes or of inadequate, disparate representation by an employee organization, no basis exists for granting a severance petition.

The Ohio Supreme Court also has addressed the circumstances under which parties can achieve changes to the composition of deemed-certified bargaining units. Initially, the Court held that O.R.C. Chapter 4117 allows changes to a deemed-certified bargaining unit upon challenge by and subsequent certification of a rival employee organization. *Ohio Council 8*, supra. In *Brecksville*, supra, the Court held that a deemed-certified employee organization and an employer could agree, through a petition jointly filed with SERB, to ask SERB to amend the composition of a deemed-certified bargaining unit. Finally, in *AFSCME*, supra at Syllabus, the Court held: “A deemed certified employee representative and an employer *may* resolve disputes concerning bargaining unit composition through their collective bargaining agreement’s grievance procedure. (emphasis added)”

Key to the Court’s holding in *AFSCME* was the principle that orderly and cooperative resolution of disputes and the policy interest of stability in labor relationships is furthered when the parties “agree between themselves about the makeup of bargaining units, or * * * choose the best method of resolving differences in that regard.” *Id.* In *AFSCME*, the parties’ choice of the grievance process to resolve disputes over bargaining-unit composition was evident because the collective bargaining agreement at issue contained language specifying when newly-created positions would be added to the bargaining unit. When the employer created a new position but did not place it in the bargaining unit, the employee organization filed a grievance alleging a violation of this specific contract language. Ultimately, an arbitrator resolved the parties’ dispute. The Court held that O.R.C. Chapter 4117 was not violated when the parties used the grievance-arbitration process to resolve their bargaining-unit dispute. *Id.*

The recognition clause in the 2002-2004 CBA does not set forth any agreement between the FOP and the City regarding amendments to the composition of the deemed-certified bargaining unit. Rather, the clause states that the City agrees to recognize the FOP as the exclusive representative of the previously-defined “sworn members” of the City’s Police Department. Thus, this language does not reflect the parties’ agreement upon a process to amend the composition of the bargaining unit.

The mere recitation in a recognition clause of the positions contained in a bargaining unit, whether deemed certified or Board certified, does not, without more, make the composition of the bargaining unit a mandatory subject of collective bargaining. Cases decided under the National Labor Relations Act (“NLRA”) are persuasive in this regard. As noted by the U.S. Second Circuit Court of Appeals in a case arising under the NLRA:

The statute imposes on labor and management alike a duty to bargain in good faith with respect to wages, hours and other conditions of employment....This duty “does not compel either party to agree to a proposal,” as Section 8(d) states, “or require the making of a concession,” and the [National Labor Relations] Board [“NLRB”] has no power to settle any of those questions. By way of contrast, it not only has power, but is indeed directed, to decide what is the appropriate bargaining unit in each case.

Douds v. Longshoremen (ILA), 241 F.2d 278, 282 (2d. Cir. 1957). Thus, the scope of the bargaining unit is a permissive, not a mandatory, subject of bargaining. Further, while under the NLRA a bargaining unit may be altered by agreement of the parties, it is an unfair labor practice for either party to insist to impasse on a permissive proposal that employees be added to or excluded from a certified bargaining unit. *Id.*; *Salt River Valley Water Users’ Ass’n*, 204 NLRB 83 (1973), *enf’d*, 498 F.2d 393 (9th Cir. 1974); *United Technologies Corp.*, 292 NLRB 248 (1989), *aff’d*, 884 F.2d 1569 (2d Cir. 1989). We concur with this reasoning.

Therefore, we find that, under Section 4(A) and O.R.C. Chapter 4117, it is an unfair labor practice for either party to insist to impasse on a permissive proposal that employees be added to or excluded from a deemed-certified bargaining unit. Thus, we further find in the present case that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by insisting to impasse on its proposal to remove the Assistant Police Chiefs from the bargaining unit.

2. The City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it bypassed the FOP and negotiated individual employment contracts with certain Assistant Police Chiefs.

After the conciliator's award was issued, the City, essentially ignoring the terms of the successor CBA, entered into employment contracts directly with certain Assistant Police Chiefs without duly negotiating with the FOP. On June 22, 2005, the City entered into a contract with Captain Cureton, which provided for him to become an Assistant Police Chief. This employment contract was entered into without any discussion or negotiation with the FOP. Furthermore, the contract contains provisions that directly contradict the existing supervisors' collective bargaining agreement, including, among other items, different residency requirements and disciplinary provisions. The City entered into a similarly worded contract with Captain Demasi, also without negotiating with the FOP.

The City entered into Captain Demasi's individual employment contract as part of a settlement of a common pleas court action filed against the City by individual employees. In this action, the City filed memoranda with the court stating that the Assistant Police Chief positions (other than Executive Officer) were within the FOP bargaining unit. The City claims that the FOP waived its right to challenge the individual employment contract entered into in settlement of this litigation. The FOP was not a party to this action, and the City never invited the FOP to participate in the settlement negotiations. Indeed, the parties stipulated that the FOP was not involved in the negotiations leading to the individual employment contracts reached with APCs Cureton and Demasi. In neither instance did the City have the right to unilaterally avoid its obligations under the CBA.

The recognition clause of the CBA provided in part as follows:

"Exclusive bargaining rights" shall be interpreted to mean that the City shall not negotiate, meet or confer with any person, group of persons, associations or unions other than the Fraternal Order of Police, Queen City Lodge No. 69, for purpose of effecting or attempting to effect a change in the terms of this Agreement as it applies to any provision of this contract, and shall not permit any City employee or agent to adopt or continue any policy, procedure or program which is in conflict with any provision of this contract.

The Ohio Supreme Court has held that an employer has a duty to bargain collectively and exclusively with the designated exclusive representative of a bargaining unit. *State Emp. Relations Bd. v. Miami Univ.* (1994), 71 Ohio St.3d 351, 1995 SERB 4-1. This duty extends unless and until the employee organization is no longer the exclusive representative. *Id.* In *In re Findlay City School Dist. Bd. of Ed.*, SERB 88-006 (1988), the employer, as here, bypassed the exclusive representative and negotiated directly with employees, and we found a violation because the employer ignored its obligation to bargain with the union.

The parties have stipulated that the FOP has at all relevant times been the exclusive bargaining representative, having never waived that right nor relinquished it upon challenge. To simply avoid its responsibility to negotiate with the exclusive representative of the Assistant Police Chiefs, as the City has done, is an attempt to abrogate the obligations set forth in O.R.C. Chapter 4117. Therefore, we find that the City violated O.R.C. §§ 4117.11(A)(1)² and (A)(5) when it refused to bargain with the exclusive representative of its employees by directly negotiating individual employment contracts for Assistant Police Chiefs covered by a collective bargaining agreement with the FOP.

²The O.R.C. § 4117.11(A)(1) allegation is a derivative violation of O.R.C. § 4117.11(A)(5) in this instance. *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) at n.14.

3. The City did not violate O.R.C. § 4117.11(A)(2).

The record does not contain any facts to support the allegation that the City became involved in the internal administration or leadership of the FOP. The records also does not indicate that the City, by requesting changes to the composition of an FOP bargaining unit, has interfered with the formation of the employee organization itself. The facts of this case are readily distinguishable from those of *In re Pierce Twp, Clermont County*, SERB 2001-008 (12-12-01), in which SERB found an O.R.C. § 4117.11(A)(2) violation when the employer took action to eliminate all positions within a local union's proposed bargaining unit while a Petition for Representation Election was pending. Therefore, the City did not violate O.R.C. § 4117.11(A)(2) when it bypassed the FOP and negotiated individual employment contracts with certain Assistant Police Chiefs. Since Complainant and Intervenor have failed to meet their burden of proof for this allegation, it is dismissed.

D. REMEDY

The parties will be ordered to return to the status quo ante effective June 7, 2005, the date on which the conciliation award and opinion was issued, to remedy the City's unilateral acts. Consequently, the City must rescind the individual employment contracts with Assistant Police Chiefs Cureton and Demasi and afford these employees the wages, hours, and terms and conditions of employment set forth in the current collective bargaining agreement between the City and the FOP. In addition, a cease-and-desist order will be issued, along with a Notice to Employees, to be posted by the City for sixty days where employees represented by the FOP work.

III. CONCLUSION

For the reasons set forth above, the Board finds that the City of Cincinnati violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-03-0126 by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit, that the City violated O.R.C. §§ 4117.11(A)(1) and (5) in Case No. 2005-ULP-09-0482 by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the FOP, and that the City did not violate O.R.C. § 4117.11(A)(2). As a result, a cease-and-desist order will be issued, along with a Notice to Employees, to be posted by the City for sixty days where employees represented by Fraternal Order of Police, Queen City Lodge No. 69 work, and the order will require the parties to return to the status quo ante effective June 7, 2005, the date on which the conciliation award and opinion was issued.

Gillmor, Vice Chairman, and Verich, Board Member, concur.