

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

In the Matter of

Municipal Construction Equipment Operators' Labor Council,

Employee Organization,

and

City of Cleveland,

Employer.

STATE EMPLOYMENT
RELATIONS BOARD
2008 AUG 21 A 11: 21

Case No. 2006-MED-12-1380

**DIRECTIVE
(OPINION ATTACHED)**

Before Chairperson Brundige, Vice Chairperson Mayton, and Board Member Verich:
August 14, 2008.

On December 1, 2006, the Municipal Construction Equipment Operators' Labor Council ("the Employee Organization") filed a Notice to Negotiate with the State Employment Relations Board ("SERB" or "the Board") concerning negotiations for a successor collective bargaining agreement with the City of Cleveland ("the Employer"). On February 15, 2007, SERB's Bureau of Mediation issued a letter appointing a mediator.

By a letter received April 30, 2007, the Employee Organization requested the appointment of a fact finder pursuant to Ohio Revised Code § 4117.14(C)(3). On May 2, 2007, a letter was sent to the Employee Organization and Employer with the names of potential members of the fact-finding panel. By a letter received May 9, 2007, the Employee Organization again requested the appointment of a fact finder. On May 14, 2007, SERB's Bureau of Mediation issued a letter appointing Joseph W. Gardner as the fact finder and directing him to hold a hearing and issue a report no later than May 28, 2007.

On May 21, 2007, the Employer filed an emergency motion to stay negotiations until SERB has resolved whether the parties are under a mutual alternative dispute resolution procedure (as the Employer contended) or are eligible for the appointment of a fact finder (as the Employee Organization contended). On May 22, 2007, the Board granted the Employer's emergency motion with the stay of negotiations remaining in effect through June 7, 2007. On May 23, 2007, the Board received the Employee Organization's opposition to the emergency motion to stay. On June 1, 2007, the Board received the

Employer's supplemental brief in support of its motion to stay and a request for hearing. On June 5, 2007, the Employee Organization filed a Reply to Employer's Supplemental Brief. On June 6, 2007, the Employer filed its Surreply to the Union's Reply Brief.

On June 7, 2007, the Board directed this matter to an expedited hearing to determine whether the parties are under the statutory procedure or a mutually agreed-upon dispute resolution process. The Board also granted a stay of negotiations "only for the statutory fact-finding procedure." In its "Directive Granting Stay of Statutory Fact-Finding Procedure and Direction to Expedited Hearing" the Board stated: "Whether the parties are under the statutory procedure or a mutually agreed-upon dispute resolution procedure is a question of law and fact that can only be resolved through a hearing. The statutory fact-finding procedure should be stayed during the hearing process, which should be expedited, but a general stay of negotiations should not be granted.

At hearing, the parties agreed to stipulate the case in its entirety. On August 20, 2007, both parties filed post-hearing briefs. On August 22, 2007, the parties filed the Stipulated Facts. On October 23, 2007, the Administrative Law Judge issued a Recommended Determination, recommending that the Board find that the collective bargaining agreement between the parties contains a valid mutually agreed-upon dispute resolution procedure, that the statutory dispute resolution procedure is inapplicable, and that the Board rescind the order to fact finding.

On November 1, 2007, the Employee Organization filed alternative motions (1) to withdraw the request for appointment of a fact finder and, if denied, (2) for additional time to file exceptions to the Recommended Determination. The Employee Organization argued that the Ohio Supreme Court decision in *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, resolved "some of the issues which might have been the subject of the requested fact finding." On November 13, 2007, the Employer filed its response in opposition to the Employee Organization's motion to withdraw. On December 13, 2007, the Board denied the Employee Organization's motion to withdraw and granted its motion for additional time to file exceptions to the Recommended Determination, giving both parties fourteen days from the issuance of the Board's directive to file exceptions to the Recommended Determination.

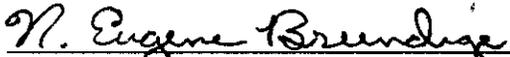
On January 4, 2008, the Employee Organization filed exceptions to the Recommended Determination and requested an oral argument. On January 14, 2008, the Employer filed a response opposing the exceptions. On February 7, 2008, the Board granted the Employee Organization's motion for oral argument. On June 18, 2008, representatives for the Employee Organization and the Employer presented oral arguments to the Board.

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After reviewing the record, the Recommended Determination, oral arguments, and all filings in this case, the Board adopts the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Recommended Determination and finds, for the reasons expressed in the attached Board Opinion, incorporated by reference, that the collective bargaining agreement between the parties contains a valid mutually agreed-upon dispute resolution procedure, that the Employer did not waive its rights under the mutually agreed-upon dispute resolution procedure, and, therefore, that the statutory dispute resolution procedure established in Ohio Revised Code § 4117.14 is inapplicable. Consequently, the May 14, 2007 order to fact finding is hereby rescinded.

It is so ordered.

BRUNDIGE, Chairperson; MAYTON, Vice Chairperson; and VERICH, Board Member, concur.



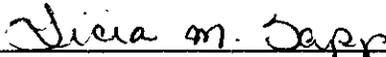
N. EUGENE BRUNDIGE, CHAIRPERSON

TIME AND METHOD TO PERFECT AN APPEAL

Any party desiring to appeal shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed with the Court of Common Pleas of Franklin County, Ohio. Such Notices of Appeal shall be filed within fifteen (15) days after the mailing of the State Employment Relations Board's order as provided in Section 119.12 of the Ohio Revised Code.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 07th day of August, 2008.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

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

In the Matter of

Municipal Construction Equipment Operators' Labor Council,

Employee Organization,

and

City of Cleveland,

Employer.

Case No. 2006-MED-12-1380

BRUNDIGE, Chairperson:

This matter comes before the State Employment Relations Board ("SERB" or "the Board") upon the issuance of an Administrative Law Judge's Recommended Determination, the filing of exceptions and a response to the exceptions, and oral arguments that were heard on June 18, 2008. For the reasons that follow, we find that the collective bargaining agreement between the parties contains a valid mutually agreed upon dispute resolution procedure, that the City did not waive its rights under the mutually agreed-upon dispute resolution procedure, and, therefore, that the statutory dispute resolution procedure established in Ohio Revised Code ("O.R.C.") § 4117.14 is inapplicable.

I. BACKGROUND

The Municipal Construction Equipment Operators' Labor Council ("the Union") and the City of Cleveland ("the City") were parties to a collective bargaining agreement ("CBA") effective from February 14, 2005 through March 31, 2007. On December 1, 2006, the Union filed a Notice to Negotiate concerning negotiations for a successor CBA with the

City, which was served on an attorney in the City's Law Department. The Union indicated in its Notice to Negotiate that the parties did not have a mutually-agreed upon alternative dispute resolution procedure ("MAD").

On December 14, 2006, SERB sent correspondence to an attorney in the City's Law Department and counsel for the Union acknowledging receipt of the Notice to Negotiate and stating in pertinent part: "In review of the Notice to Negotiate, we understand that the parties do not have a mutually agreed dispute settlement procedure to resolve any impasses in current negotiations and that the statutory dispute settlement procedure is to apply."

On December 29, 2006, the City's bargaining representative, filed a Notice of Appearance with SERB. The parties commenced negotiations on January 11, 2007. On February 15, 2007, SERB sent a notice to the parties' representatives notifying them, among other things, of SERB's appointment of a mediator, and that the statute specified that either party may request a fact-finding panel at any time after the appointment of a mediator.

On February 20, 2007, at the parties' third negotiation session, Mr. Stewart Roll, counsel for the Union, demanded that the parties proceed to mediation per the terms of the Agreement. During discussions regarding the scheduling of said mediation, Mr. Roll directed that the mediation had to occur within three days per the requirements of the "Voluntary Dispute Settlement Procedure" contained in the CBA, and that he would contact the Federal Mediation and Conciliation Service ("FMCS") in that regard. Mr. Jon Dileno, counsel for the City, suggested that an FMCS mediator may not be available in such short order and suggested retrieving a few dates over the ensuing three weeks from the FMCS mediator. When Mr. Roll expressed some reluctance to follow that suggestion, Mr. Dileno indicated he was not willing to schedule three mediation sessions over the course of the next three days. Mr. Roll then contacted FMCS in order to secure a mediator. Following

communications with the federal mediator, the Union agreed to a schedule of mediation dates beyond the three-day limitation identified in the CBA.

The parties conducted mediation sessions on March 6, 19, and 26, and April 2, 2007, but did not reach an agreement. At the close of mediation, the Union requested that the 2005-07 CBA be extended. The City would not agree to extend the CBA beyond April 2, 2007.

After being told that the City would not extend the CBA, Mr. Roll sent a letter dated April 3, 2007, to the City's Law Director, notifying him of the expiration of the parties' CBA and demanding payment to the Union's members of the applicable prevailing wage. By letter and e-mail dated April 26, 2007, Mr. Roll requested SERB to appoint a fact finder pursuant to O.R. C. § 4117.14(C)(3). The e-mail reflected that Mr. Dileno was copied; the letter did not reflect that Mr. Dileno was copied.

By a letter received April 30, 2007, the Union requested the appointment of a fact finder pursuant to O.R.C. § 4117.14(C)(3). On May 2, 2007, a letter was sent by SERB to the Union and the City with the names of potential members of the fact-finding panel; the letter requested a selection by May 9, 2007. Mr. Dileno asserted that the May 2, 2007 letter was not received by his office until May 9, 2007.

By a letter received May 9, 2007, the Union again requested the appointment of a fact finder. On May 9, 2007, Mr. Dileno forwarded a facsimile to SERB and Mr. Roll that stated in pertinent part: "In response to your notification of a fact-finding panel regarding the above-referenced negotiations, I am writing to inform you that the parties have a written alternative dispute resolution procedure which does not culminate in fact-finding (See, Attached). Therefore, under the terms of R.C. §4117.14(C)(1)(f) fact-finding is not a proper or lawful dispute process[.]"

On May 14, 2007, SERB's Bureau of Mediation issued a letter appointing Joseph W. Gardner as the fact finder and directing him to hold a hearing and issue a report no later than May 28, 2007. On May 21, 2007, the City filed an emergency motion to stay negotiations until SERB resolved whether the parties were under a MAD, as the City contended, or were eligible for the appointment of a fact finder, as the Union contended.

On May 22, 2007, the Board granted the City's emergency motion to stay negotiations with the stay of negotiations remaining in effect through June 7, 2007. On May 23, 2007, the Board received the Union's opposition to the emergency motion to stay. On June 1, 2007, the Board received the City's supplemental brief in support of its motion to stay and a request for hearing. On June 5, 2007, the Union filed a reply to the City's supplemental brief. On June 6, 2007, the City filed its surreply to the Union's reply brief.

On June 7, 2007, the Board directed this case to hearing to determine whether the parties were under the statutory procedure or a MAD. The Board also granted a stay of the statutory fact-finding procedure, but did not grant a general stay of negotiations. At hearing, the parties agreed to stipulate the case in its entirety.

The Administrative Law Judge's Recommended Determination was issued on October 23, 2007. The Administrative Law Judge recommended that the Board find that the parties' CBA, which expired on March 31, 2007, contained a valid MAD and, therefore, that the statutory dispute resolution procedure established in O.R.C. § 4117.14 was inapplicable. On February 7, 2008, the Board granted the Union's "Request for Oral Argument." On June 18, 2008, the parties' representatives presented oral arguments to the Board.

II. DISCUSSION

A. What Is A Mutually Agreed Upon Dispute Settlement Procedure ("MAD")?

O.R.C. § 4117.14(C) provides in part as follows: "In the event the parties are unable to reach an agreement, they may submit, at any time prior to forty-five days before the expiration date of the collective bargaining agreement, the issues in dispute to any mutually agreed upon dispute settlement procedure which supersedes the procedures contained in this section." The entire intent and purpose of a MAD is to tailor a procedure to accommodate the specific needs of the parties. *In re Niles City Bd of Ed*, SERB 91-010 (11-8-91) at 3-58.

SERB's policy is to intervene as little as possible in the contractual provisions of the MAD. *Id.* SERB will intervene where a MAD is faulty and inoperative, e.g., the MAD was ambiguous and open to various interpretations and manipulations, [*Weathersfield Local Board of Education*, SERB 91-009 (11-8-91)] or the MAD's provisions rendered it virtually inexhaustible [*In re Mad River-Green Local Board of Ed*, SERB 88-016 (9-29-88)]. It is the parties' own responsibility to draft a thoughtful and proper MAD; further:

[P]arties have to realize that while they are under no obligation to agree to a MAD, once they choose to adopt a MAD they have a responsibility to write one that lends to a peaceful resolution and one that has finality. The parties then have a duty to bargain in good faith and give the process a chance to work. * * * The parties who voluntarily enter into a MAD are expected to be bound and obligated by their creation and should not expect SERB to let them avoid compliance with the MAD they freely and voluntarily agreed to.

In re Niles City Bd of Ed, *supra*.

B. Was the CBA's "Voluntary Dispute Settlement Procedure" a MAD?

The parties negotiated a CBA that was effective from February 14, 2005 through March 31, 2007. That agreement included an article that was titled "Voluntary Dispute Settlement Procedure." It provided as follows:

Either the City or the CEO Union may initiate negotiations by letter of submission forwarded to the other party within ninety (90) days prior to the expiration date of the current Agreement. The parties shall hold their first negotiation session within ten (10) calendar days from the notification of the intent to negotiate. At this time, they will jointly notify SERB of the commencement of negotiations and impasse procedures identified in this Agreement in compliance with the procedure provided and then in effect under Revised Code Section 4117.14 and related sections.

All negotiations sessions shall be closed to the public and media and conducted during times mutually agreed upon by the respective parties, and the parties agree not to "go public" with the issues of the negotiations without giving the other party prior notice of such intent.

If fifty (50) days prior to termination, tentative agreement on all items is not reached, either party may use the services of the Federal Mediation and Conciliation Service (FMCS), as follows: FMCS shall be contacted by either party so that mediation may start within three (3) days after petitioning FMCS or the date mutually agreed upon.

Once started, mediation shall continue until tentative agreement is reached on all unresolved items with mediation sessions being held at the direction of the mediator.

In the event that the parties are unable to reach agreement by March 31, 2007, or a date mutually agreed upon, all of the terms in this Agreement shall be deemed exhausted, provided the parties may extend the Agreement by mutual agreement.

One of the questions before the Board is whether this provision constitutes a MAD. O.R.C. § 4117.14(C)(1)(f) states that the dispute settlement procedures may include various forms of arbitration as well as "[a]ny other dispute settlement procedure mutually

agreed to by the parties.” The Union advances two arguments why the “Voluntary Dispute Settlement Procedure” does not constitute a MAD. First, the Union argues that the section that discusses mediation allows that the parties “may” use FMCS to provide mediation services. Second, the Union argues that because the process does not end in a final and binding conclusion to bargaining, there cannot be a MAD. Both arguments fail.

The evidence shows the language of the CBA was mutually agreed to by both parties and clearly constitutes a MAD. The fact that the CBA allows either party to exercise or decline to exercise a right does not detract from the agreement reached and is consistent with the intent of the legislation in O.R.C. § 4117.14(C)(1)(f) to allow maximum flexibility to the parties to resolve labor-management disputes in the way that works best for them. SERB has not declared a MAD to be deficient because it contained only mediation as its sole alternative-dispute resolution. To the contrary, SERB has held valid a procedure consisting only of mediation utilizing FMCS’ services in *In re Vandalia-Butler City School Dist*, SERB 86-012 (3-27-86). “[T]he MAD will be sustained absent some compelling public policy against it.” *Id* at 250.

In *In re Niles Cty Bd of Ed*, *supra*, SERB approved the use of a mediation-only MAD. SERB stated “in the case at issue the MAD is clear and its exhaustion point is specific, i.e. the expiration date of the contract. The fact that mediation is the sole requirement under a MAD does not render it faulty. The parties in this case chose not to fall under the statutory dispute resolution procedure and instead to have a MAD.” *Id* at 3-56. Thus, a mediation-only process can be a valid MAD.

The second argument is also counter to the purpose of the statute. The legislature, in its wisdom, in enacting O.R.C. Chapter 4117 allowed non-safety employees the right to strike as the ultimate tool in the union arsenal for dispute resolution.

[T]he General Assembly manifestly intended more flexibility for job actions by public employees permitted to strike than those who were not (strike prohibited employees). This being so, the provisions of the statute permitting parties to adopt a mutually agreeable alternative impasse procedure (MAD) in place of that provided by R.C. 4117.14 must be treated more liberally when “strike permissive” employees rather than “strike prohibited” employees are involved.

In re Vandalia-Butler City School District, supra at 250 [footnotes omitted]. It also reserved for management the right to unilaterally implement its final offer if there is no meeting of the minds and the Union does not exercise its right to strike.

If the Union argument prevailed, SERB would be creating a situation wherein all public employees would have their bargaining disputes resolved by submission to a final and binding process. Many parties have elected to bypass the fact-finding process in favor of mediation with the conclusion of the MAD returning the parties to their rights as enumerated in O.R.C. § 4117.14(D)(2) and other relevant sections of the Code.

This position is clearly in opposition to the distinction drawn in O.R.C. § 4117.14(D)(1) that separates safety forces from non-safety forces. According to the position advanced by the Union in the oral argument, a mediation-only process is not a valid MAD because “a mediator cannot implement dispute resolution”; if the parties concluded a mediation-only MAD without having reached an agreement, the result would leave the parties in some kind of bargaining “limbo.” Oral Argument Transcript, pp. 6, 25-26. The Union interprets O.R.C. § 4117.14(C)(1) as defining a MAD as dispute resolution by a neutral’s decision. This position is a misreading of O.R.C. Chapter 4117. O.R.C. § 4117.14(C)(1)(a) through (e) gives options for MADs that end with a decision being made by a neutral. This list, however, is not exhaustive. The element of a decision by a neutral is not a statutory requirement.

A legally binding MAD must be mutually agreed to and must have a point of conclusion. The "Voluntary Dispute Settlement Procedure" provides such a concluding point when it states in its final paragraph: "In the event that the parties are unable to reach agreement by March 31, 2007, or a date mutually agreed upon, all of the terms in this Agreement shall be deemed exhausted, provided the parties may extend the Agreement by mutual agreement." Once the MAD is exhausted, strike-permissive employees could exercise their right to strike.

The Union argues that its position that O.R.C. § 4117.14(C)(1) requires dispute resolution by a neutral's decision is supported by O.R.C. § 4117.14(C)(3), which provides for fact finding any time after the appointment of a mediator. A plain reading of the statute reflects that the procedures outlined in O.R.C. § 4117.14(C)(2)—(6), (D), and (G) all constitute the statutory dispute resolution procedures under which parties with no MAD fall.

Ohio Administrative Code Rule 4117-9-03(A) states:

The parties may, at any time, agree to submit any or all issues in dispute to any mutually agreed-upon dispute settlement procedure authorized by section 4117.14 of the Revised Code which procedure shall supersede the procedure set forth in rules 4117-9-04, 4117-9-05, and 4117-9-06 of the Administrative Code, and in divisions (C)(2) to (C)(6), (D), and (G) of section 4117.14 of the Revised Code.

The Union further argues that the City waived its right to assert that the agreement contained a MAD. The Union bases its waiver argument on the City's failure to object to the Union's Notice to Negotiate. The Notice to Negotiate form had the "NO" box checked as to whether the parties had a MAD. The cover letter from the Union referenced provisions contained in the "Voluntary Dispute Resolution Procedure" portion of the CBA. Both were dated December 1, 2006. The City responded with a letter pointing out that the

Union's notice was premature, but the City agreed to meet during the week suggested by the Union and gave notice of its intent to modify the terms of the 2004-2007 CBA.

SERB has previously held that the waiver of a statutory right must be clear and unmistakable. *In re City of Lakewood*, SERB 88-009 (7-11-88) *aff'd* 1990 SERB 4-35 (8th Dist Ct App, Cuyahoga, 621-90); *In re Pickaway Ross Joint Vocational School District Bd of Ed*, SERB 87-027 (11-19-87); *In re Cuyahoga County Commrs*, SERB 89-006 (3-15-89). For a party to have waived a contractual right, such waiver must have been clear and unmistakable. *West American Insur. Co. v. Skaggs*, 1988 Ohio App. LEXIS 1038 ("*West American Insur.*") (4th Dist Ct of App, Ross County, 3-25-88). As stated in *West American Insur.*, "to make out a case of implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party[.]" *Id.* at p. 5. See also, *Directory Concepts, Inc. v. Smith*, 2004-Ohio-3666 (3rd Dist Ct App, Crawford, 7-12-04) (waiver, absent expressed statements, must be established by clear and unequivocal acts).

The "Voluntary Dispute Resolution Procedure" agreed to by the parties has not been clearly and unmistakably waived. The CBA procedure was referred to in the cover letter accompanying the Union's Notice to Negotiate. At the parties' third negotiation session, the counsel for the Union demanded that the parties proceed to mediation per terms of the agreement. This action could occur within 50 days of the expiration of the CBA, whereas O.R.C. § 4117.14(B) calls for negotiations to commence 60 days prior to the expiration of the CBA. During discussions about scheduling the mediation, counsel for the Union directed that the mediation had to occur within three days per the requirements of the "Voluntary Dispute Resolution Procedure" in the CBA. The statutory procedure requires SERB to appoint a mediator to assist in the collective-bargaining process. The Union did not avail itself of the services of the SERB mediator, instead contacting FMCS directly in accordance with the terms of the CBA's "Voluntary Dispute Resolution Procedure."

Once mediation concluded and the CBA expired, the Union demanded its members be paid the prevailing wage pursuant to applicable external law, a request that would be at odds with the continuance of the statutory dispute-resolution procedures. The evidence presented in this case clearly indicates that the CBA between the parties contains a valid MAD. Therefore, the statutory dispute resolution procedure does not apply, and the Bureau of Mediation's order directing the parties to fact-finding should be rescinded.

III. CONCLUSION

For the reasons above, the Board finds that the collective bargaining agreement between the parties contains a valid mutually agreed upon dispute resolution procedure, that the City did not waive its rights under the mutually agreed-upon dispute resolution procedure, and, therefore, that the statutory dispute resolution procedure established in Ohio Revised Code § 4117.14 is inapplicable. Consequently, the statutory dispute resolution procedure established in Ohio Revised Code § 4117.14 is inapplicable, and the order to fact finding is rescinded.

Mayton, Vice Chairperson, and Verich, Board Member, concur.

SERB

"Promoting Orderly and Constructive
Labor Relations Since 1984"

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Case No. 2006-MED-12-1380

CERTIFICATION

I, the undersigned General Counsel and Assistant Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Directive (with Opinion Attached) of the State Employment Relations Board entered on its journal, on the 27th day of August, 2008.



J. Russell Keith
General Counsel and Assistant Executive Director
August 27, 2008