

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

In the Matter of

Teamsters Local 436, International Brotherhood of Teamsters,

Employee Organization,

and

City of Cleveland,

Employer.

Case Number 2012-REP-07-0074

**ORDER DISMISSING REQUEST FOR RECOGNITION**  
**(OPINION ATTACHED)**

Before Chair Zimpher and Board Member Brundige: December 12, 2013

On July 11, 2012, the Teamsters Local 436, International Brotherhood of Teamsters ("Employee Organization" or "Teamsters Local 436") filed a request for recognition, seeking to represent all Assistant Directors of Law for the Civil Division of the City of Cleveland ("Employer" or "City"). On August 2, 2012, the Employer filed objections to the request for recognition, a petition for representation election, and a motion to dismiss for lack of jurisdiction. Alternatively, the Employer requested that the matter proceed to a hearing in order to present evidence to show that the employees in question are not "public employees" under Ohio Revised Code ("O.R.C.") Chapter 4117.

On October 4, 2012, the Board directed this matter to hearing to determine if the employees in question are "public employees" under O.R.C. Chapter 4117, and if they are found to be "public employees," to determine an appropriate bargaining unit. A three-day evidentiary hearing was held on February 21 and 22, 2013, and March 14, 2013, wherein testimonial and documentary evidence was presented. Subsequently, the parties filed post-hearing briefs. On October 15, 2013, Administrative Law Judge Beth A. Jewell (ALJ Jewell) issued a Recommended Determination, recommending that the Board dismiss, *with prejudice*, the Employee Organization's petition for recognition, since the evidence demonstrates that the Assistant Directors of Law are employees of a public official who act in a fiduciary capacity, appointed pursuant to O.R.C. § 124.11 and; therefore, are exempt from the definition of "public employee" pursuant to O.R.C. § 4117.01(C)(9).

On October 25, 2013, the Employee Organization filed exceptions to the Recommended Determination and a motion to withdraw the request for recognition, *without prejudice*. On November 4, 2013, the Employer filed a memorandum opposing the exceptions and a memorandum opposing the motion to withdraw.

Ohio Administrative Code Rule 4117-1-16 provides that a party wishing to withdraw any action pending before the Board must file a motion to withdraw. In considering such a motion, the Board is always mindful of its statutory duty to resolve issues brought before it regarding the interpretation and application of O.R.C. Chapter 4117. In considering the Employee Organization's motion to withdraw its petition for recognition, without prejudice, the Board notes that significant resources have been expended to establish a comprehensive evidentiary record at a three-day hearing before ALJ Jewell. The parties submitted post-hearing briefs and ALJ Jewell then issued a twenty-two page Recommended Determination that thoroughly analyzes the legal issue of whether Assistant Directors of Law in the City of Cleveland are "public employees" who are eligible for collective bargaining under O.R.C. Chapter 4117. Since the Board has the duty to provide a resolution of this issue, it would waste resources and undermine the Board's processes to allow a party to withdraw without prejudice its petition for recognition *after* a Recommended Determination has been issued in the matter. Therefore, the Employee Organization's motion to withdraw the request for recognition, without prejudice, is *denied*.

After reviewing the Recommended Determination, exceptions, responses to exceptions, and entirety of the information contained in the record, the Board adopts the reasoning set forth in ALJ Jewell's Recommended Determination, finding that the evidence demonstrates that the Assistant Directors of Law are employees of a public official who act in a fiduciary capacity, appointed pursuant to O.R.C. § 124.11 and; therefore, are exempt from the definition of "public employee" pursuant to O.R.C. § 4117.01(C)(9).

Based upon the foregoing, the Board adopts and incorporates by reference the Findings of Fact, Analysis and Discussion, and Conclusions of Law in ALJ Jewell's Recommended Determination, grants the Employer's objections and dismisses the request for recognition with prejudice, and dismisses the Employer's petition for representation election and motion to dismiss as moot.

It is so ordered.

ZIMPHER, Chair, and BRUNDIGE, Member, concur.

  
\_\_\_\_\_  
W. CRAIG ZIMPER, CHAIR

### **TIME AND METHOD TO PERFECT AN APPEAL**

Any party that desires to appeal the order of the State Employment Relations Board shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12<sup>th</sup> 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. The aforementioned Notices of Appeal shall be filed within fifteen (15) calendar days after the mailing of the State Employment Relations Board's order as provided in Ohio Revised Code Section 119.12.

### **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 13<sup>th</sup> day of December, 2013.

  
\_\_\_\_\_  
ERIN E. CONN, ADMINISTRATIVE ASSISTANT



### **III. FINDINGS OF FACT<sup>2</sup>**

1. The City is a "public employer" under R.C. 4117.01(B). (S.)
2. The Union is an "employee organization" under R.C. 4117.01(D). (S.)

3. Chapter 15, Section 83 of the City Charter ("Charter") sets forth the qualifications and duties of the Director of Law. Pursuant to section 125.01 of the City's Codified Ordinances, the Director of Law supervises the Department of Law and appoints its lawyers, including the ADLs, Chief Counsel, Chief Trial Counsel, Chief Corporate Counsel, and Chief Assistant Directors of Law. Barbara Langhenry is the current Director of Law, and reports directly to the Mayor. (Tr. 39)

4. The City's Department of Law provides legal services, representation, and advice to the City, the Mayor, City Council, and all City departments, commissions, and officers, in their official capacities. The Department of Law and its lawyers are engaged in virtually every issue and project of the City. (Tr. 14, 21, 26, 28; City Charter, Ch. 15, sections 83, 85-86; City Ex. 17)

5. Currently employed in the Department of Law, Civil Division, are Chief Trial Counsel Thomas Kaiser, Chief Corporate Counsel Richard Horvath, and four Chief Assistant Directors of Law. Two ADLs, Hal Madorsky and Bill Menzalora, currently serve as Acting Section Chiefs. These individuals currently manage six sections in the Law Department. The Director of Law determines the structure of the sections and the kinds of legal work handled by the ADLs in each section. Currently, each section is aligned with a group of City departments; the ADLs in each section provide legal services to the corresponding departments. The sections in the Law Department's Civil Division are Development, Code Enforcement, Operations and Sustainability, House Counsel, Litigation, and Safety. Litigation Section attorneys handle litigation for all City departments; ADLs within each section also handle section-related litigation. Each ADL is assigned to a section and reports to one or more Chief ADLs. Although ADLs are assigned to a section serving certain departments, or may specialize in a certain area, the Director may ask any ADL to provide any type of legal assistance for any City department. (Tr. 28, 43, 49, 50, 63, 101; Jt. Ex. 9)

---

<sup>2</sup> References to the Joint Stipulations of Fact in the record are indicated parenthetically by "S." References to the testimony in the record are indicated parenthetically by "Tr.," followed by the page number. References to the Employer's exhibits in the record are indicated parenthetically by "City Ex.," followed by the exhibit number. References to the Employee Organization's exhibits in the record are indicated parenthetically by "U. Ex.," followed by the exhibit letter. References to the record in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for that related finding of fact.

**A. The Development Section**

6. ADLs in the Development Section provide daily legal advice to the departments of Community Development, Economic Development, Building and Housing, and Port Control. They handle legal issues related to real estate and land transactions and draft, negotiate, and advise on contracts, grants, loan agreements, and other transactions. Section ADLs are experts in transactional, financing, and municipal law and handle the City's most complex development projects, which involve multiple funding sources and require attorneys to provide sophisticated legal advice. (Tr. 50, 51, 326, 330-336, 343-344; Jt. Ex. 9)

7. Development Section ADLs also draft department legislation, including legislation to authorize spending of federal funds. On a rotating basis, Section ADLs attend weekly meetings of the City Council Community Development and Economic Development Committee, which reviews all proposed legislation from those departments. The ADLs' committee duties include reviewing pending legislation, answering council members' questions, and drafting amendments to proposed legislation. (Tr. 344-345, 633-634; City. Ex. 24, p.10)

8. ADL Jack Arnold is Port Control Director Smith's attorney on all matters pertaining to operations and administration of the Cleveland Hopkins International Airport. Mr. Arnold's office is located in the Director's suite of Port Control's administrative offices at the airport, next to the offices of Director Smith and his Chief of Staff. With the Mayor's approval, Director Smith officially added Mr. Arnold to Port Control's Executive Management Team, which consists of Director Smith, his Chief of Staff, and the commissioners who head Port Control's eight internal divisions. Mr. Arnold attends weekly executive meetings and is "involved in almost every contract matter" at Port Control. He advises all Port Control divisions, works on numerous airport leases and insurance policies, and negotiates the airport's major deals. Mr. Arnold represented the City in the AirMall Cleveland negotiations, which expanded the airport's food partnerships, and authored all related contracts and leases. Mr. Arnold was the City's lead attorney and negotiator in the United Airlines merger with Continental. Mr. Arnold is currently involved in the City's preparations to renegotiate the Master Lease Agreement in 2015, which governs the rights of all airline carriers to airport space and sets their landing fees. Mr. Arnold also advises Port Control on its legislative strategy and sits on its legislative review committee; reviews all procurement and legislative actions; determines the best strategy to pursue; prepares required paperwork, and ensures legal compliance. (Tr. 293-294, 295-298, 305-307, 308-310; City Ex. 23, pp. 1-2)

9. Director Smith considers ADL Andrea Paspek to be "his lawyer" on Port Control's City harbor-related legal matters. Ms. Paspek is actively involved in the lease and contract matters of the harbors division. Ms. Paspek directly advises Director Smith, his Chief of Staff, and other Port Control leaders on managing the harbors and other City properties along Lake Erie and the Cuyahoga River. She has either advised

on or drafted the City's most essential lease agreements along the waterfront, including agreements with the Cleveland Browns and Rock & Roll Hall of Fame. Ms. Paspek has handled some of the City's largest development deals. Ms. Paspek was "front and center" in negotiating and drafting a landmark agreement delineating property management responsibilities between the City of Cleveland and the Cleveland-Cuyahoga County Port Authority. She also negotiated, drafted, and is charged with implementing Port Control's agreement with the Downtown Cleveland Alliance. In addition to her Port Control work, Ms. Paspek is one of the primary legal advisors to the Department of Economic Development. (Tr. 300-304, 306, 329-330, 342; City Exs. 20, 24)

10.ADL George Peters is one of the most experienced ADLs in the Development Section, primarily advising the Department of Community Development. He has negotiated and drafted numerous grant, loan, purchase, lease, construction, and other agreements. Mr. Peters has legal expertise in municipal real estate and community development block grant funding. Mr. Peters is providing legal advice to the Department of Community Development related to an ongoing federal Department of Housing and Urban Development ("HUD") audit of the City's use of HUD funds. (Tr. 329, 340, 526-527, 625, 635-636, 646, 659; City Ex. 24, pp. 12-14)

11.ADL Steve Martinek regularly advises the Department of Economic Development. He is an expert in tax increment financing and frequently handles the City's complex financial transactions. ADL Martinek drafted an agreement between NASA and the City that permits manufacturers to obtain specialized grants to incent them to expand in the Cleveland area or to improve their technology. He also negotiated and drafted an Urban Development Action Grant Agreement between the City and the Manufacturing Advocacy and Growth Network to incent manufacturers to locate in the City. He also handled several City development projects involving various financing structures. (Tr. 329-330, 332-334, 342-343; City Exs. 24, pp. 18-20; 25)

12.ADL Mary Cornely also represents the City in development projects and prepares and negotiates loan and grant agreements under various City programs to expand business in the City. She provides daily legal advice to the Department of Community Development. (Tr. 329; City Ex. 24, pp. 7-10)

## **B. Code Enforcement Section**

13.ADLs in the Code Enforcement section enforce Cleveland's housing, building, fire, health, safety, sidewalk, and zoning codes through administrative and civil actions and criminal prosecutions in municipal court. Code Enforcement Section ADLs handle criminal prosecutions from start to finish and review search warrant requests, charges, and evidence; decide whether sufficient grounds exist to bring criminal charges; and draft and file charges. They also exercise discretion on whether to dismiss a case and provide recommendations to the court on sentencing and fines. (Tr. 41-42, 43, 45-46, 56, 68, 198, 209, 213, 235, 433)

14. ADL Carolyn Downey represents the Department of Building and Housing in administrative proceedings before the Board of Zoning Appeals and handles any subsequent court appeals. She prepares cases, conducts research, determines litigation strategy, drafts filings, and handles oral arguments. Ms. Downey and the other section ADLs will brief their supervisors on sensitive matters, but normally continue to independently handle and determine the strategic direction of their cases. Ms. Downey serves as the prosecuting attorney for the Housing Court's selective intervention program, a diversion program for first-time Housing Code violators, and works on wrongful demolition cases and public nuisance receivership cases seeking injunctions against noncompliant property owners. (Tr. 199-203, 203-205, City Exs. 6, pp. 18-23; 27)

15. ADL Bill Armstrong prosecutes Health Department misdemeanor citations, Building and Housing Code violations by larger commercial properties, and Fire Code violations at the administrative level and before the Housing Court. He also handles all aspects of civil litigation on various Code Enforcement cases, including nuisance actions. (Tr. 209-212, 214, 216-217; City Ex. 6, pp. 3-8)

16. ADL Patricia McGinty Aston represents the City in administrative proceedings before the Board of Building Standards and any resulting appeals for violations of building, housing, and fire Codes, and continues to represent the City throughout the appellate process following the administrative proceeding. Like other Section attorneys, she prosecutes criminal actions in Housing Court. Ms. McGinty Aston also first-chairs complex litigation and advises the Department of Building and Housing on issues involving the state and local building Codes. She has full discretion to determine litigation strategy, to draft and prepare court filings, and to make required court and administrative appearances. (Tr. 217-219, 383-385, 404-405; City Ex. 6, pp. 11-12, 15-17)

17. ADLs Barbara Tamas and Katie Zvomuya represent the City before the Housing Court. They are also part of the City's Bulk Holders Taskforce, which identifies "slumlords" with bulk holdings of neglected properties and forces them to comply with Code standards and reimburse the City through civil or criminal proceedings. Ms. Zvomuya also independently handles all aspects of civil litigation. (Tr. 208-209, 215, 219-221, 223; City Exs. 6, pp. 29-31; 7)

### **C. Operations and Sustainability Section**

18. ADLs assigned to the Operations and Sustainability Section provide daily advice to the Departments of Public Works, Utilities, and Health, and the Office of Sustainability. They handle advising, contracting, negotiations, and certain litigation. Additionally, ADLs who serve the power and water utilities must have specialized expertise in municipal finance and the use of public funds. (Tr. 57, 346-347)

19.ADL Linda Applebaum is the primary legal advisor to the Department of Health. She drafts contracts and handles regulatory compliance and occasional environmental issues. Until recently, she also represented City Council on the City Council Finance Committee, where she reviewed proposed legislation for compliance, drafted amendments, and addressed inquiries from council members. Ms. Applebaum has also served as a first-chair attorney in several litigation matters, in which she handled the bulk of the legal work, including drafting dispositive motions and presenting oral arguments on behalf of the City. (Tr. 352, 487-488, 495-496, 503, 510-514, 516, 523-524, 557; City Exs. 9, 10; 23, p. 5)

20.ADL Jim Cochran is involved in collective bargaining negotiations with the Municipal Equipment Operators' Labor Council's bargaining units in the departments of Public Works and Utilities. Mr. Cochran attends ongoing meetings about these labor negotiations along with the City's outside counsel. In prior collective bargaining negotiations, he sat at the bargaining table, assisted with drafting bargaining proposals, attended strategy meetings, and advised on bargaining strategies. He regularly advises the City's Labor Relations Manager, Nycole West, and other department leaders on grievances, discipline and other employment inquiries. Mr. Cochran also handles grievance arbitrations involving some of the City's largest bargaining units, pre-disciplinary hearings, CBA interpretation issues, and employment litigation before state and federal administrative agencies and the courts. (Tr. 180-183, 244-245, 248-249, 250, 264, 276-278, 279-280)

21.ADL John Mills handles all legal issues for the Office of Sustainability. Much of his work involves regulatory compliance, contracting, negotiations, and advising for the City's electricity and water utilities. Mr. Mills negotiated the collection agreement between the City and the Northern Ohio Regional Sewer District, which governs the City's supply of water to nearly 70 suburbs and related billing and collection. Mr. Mills also commences litigation against contractors who default on agreements with the City and handles other litigation matters. Mr. Mills also negotiates with contractors who default on contracts with the City and is involved in major efforts to recover contractor overcharges for the City. (Tr. 60, 353-356; City Ex. 32)

22.ADL Kate Ryan is the attorney for the City's Division of Water, which is the closest analogue the City has to a multi-million dollar corporation. Its officials call Ms. Ryan directly for all of their legal needs. She also negotiates and drafts billing, collection, and real estate contracts. Ms. Ryan negotiated and drafted changes to the suburbs' water agreements with the City. She addresses any legal issues that arise under these agreements. (Tr. 58-60, 356-360)

23. Shirley Tomasello is the Department of Law's environmental law expert. Ms. Tomasello handles environmental work for all City departments. She recently spearheaded a successful effort to revive the City's toxic sweep task force, which works to eliminate lead hazards in the City. (Tr. 350-352, 360-362; City Ex. 23, pp. 3-4)

24. ADL Arcola Whatley serves as the daily legal advisor to the Department of Public Works. She attends the Department's management meetings and is typically the first person that the Director of Public Works calls for advice. Ms. Whatley's daily advising to the Public Works Department ranges from reviewing concession and rental agreements with various vendors to handling disputes over cemetery gravestone damage. (Tr. 57-58, 362)

25. ADL Hal Madorsky is currently the Acting Chief of the Operations and Sustainability Section and serves as the primary attorney for the Cleveland Public Power. He negotiates contracts for the City's utilities and specializes in the area of energy regulation. He also handles the City's challenges to certain filings by investor-owned utilities before the Public Utilities Commission of Ohio. (Tr. 345, 347-348, 350; City Ex. 23)

**D. Litigation Section**

26. Litigation Section ADLs handle civil rights, environmental, and police misconduct cases, and contract and construction disputes. They also defend the City in negligence actions and pursue claims when the City suffers property damage. ADL Jerome Payne's testimony summed up the role of Litigation Section ADLs: When "[s]omebody sues the City, I'm [on] the front line[s]." (Tr. 666)

27. The Department of Law generally handles City litigation in-house, and ADLs often take the lead in trying cases. The Litigation Section has many seasoned ADL litigators, including Mr. Payne, who focuses on tort litigation; Gary Singletary, who handles complex municipal home-rule issues; and Stewart Hastings, who handles some of the City's most complex tort matters. Both Mr. Payne and Mr. Singletary have handled cases and oral arguments before the Ohio Supreme Court. Mr. Payne recently independently tried and won a jury trial over water charges, and Mr. Singletary successfully enforced the City's right to regulate trans fats in restaurants. Litigation Section ADLs generally handle cases from start to finish. ADLs do legal research, draft and file motions, select witnesses, take depositions, determine litigation strategy, present oral arguments, and try cases. (Tr. 75, 76-77, 80-81, 85, 665; City Ex. 30)

28. ADLs Stewart Hastings and Gary Singletary also represent the Landmarks Commission, which is charged with preserving the City's historic buildings, and attend all Landmarks Commission meetings. In those "frequently contentious" bi-monthly all-day meetings, Mr. Hastings provides legal advice to commission members and assists them in carrying out their functions. (Tr. 673-674)

29. ADL Awatef Assad has worked for the City for nearly 14 years and is generally assigned to the City's largest high-stakes litigation, such as a large class action concerning the City's operation of its jails and challenging the City's conduct of intake procedures and inmate searches on constitutional grounds. (Tr. 63-64)

30.ADL Jack Bacevice passed the bar and started working for the City in 2011. He has handled an oral argument before the Sixth Circuit. He is also assigned many cases on his own and has assisted other ADLs in handling labor and employment law litigation. (Tr. 64-66)

31.ADL Jose Gonzalez almost exclusively handles Workers' Compensation litigation, with an active docket of nearly 70 cases. Although he is involved with some administrative claims, he is primarily responsible for handling claims appealed to court. He also regularly advises administrative personnel on workers' compensation issues and handles violations of specific safety regulations. (Tr. 77-78; City Ex. 32, pp. 1-6)

32.ADL Catherine Ma's practice consists of many torts cases from the Water Department, which are often assigned to her alone and require her to handle all aspects of litigation and discovery. Jennifer Meyer also represents the City in varied litigation and has progressively been taking on more and more complex cases, including civil rights and personal injury matters. (Tr. 78-80; City Ex. 32, pp. 1-6)

#### **E. House Counsel Section**

33.House Counsel ADLs advise the City's departments of Human Resources, Finance, Aging, and Capital Projects; the City's Civil Service Commission, Central Collection Agency, Office of Equal Opportunity, Community Relations Board, and Board of Control; City Council, and the Cleveland Municipal Court and Clerk. These ADLs draft and negotiate contracts. They represent City Council on various committees, on which they assist in drafting legislation and amendments and identify legal issues with pending legislation. They also handle First Amendment issues that arise in connection with use of public property and funds. (Tr. 85-86, 548-549, 566-567; Jt. Ex. 9; City Ex. 26, p. 1)

34.ADL Lewis Dolezal represents the City's Division of Assessments and Licenses and is physically located in that division. He represents the City on criminal enforcement actions, including excise tax violations. Mr. Dolezal has drafted City legislation, including ordinances requiring retailers to post unit pricing, admissions tax laws, and laws that permit food trucks to operate in the City. He advises on excise tax, protected health information, and other matters; works on internal audits, drafts post-audit assessments, reviews bond and insurance documents, drafts contracts and requests for proposals, and monitors compliance with open contracts. Mr. Dolezal also files proofs of claim on behalf of the City in bankruptcy matters. (Tr. 455, 551-552, 595-598, City Exs. 26, pp. 4-5; 29)

35.ADLs William Gareau, Linda Bickerstaff, and Amber Greenleaf represent the City's interests at the Central Collection Agency, which collects taxes for the City and 45 other Ohio municipalities. CCA ADLs initiate civil and criminal actions against those who fail to pay City taxes, defend the City's claims in bankruptcy actions, and handle some collections litigation. (Tr. 47-48, 87-89, 438-439)

36. Mr. Gareau initiates criminal prosecutions against offenders who fail to pay City taxes. He drafts the Tax Administrator's decisions on inquiries received by the Division of Taxation, represents the City in bankruptcy cases, and provides legal advice on tax matters to various City departments and the Tax Administrator. When needed, he also meets with corporate counsel and handles tax litigation before the Board of Tax Review and any subsequent court appeals. (Tr. 439-441, 443-444, 460, 472, 473-474, 478-480)

37. Linda Bickerstaff handles civil actions against tax code violators and provides taxation advice to various departments. Ms. Bickerstaff also has litigation experience. She represented the City in a case before the Ohio Supreme Court in which she handled all aspects of the case without her Section Chief's involvement. Ms. Bickerstaff regularly advises the Finance Director, Tax Commissioner, and other CCA personnel and fields taxpayer questions. She also drafts City ordinances and recommends tax code amendments to City Council. (Tr. 477-478, 561-562, 565; City Exs. 26, pp. 5-6; 31)

38. Amber Greenleaf is a new attorney who assists Mr. Gareau with criminal prosecutions of tax offenders, provides legal advice to City departments, and handles other assignments from the Tax Administrator. She is being trained to independently perform all duties handled by experienced Section ADLs. (Tr. 452-454, 469-470, 560-561)

39. ADL Teddi Monegan focuses her practice on labor, employment, and personnel matters. She is the primary legal advisor to the departments of Human Resources and Port Control on labor and employment matters. Port Control leadership and staff communicate directly with Ms. Monegan regarding labor and personnel matters. Director Smith estimated that at least 90 percent of Ms. Monegan's time spent advising Port Control on personnel matters concerns issues involving union employees. City Labor Relations Manager West works directly with Ms. Monegan daily to obtain legal advice on collective bargaining and other personnel matters. Ms. Monegan works closely with Ms. West to develop and draft various City labor and employment policies. Additionally, Ms. Monegan is involved in formulating the City's collective bargaining strategy and negotiating labor agreements. Ms. Monegan develops and reviews proposals, analyzes employee complaints, and participates in negotiations. Ms. Monegan also provides advice on discipline, grievance handling, and Step 3 grievance responses prepared by the Department of Human Resources and Labor Relations. Ms. Monegan handles employment cases before state and federal administrative agencies, including the Equal Employment Opportunity Commission ("EEOC") and Ohio Civil Rights Commission ("OCRC"), and the courts. (Tr. 178-179, 253, 254, 255-256, 264, 304-305, 312-313, 317, 568)

40. ADL Debra Rosman is Finance Department Director Sharon Dumas' "go-to lawyer" on numerous Finance Department legal matters, including City debt service

activities, bond issues, other financing structures, grant agreements, tax issues, payroll, and inquiries concerning City Ordinances. Ms Rosman is the City's counsel on all agreements that involve financing with City bonds. She advises various City departments on issues relating to bonds and bond proceeds. She represented the City on a \$50 million bond issue, in which she worked with outside bond counsel to prepare the sale documents, negotiated with bond counsel, and drafted the Director of Law's legal opinion on the bond issue. Ms. Rosman also drafts contracts; advises on trust, estate, and copyright matters; and reviews City internal audits. Ms. Rosman attends Finance Department meetings and discussions addressing the City's bargaining strategies, labor negotiations, budgeting, potential layoffs, and potential privatization or merger of City entities. Ms. Rosman has advised Director Dumas on bargaining strategy. (Tr. 116-121, 598-600, 601-606, 614-617; City Exs. 21; 22; 26, p.3)

41.ADL Jeffrey Marks advises the Board of Control, the Division of Purchases and Supplies, the Division of Accounts, the Office of Equal Opportunity, the Community Relations Board, and the Fair Housing Administrator. He fields inquiries about contracting and procurement matters; drafts and processes the City's professional service contracts; and reviews contractor registration bonds, insurance, and contracts for legal form and correctness. Mr. Marks assists in drafting and implementing rules and regulations and consults on City ordinances involving contracts. (Tr. 569-572; City Ex. 26, pp. 1-2)

42.ADL Dennis Matejka advises the Fire Prevention Bureau, the Film Commission, and the Division of Architecture on permitting and other related issues. He drafts legislation for various City departments, negotiates or drafts between 20 and 30 contracts per month, and reviews contracts for form and correctness. He also participates on the City Council's committee on Public Safety, drafting any requested amendments to legislation. (Tr. 565, 577-578; City Ex. 26, p. 2)

#### **F. Safety Section**

43.ADLs in the Safety Section advise the Department of Public Safety and the Community Relations Board in all areas of law. Because the Department of Public Safety has the most employees of any City department, ADLs assigned to this Section are frequently involved in labor and employment matters, often involving the City's largest bargaining units. (Tr. 89, 97)

44.ADL Susan Bungard was recently transferred to the Safety Section from the Code Enforcement Section. Ms. Bungard currently serves as counsel to the Department of Public Safety, and has performed many of the duties of Code Enforcement Section ADLs. Ms. Bungard represents City Council members before the Division of Liquor Control when they object to liquor permit applications, existing liquor licenses, or related assessments. As part of her liquor work, Ms. Bungard compiles information necessary to present each case, obtains crime and health statistics for the area, determines the status of any licenses or permits, and interviews City Council

members regarding their objections. She then advocates for the City at Division of Liquor Control hearings, 90 percent of which are contested proceedings; and handles necessary appeals. Ms. Bungard files and handles nuisance actions to close liquor establishments when necessary. Liquor appeals are considered to be quite political, and City Council members frequently have significant interests at stake because the outcome directly affects their wards and constituents. (Tr. 89-91, 377-378, 394-398, 328-430, 432; City Ex. 6, pp. 26-27)

45. ADL Bungard is also lead counsel on at least four litigation matters. She has argued before the Sixth Circuit and would expect to do any oral arguments on her pending litigation. Ms. Bungard is competent to independently handle every aspect of litigation and trial, with minimal consultation as needed from her supervising Chiefs, including determining the strategy for each case, conducting discovery, taking depositions, drafting dispositive and other motions, and trying the case. When in the Code Enforcement Section, Ms. Bungard has initiated and handled building and housing code violations before the Housing Court on behalf of various City departments. ADL Bungard also is assigned labor arbitration matters. She has interpreted provisions of City collective bargaining agreements and is involved in pre-disciplinary proceedings for City personnel. (Tr. 92-93, 380-383, 383-385, 395-396, 418-422; City Exs. 7, 8)

46. Alex Cortes, an ADL who joined the City after a clerkship with the Court of Common Pleas, handles cases on his own. He completes brief writing on some of the City's larger cases and, in a recent win for the City, wrote a brief before the Sixth Circuit in a case involving a litigant seeking damages against the City for wrongful conviction. Mr. Cortes also handles labor and employment work, including arbitrations, pre-disciplinary conferences, and other discipline matters. (Tr. 93-94, 183-184)

47. ADL Nancy Kelly advises on and negotiates contracts for the Department of Public Safety and has drafted numerous legal opinions – about 60 in just one year. She is often the City's lead negotiator on the Section's most complex transactions, including a contract to have Cuyahoga County take over City jail operations and an agreement allowing the City to use regional broadcast frequencies controlled by the suburbs. Both projects involved year-long negotiations with stakeholders, sophisticated contractual issues, extensive drafting, and the need to make strategic decisions and to provide ongoing counseling to the client. Ms. Kelly also provides daily legal advice on the Public Safety Department's high-profile legal matters, such as investigations into the November 2012 police chase and shooting. (Tr. 97-99, 323-325)

48. ADL Shawn Mallamad works on labor and employment matters for Human Resources, Public Safety, and other departments. He handles and advises on labor arbitrations, grievances, and pre-disciplinary hearings. Mr. Mallamad defends the City in employee complaints before administrative forums such as the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission, and in state and federal courts. He works on City litigation, with a current load of about 39 cases. (Tr. 105, 111, 184-185, 280-281, 407)

49. In 2012, ADL Bill Menzalora began serving as the Acting Chief of the Safety Section. As an ADL, Mr. Menzalora worked closely with Labor Relations Manager Nycole West to prepare for and conduct collective bargaining negotiations, advised on Step 3 grievances, and handled grievance arbitrations. In some instances, Mr. Menzalora has served as the City's lead bargaining negotiator without the involvement of outside counsel. He also sits in predisciplinary hearings within the Department of Public Safety and advises on employee discipline. (Tr. 258-260, 261-262, 280-281)

#### **IV. ANALYSIS AND DISCUSSION**

##### **The ADLs are Employees of a Public Official Who Act in a Fiduciary Capacity, Appointed Pursuant to Section 124.11 of the Revised Code**

The burden of proof to establish an employee's exclusion from eligibility for collective bargaining is placed upon the party seeking the exclusion. In re Franklin Local School District Bd. of Ed., SERB 84-008 (11-8-84). As set forth below, the City's argument that the ADLs are exempted from the definition of "public employee" under R.C. 4117.01(C)(9) leads to a recommended determination that is dispositive of the issue presented for resolution.

R.C. 4117.01(C)(9) in pertinent part is as follows:

(C) 'Public employee' means any person holding a position by appointment or employment in the service of a public employer ... except: ... (9) Employees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code.

Thus, in order to fall within the exception outlined in 4117.01(C)(9), the City must prove that the ADLs meet three criteria: (a) the ADLs must be appointed pursuant to Section 124.11 of the Revised Code; (b) the ADLs must be employees of a public official; and (c) the ADLs must act in a fiduciary capacity.

The first criterion is satisfied. Section 124.11 of the Revised Code provides an enumerated list of positions exempt from the classified civil service. Individuals employed in the positions set forth in R.C. 124.11(A)(1-32) are individuals "appointed pursuant to section 124.11" to unclassified positions. Section 124.11(A)(11) explicitly identifies the following positions as unclassified:

[A]ssistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city directors of law.

The City Charter also addresses classified civil service, and the City's Codified Ordinances explain how ADLs are appointed by the Director of Law. The Cleveland City Charter states in pertinent part as follows: "The civil service of the City is hereby divided into unclassified and classified service. 1. The unclassified service shall include: (b) All directors and assistant directors of departments." Section 125.01(a) of the Codified Ordinances ("Ordinance 125.01(a)") addresses city department directors' powers and duties. In pertinent part, this section reads: "(a) [The Director of Law] may appoint such number of Assistant Directors of Law as he or she deems necessary for the proper conduct of the work of the civil branches, whose appointments shall be subject to the approval of Council."

The Union urges that if the ADLs are appointed pursuant to Ordinance 125.01(a), then they are not appointed pursuant to R.C. 124.11. It is true that the ADLs are appointed to their positions based on the power granted to the Director of Law pursuant to Ordinance 125.01(a). However, the proviso in R.C. 4117.01(C)(9) that the employee be "appointed pursuant to" R.C. 124.11 is not addressing the manner in which an employee gains employment, but rather whether an employee holds a position that is within the unclassified service. Unclassified employees are appointed at the discretion and serve at the pleasure of the appointing authority. Dunn v. Bruzzese, 2007-Ohio-3500, 874 N.E.2d 1221, 1236 (2007) (citation omitted). Individuals employed in the positions identified in R.C. 124.11 have been appointed to the unclassified service, not appointed to their positions.

ADLs are appointed to their positions by power vested in the Director of Law under Ordinance 125.01(a). ADLs are also appointed to the unclassified service under the Cleveland City Charter. The Union urges that the home rule amendment applies and the City Charter governs; therefore, the Union asserts that ADLs are appointed to the unclassified service pursuant only to the Charter and not R.C. 124.11. The Union's claim that the City's ADLs are not appointed pursuant to R.C. 124.11 would lead to the absurd result that under R.C. 4117.01(C)(9), employees who act in a fiduciary capacity toward public officials in a municipality with its own civil service laws would not be "public employees," while employees who act in a fiduciary capacity in a municipality that does have its own civil service laws would not be "public employees."

However, home rule amendment analysis is unnecessary when the state statute and the Charter provision are not in conflict. ADLs are appointed to the unclassified service pursuant to R.C. 124.11. Although the City Charter also appoints ADLs to unclassified service, the City Charter and the Revised Code are consistent. "In the absence of express language in a charter showing that it conflicts with the statute, it is the duty of the courts to harmonize the provisions of the charter with the provisions of the statute relating to the same matter." State ex rel. Robinson v. Dayton, 2012-Ohio-5800, 984 N.E.2d 353, 361 (Ohio Ct. App. 2012). Moreover, "[g]eneral civil service laws will apply where the charter is silent or has adopted the state statute." Glick v. City of Cleveland, 2003-Ohio-997 (Ohio Ct. App. Mar. 6, 2003). The City Charter is consistent

with the Revised Code provision appointing ADLs to unclassified service; therefore, home rule analysis is not required, and general civil service laws apply. In accordance with the state's general civil service law, ADLs are appointed pursuant to R.C. 124.11.

The second criterion is satisfied. The City's ADLs are employees of a public official. It is well established that city law directors are public officials. See, e.g. Mantua ex rel. Webb v. Clavner, 88 Ohio App. 3d 492, 495, 624 N.E.2d 317, 319 (1993) (addressing the subject of the removal of public officials and legal representation by another public entity or official, i.e. law directors); In the Matter of State Employment Relations Board v. International Ass'n of Fire Fighters, Local 1267, SERB 2006-009 (identifying as public officials the individuals that union members addressed in a public meeting, including city council members and the city director of law).

The Union argues that the Director of Law is not a public official because she is appointed, not elected. However, "[p]ublic official... includes any person who is elected or appointed to an office of any city. A city law director is a public official." OH Eth. Op. 89-012 (Ohio Eth.Com.). The Union also argues that ADLs are employees not of a public official, but of the City of Cleveland. The Union's argument follows that ADLs cannot be "employees of a public official" because the City employs them, not the public official. After the Director of Law is appointed, he or she, in turn, appoints his or her assistants, including the ADLs. The language "of a public official" does not require, nor does case law suggest, that the Director of Law personally employ the ADL in order for the ADL to be considered an employee of a public official. Directors of Law are public officials, and ADLs are employees of a public official.

Turning to the third criterion, R.C. 4117.01(C) does not define "fiduciary capacity." SERB has adopted the analysis courts use to determine fiduciary status under R.C. 124.11(A)(9), which provides that assistants of state agencies who hold a fiduciary relationship to that agency are in the unclassified civil service. In re SERB v. Fulton County Engineer, SERB 96-008 (1996) ("Fulton"). In Fulton, SERB adopted the following passage from the Ohio Supreme Court in State ex rel. Charlton v. Corrigan, 36 Ohio St. 3d 68 (1988) ("Charlton"), to describe fiduciary relationships:

Cases which have analyzed the nature of the fiduciary relationship exception to classified civil service requirements have invariably characterized the relationship as one of trust and confidence . . . It is more than the ordinary relationship of employer and employee . . . and exists where special confidence . . . is reposed in the integrity and fidelity of another.

Fulton, SERB 96-008 (1996), quoting Charlton, 36 Ohio St. 3d 68, 70-71 (Ohio 1988) (internal citations and quotes omitted). In Fulton, SERB held that when determining if an employee acts in a fiduciary capacity, the focus is on whether the employee's job duties require a high degree of trust, confidence, reliance, integrity, and fidelity, above

and beyond whatever technical competence the position may require. Ohio courts follow this standard in analyzing whether employees have a fiduciary relationship with public officials. Johnson-Hebb v. Clinton County Public Defender, 187 Ohio App. 3d 17, 20-21 (Ohio App. 2010)(“Clinton County”); Olander v. Ohio Environmental Protection Agency, 134 Ohio App. 3d 723, 726 (Ohio App. 1999)(“Olander”). “Charlton teaches that the hallmarks of a fiduciary relationship are the need for extraordinary trust and confidence to be placed in an employee and a concomitant expectation of the utmost loyalty and integrity from the employee.” Clinton County, supra, at 21.

A “great degree of discretion in carrying out one’s duties may indicate a trust relationship.” Charlton, 36 Ohio St. 3d at 71; Olander, 134 Ohio App. 3d at 727 (human resources administrator for the Ohio Environmental Protection Agency was a fiduciary under 124.11(A)(9) because his duties required him to exercise discretion in a manner requiring a high degree of trust, confidence, integrity, and fidelity). In Charlton, the Court found that a fiduciary relationship existed between the county treasurer and many of his appointed deputy treasurers who, in addition to routine work, made discretionary investment and banking decisions or exercised discretion on whether to investigate and prosecute taxpayers. Charlton, supra, at 72-73. Only deputies who always did the most routine work such as typing, answering the telephone, and cashiering were not found to be fiduciaries. Id. at 73.

While a duties inquiry is “[o]ne method of determining whether a fiduciary relationship exists . . . it may also be inquired whether there is some element within the overall structure of the employment relationship which makes integrity and loyalty to the employer an essential job qualification, over and above technical or competency requirements.” Charlton, supra, at 71. The overall structure of the employment relationship between the City and the ADLs essentially demonstrates that each and every ADL acts in a fiduciary capacity to the City and its Director of Law.

The Ohio Rules of Professional Conduct recognize that attorneys have special fiduciary obligations to clients over and above mere technical competence. The Union argues that since all licensed attorneys must comply with these Rules, the additional fiduciary obligations they impose are merely subsumed into the “technical competence” required to be an attorney. The Rules plainly reject this conclusion, since they expressly impose duties on attorneys beyond mere “competence”: “In all professional functions a lawyer should be competent, prompt, diligent, and loyal.” Ohio R. Prof. Conduct, Preamble, p. 1 [4] “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.” Ohio R. Prof. Conduct, 1.3[1]. Attorneys must keep client confidences, and client communications are subject to attorney-client privilege –notwithstanding whether the attorneys are employed by a public or private entity. Ohio R. Prof. Conduct 1.6(a); Ohio R. Prof. Conduct, Preamble, pg. 1 [1]; State ex. rel. Leslie v. Ohio Housing Finance Agency, 105 Ohio St. 3d 261 (Ohio 2005)(“Leslie”). In upholding the existence of attorney-client privilege, the Court in Leslie held that “an attorney does not become any less of an attorney by virtue of

state agency employment. That is so even if the attorney's position includes performance of nonlegal or so-called ministerial duties." Id. at 267.

As an essential job qualification, the City is entitled to require of its ADLs the special loyalty, integrity, and trust that characterizes any attorney-client relationship. See Office of Disciplinary Counsel v. Moore, 101 Ohio St. 3d 261, 264 (Ohio 2004)("attorney stands in a fiduciary relationship with the client and should exercise professional judgment solely for the benefit of the client and free of compromising influences and loyalties"); compare In re Termination of Employment of Pratt, 40 Ohio St. 2d 107, 115 (Ohio 1974)(sheriff's deputies "did not perform the duties required of a fiduciary, such as a trustee, a lawyer, an accountant, or a guardian").

The reasoning in Ohio Civil Service Employees Ass'n (OCSEA) v. Ohio State Emp. Relations Bd., 144 Ohio App. 3d 96 (Ohio App. 2001)("OCSEA"), the only case considering whether public-sector attorneys act in a "fiduciary capacity" for the purpose of determining if they are "public employees" under R.C. 4117.01(C) supports the conclusion that City ADLs act in a fiduciary capacity toward the Director of Law and their client and employer – the City. When determining an employee's fiduciary status under R.C. 4117.01, OCSEA held that courts should consider the "fundamental purpose of the legislature in excluding some employees from collective bargaining," including "whether the employees perform the type of duties and share the type of responsibility that would make it inappropriate for them to have personal interests at stake that may be in conflict with that of the employer during bargaining activities, such as contract negotiations, grievance proceedings, etc." Id. at 103. The court recognized as follows:

In order for the head of an agency to delegate administrative, managerial, and fiduciary duties to employees effectively, he or she must feel confident that these employees' interests are aligned with the employer's interest in implementing agency policies and goals, and must have confidence that, when sitting at the bargaining table, these highly trusted employees will not have divided interests.

Id.

In OCSEA, the court held that assistant public defenders did not act in a fiduciary capacity toward the public defender or the county under R.C. 4117.01. Because the employer and clients of the assistant public defenders were different, with entirely different interests, allowing assistant public defenders to bargain with the county would not drive a wedge between these employees and the beneficiaries of their fiduciary obligations. The court held that the assistant public defenders owed a "special loyalty . . . to their clients," the indigent defendants whom they represented and in whose interests they litigated, and did not owe this special loyalty to the Public Defender, their employer. OCSEA, supra, at 104. The indigent defendant clients –not the Public Defender – were

the beneficiaries of the attorneys' fiduciary obligations, including the trust, confidence, fidelity, and integrity that characterize an attorney-client relationship. Id.

The City is the ultimate recipient of the ADLs' special obligations. Like the Director of Law, all ADLs serve to protect the interests of their client, the City. In determining fiduciary status, the salient distinction between the assistant public defenders and the ADLs is that the ADLs' client is also their employer. Unlike the assistant public defenders in OCSEA, the ADLs owe trust, confidence, and special loyalty to their employer, the City. Unlike the assistant public defenders, the ADLs' client and employer are the same and have the same interests.

ADLs also act in a fiduciary capacity toward the Director of Law. Indeed, nearly 70 years ago, the Ohio Supreme Court held "[a]ssistant directors of law occupy a fiduciary relation to their principal, the director of law[.]" De Woody v. Underwood, 136 Ohio St. 575, 580 (1940). The Court has also recognized "[t]he position of assistant director of law is necessarily a position of trust and confidence. The director of law must answer to the people for the shortcomings of his assistants." State ex rel. Ryan v. Kerr, 126 Ohio St. 26, 30 (1932). The ADLs' work product directly reflects on the Department of Law, its Director, and, ultimately, the City. It is impossible for the Director to redo or even check all of the ADLs' legal work. When granting authority to settle litigation, Director Langhenry typically does not go through the entire case file herself, but rather relies on the ADLs' strategic assessment of the case and insists that the ADL consult with the affected City department and recommend whether the case should be settled and for what amount. As a result, it is extremely important for the Director to have great trust and confidence in her ADLs' loyalty and integrity, judgment, decision making, work product, and allegiance to the City. Each year, ADLs draft many contracts and review many more, provide legal advice on thousands of inquiries, and handle virtually all of the City's civil litigation. The extent to which the Director relies on the integrity, advice, guidance, work product, and loyalty of ADLs cannot be understated.

ADLs perform sophisticated legal work that requires significant training, loyalty, and integrity. ADLs exercise discretion and good-faith judgment on behalf of the City. Even more so than the treasurers in Charlton, the nature of the ADLs' work is to solve all types of complex City legal problems. As litigators, ADLs formulate legal strategy, prepare and manage cases, prepare pleadings, motions and briefs, conduct discovery and research, make court appearances, and try cases before all types of tribunals. They negotiate, implement, and advise on City contracts and financial deals. Department directors work closely with ADLs and rely on ADLs to help them carry out their own duties for the City. Some ADLs participate in City departments' status and strategy meetings. Department directors rely on ADLs' specialized training, expertise, and experience to provide legal and other advice, often on a daily basis.

Before the City's department directors sign City contracts, ADLs often negotiate with interested parties, draft the contract, and present the finished product for a director's approval. This is also the case with complex City bond issues, which are

handled by an expert ADL who negotiates with interested parties and interacts with outside bond counsel; prepares, revises, or reviews the volumes of pages of documents characteristic of such a transaction; and drafts the Director's opinion on the bond issue for the Law Director's signature. Director Langhenry relies on the ADL's representations, research, legal interpretations, and written work product. Additionally, the Director delegates to ADLs her duty to sit on the City's Board of Revision of Assessments. ADLs sit on the Board and make final, binding decisions in the Director's place, requiring the director to have a high degree of trust, confidence, and reliance in their judgment.

ADLs work on extremely sensitive legal matters and have access to the City's most sensitive confidential information. In Charlton, supra, at 73, the Court found that deputy treasurers' "access to a variety of confidential and sensitive information about the county's taxpayers" supported fiduciary status because a "high degree of trust must be reposed in those having control and access to such information." See also Olander, supra, at 728 (HR administrator was a fiduciary in part because "he handled very sensitive matters for the [EPA Director]" such as drafting the Director's response to the Governor regarding a former employee's concerns); OCSEA, 144 Ohio App. 3d at 102 (when employees control or have access to confidential and sensitive information, a high degree of trust must be reposed in them).

The Union asserts that the ADLs are not fiduciaries because City department directors sign the contracts to which the City is a party. The ADLs review all contracts and sign them to indicate approval of legal form and correctness. However, the ADLs would be fiduciaries even if they lacked any authority to sign on the Director's behalf. Signature authority is not required for fiduciary status. Wells v. Monroe County Bd. of Comm'rs, 1995 Ohio App. LEXIS 2927, \*18-19 (Ohio App. 1995)(an employee can be a fiduciary even if he lacks signature authority for the principal); Olander, 134 Ohio App. 3d at 728-729 (HR administrator was a fiduciary based on duties even though agency director completely revoked his signature authority). Moreover, rather than engaging in routine or ministerial tasks when approving contracts or ordinances for legal form and correctness, ADLs must independently analyze these documents in light of applicable law, identify potential legal problems, and recommend or make necessary revisions to address them. In so doing, they are performing a fiduciary function for the City and the Director. An ADL's signature certifies that the Department of Law has determined the contract or legislation contains all necessary elements, protects the City's legal interests, and is not contrary to law.

The Union's argument that the ADLs' work on contracts and legislation is merely routine, ministerial work is not persuasive. In State ex rel. Bramley v. Norton, 7 Ohio Dec. 354, 1897 WL 1559, \*11-12 (Ohio C.P. 1897), the court denied a writ of mandamus to compel the director of law to approve a contract for legal form and correctness because he believed the ordinance on which it was based was illegal. More recent cases illustrate that a noncompliant contract or bidding process may be legally challenged, as Section 90 of the City Charter permits taxpayers to sue for

injunctions against execution of an unlawful City contract; or the City's contract, bidding process, or ordinance may be voided or invalidated. See e.g. City of Cleveland v. Ohio, 508 F.3d 827, 832-33, 841 (6th Cir. 2007)(in a declaratory judgment action filed by the City, the court upheld a federal agency's decision to withdraw funds from a City project because the City's local hiring preference was incorporated into its contract with the winning bidder after the City had removed it from advertised bidding specifications, and invalidated a bond penalty provision in a City ordinance because it violated federal law); State ex rel. Allerton Parking Corp. v. Cleveland, 6 Ohio St. 2d 165, 166 (Ohio 1966)(voiding City's arrangement to sell certain real urban renewal property due to City's failure to comply with stringent Charter requirements on use of such property); Thelander v. Cleveland, 3 Ohio App. 3d 86 (Ohio App. 1981)(bidding process for restaurant concession at City airport declared void because the bid invitation had material omissions); see also Battaglia v. Cleveland Hts, 1981 Ohio App. LEXIS 14004 (Ohio App. 1981)(reversing dismissal of residents' complaint that municipality passed an unlawful resolution due to fact issue on whether the city complied with Ohio's open public meeting law).

Chief ADLs Comer and Curtis, Chief Corporate Counsel Horvath, and Director Langhenry all testified that the primary role of Section Chiefs and Chief Counsels is to delegate assignments, monitor the workload of section attorneys, and serve as a resource for ADLs. Department personnel often go straight to ADLs with their legal inquiries and have little interaction with the Chiefs or the Director on day-to-day legal matters, viewing ADLs as their primary legal advisors. Some ADLs participate in status and strategy meetings in the various City departments that they provide counsel to. ADLs often independently handle their matters with little supervisory intervention, exercise discretion on their legal matters, independently advise clients, and are expected to know when they need additional consultation or expertise. ADLs often receive work directly from City departments and respond directly to them without going through the Section Chiefs, Chief Counsels, or the Director – who do not see, review, or approve all written work product.

In any event, when exercised, the Chiefs' and Director's authority to review ADLs' work and make final decisions does not prevent ADLs from acting in a fiduciary capacity to the Director or the City. Olander, 134 Ohio App. 3d at 729 (human resources administrator's fiduciary status was not affected by his lack of authority to make final decisions); Robinson v. Ohio Dep't of Ins., 1995 Ohio App. LEXIS 2177, \*4-6, 8 (Ohio App. 1995)(human resources administrator who made recommendations on positions, salaries, new hires, discipline, and department policies was a fiduciary even though she was not the ultimate decision maker). Consulting with peer attorneys, Chief ADLS, Chief Trial Counsel, Chief Corporate Counsel, or even the Director of Law facilitates an exchange of ideas and expertise between attorneys that creates better results for the client. The ADLs' unimpeded access to consult with Section Chiefs, Chief Counsels, and the Director supports fiduciary status because it underscores the need for trust, confidence, and reliance on their work. See Olander, 134 Ohio App. 3d

at 728 (human resources administrator's fiduciary status was bolstered by his generally unimpeded access to his agency director).

While the ADLs in the proposed bargaining unit are on the lowest tier of the Department of Law's organizational chart<sup>3</sup>, the organizational structure is not, on its face, indicative of the types of duties assigned and the discretion granted to each of the ADLs. The ADLs are assigned different duties with varying levels of autonomy and complexity. The Union urges that the ADLs have no discretion and that their entire work product is subject to review and approval; however, the record does not establish a strict sense of hierarchy nor does it set forth an established review process, either formal or informal. Submitting work for review or conferring with the Director or a Chief is often done for the purpose of keeping the Director of Law and Chiefs abreast of workload issues and major legal issues that have arisen.<sup>4</sup> Submitting cases to go up the chain of command does not necessarily affect the way the cases are handled.<sup>5</sup> "It's more or less a briefing to keep everyone apprised."<sup>6</sup> Moreover, the Director of Law stated that when a case comes to her to review, she does not go through the case file. She does not review the ADL's work to ensure accuracy but instead has a discussion with the ADL about the case during which she relies extensively on the ADL's assessment.<sup>7</sup>

The Director of Law described the department's organizational structure as a "management tool," a way in which the department can control the flow of work.<sup>8</sup> The Chief Counsels and Chief ADLs serve as a resource for the ADLs. The Chiefs' role is to ensure that ADLs do not become overwhelmed to a point they cannot effectively advise their clients.<sup>9</sup> The Chiefs delegate an "enormous amount of authority and responsibility, and [ADLs] are expected to come to [the Chiefs] if they have a question or if they are handling a matter that is new to them."<sup>10</sup> Additionally, submitting legal opinions to the Chiefs is important to maintain consistency both within each section and among the different sections of the Department of Law.<sup>11</sup>

The discretion ADLs exercise in their legal work and the high degree of trust placed in them by the Director and City requires ADLs to exhibit higher than normal reliability. When ADLs make mistakes, act outside of their authority, or neglect their duties, their actions as attorneys can bind the City to unfavorable consequences. See Argo Plastic Products Co. v. City of Cleveland (1984), 15 Ohio St. 3d 389, 392-393 (city cannot obtain relief from judgment solely due to the misconduct of its own attorney,

---

<sup>3</sup> Jt. Ex. 9

<sup>4</sup> Tr. 136, 370-371, 499

<sup>5</sup> Tr. 203

<sup>6</sup> Id.

<sup>7</sup> Tr. 70

<sup>8</sup> Tr. 138

<sup>9</sup> Tr. 136, 370

<sup>10</sup> Tr. 371

<sup>11</sup> Tr. 500-501

where its chief assistant director of law settled an action without settlement authority); GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St. 2d 146, syllabus ¶ 4 (neglect of a party's attorney is imputed to the party). As in private practice, the oversight structure in the Department of Law exists to ensure quality and prevent mistakes. It does not diminish the fiduciary obligations of attorneys to their clients.

The fact that ADLs are required to comply with City policies concerning approval of business travel expenses and media communication does not in any way diminish their fiduciary obligations. The undisputed evidence in the record demonstrates that all City employees must follow the City's travel and media policies—even department directors, including the Director of Law.

Under OCSEA, the clients whom the attorneys represented were the beneficiaries of their attorneys' fiduciary obligations, including the trust, confidence, fidelity, and integrity that characterize any attorney-client relationship. The opposite reality here dictates a different result: ADLs are fiduciaries precisely because they owe their trust and confidence to their client and employer, the City. ADLs' fiduciary obligations extend not only to the City, but also to the Director of Law. Both the City and the Director of Law rely on the quality of the ADLs' work product, specialized areas of legal expertise, day-to-day legal advice, and their fidelity, loyalty, and integrity, to carry out their duties. Every lawyer in the Department of Law, including the Director, owes allegiance, loyalty, and fidelity to the same client—the City. Because the interests of the ADLs, the Director, and the City are synonymous, ADLs are fiduciaries ineligible for bargaining under R.C. 4117.01(C)(9).

## **V. CONCLUSIONS OF LAW**

The following Conclusions of Law are respectfully recommended:

1. The City of Cleveland is a "public employer" as defined by R.C. 4117.01(B).
2. Teamsters Local 436, International Brotherhood of Teamsters, is an "employee organization" as defined by R.C. 4117.01(D).
3. The Assistant Directors of Law are employees of a public official who act in a fiduciary capacity, appointed pursuant to Section 124.11 of the Revised Code and are, therefore, exempted from the definition of "public employee" under R.C. 4117.01(C)(9).

**VI. RECOMMENDATIONS**

Based upon the foregoing, it is respectfully recommended that the State Employment Relations Board dismiss the Request for Recognition, with prejudice.

# SERB

"Promoting Orderly and Constructive  
Labor Relations Since 1984"

**State  
Employment  
Relations  
Board**



65 East State Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215-4213  
Phone 614.644.8573  
Fax 614.466.3074  
[www.serb.state.oh.us](http://www.serb.state.oh.us)

W. Craig Zimpher, Chair  
N. Eugene Brundige, Board Member

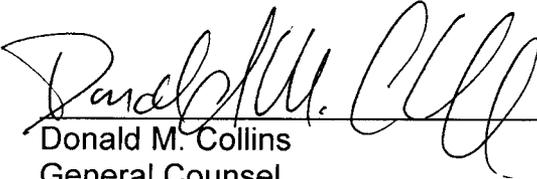
John R. Kasich, Governor

Christine S. Dietsch, Executive Director

Case No. 2012-REP-07-0074

## CERTIFICATION

I, the undersigned General Counsel for the State Employment Relations Board hereby certify that the attached is a true and exact reproduction of the original Order of the State Employment Relations Board entered on its journal on the 13<sup>th</sup> day of December, 2013

  
\_\_\_\_\_  
Donald M. Collins  
General Counsel