[Cite as *Cincinnati v. State Emp. Relations Bd.*, 2009-Ohio-5782.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Cincinnati,	:	
Appellant-Appellant,	:	
		No. 09AP-261
v.	:	(C.P.C. No. 08CVF-12938)
State Employment Relations Board et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on November 3, 2009

John Curp, City Solicitor, City of Cincinnati, and *Augustine Giglio,* Assistant City Solicitor, for appellant.

Richard Cordray, Attorney General, *Anne Light Hoke* and *Aaron W. Johnston,* for appellee State Employment Relations Board.

Hardin, Lazarus, Lewis & Marks, Stephen S. Lazarus and *R. Jessup Gage,* for appellee Employee Organization.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, City of Cincinnati ("City"), appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Employment Relations Board ("SERB") that granted the request of appellee, Cincinnati Assistant Fire Chiefs Union Local 48, International Association of Firefighters, AFL-CIO ("Union") to

represent the Assistant Fire Chiefs in the Cincinnati Fire Department. Because the common pleas court did not abuse its discretion in concluding substantial, reliable, and probative evidence supports SERB's order, we affirm.

I. Procedural History

{¶2} On October 6, 2006, the Union filed a Request for Recognition with SERB, seeking to represent "[a]ll members of the Cincinnati Fire Department in the sworn rank of Assistant Fire Chief." The City filed an objection to the Request for Recognition, contending both that the proposed bargaining unit was not an appropriate unit pursuant to R.C. 4117.06 and that the employees in the proposed unit were not statutorily defined public employees.

{¶3} After litigation concerning the timeliness of the City's objection was resolved favorably to the City, a hearing was held in February 2008 before an Administrative Law Judge ("ALJ") of SERB, who recommended that SERB grant the Union's Request for Recognition. The City filed exceptions and a request for oral argument. On August 28, 2008, SERB denied the City's request for oral argument, adopted all the ALJ's recommendations, amending only the ALJ's third Conclusion of Law, and issued an order that granted the Union's Request for Recognition.

{¶4} Pursuant to R.C. 119.12, the City appealed from SERB's order to the Franklin County Court of Common Pleas, which affirmed SERB's order. Although the common pleas court acknowledged the record contained some evidence supporting the City's position, it also noted substantial evidence supporting SERB's order. Noting it was required to presume the agency's findings of fact are correct and to defer to them, the

common pleas court concluded the requisite quantum, quality and nature of evidence was sufficient to support SERB's order.

II. Assignments of Error

{¶5} The City appeals, assigning the following errors:

> APPELLANT'S FIRST ASSIGNMENT OF ERROR
>
> The trial court erred in finding that the decision of the agency was supported by substantial, reliable and probative evidence and in accordance with law.
>
> APPELLANT'S SECOND ASSIGNMENT OF ERROR
>
> The Trial Court erred in not precluding Assistant Fire Chiefs from claiming they were not management employees after having contracted with the City for higher pay/benefits in consideration of their management level duties and responsibilities for the City of Cincinnati.

III. First Assignment of Error

{¶6} The City's first assignment of error asserts the common pleas court erred in concluding under R.C. 119.12 that substantial, reliable, and probative evidence supports SERB's order granting the Union's Request for Recognition. See also R.C. 4117.02(P) (subjecting SERB to R.C. Chapter 119). Absent such evidence, the City contends, the order is not in accordance with law.

{¶7} Under R.C. 119.12, when a common pleas court reviews an order of the administrative agency, the common pleas court must consider the entire record to determine whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The common pleas court's "review of the administrative record is

neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Provisions Plus, Inc. v. Ohio Liquor Control Comm.,* 10th Dist. No. 03AP-670, 2004-Ohio-592, ¶7, quoting *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207.

{¶8} In its review, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Conrad,* supra; see also *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826 (noting that while an agency's findings of fact are not conclusive, they are presumed correct and "must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable"). " 'Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order.' " Id. at ¶37, quoting *Conrad* at 111.

{¶9} By contrast, an appellate court's review is more limited. *Provisions Plus,* supra, at ¶8, citing *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court determines whether the common pleas court abused its discretion. Id. An abuse of discretion implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *Aida Ent., Inc. v. Ohio State Liquor Control Comm.,* 10th Dist. No. 01AP-1178, 2002-Ohio-2764, ¶11, quoting *Rossford Exempted*

Village School Dist. Bd. of Edn. v. State Bd. of Edn. (1992), 63 Ohio St.3d 705, 707. Absent an abuse of discretion, the appellate court may not substitute its judgment for that of the common pleas court. *Provisions Plus,* supra. An appellate court, however, has plenary review of purely legal questions. Id.

{¶10} R.C. 4117.03(A) provides that "public employees" have the right, among others, to participate in any employee organization of their own choosing, to have a labor organization represent them, to bargain collectively, to present grievances, and engage in other activities typically associated with collective bargaining. As relevant here, a "public employee" is defined in R.C. 4117.01(C) as "any person holding a position by appointment or employment in the service of a public employer, * * * except * * * [m]anagement level employees."

{¶11} The parties do not dispute the City is a public employer under R.C. 4117.01(B) and the Union is an employee organization under R.C. 4117.01(D). Rather, the issue is whether the Assistant Fire Chiefs are "management level employees" who do not qualify as public employees and thus do not possess the statutory rights afforded to public employees. R.C. 4117.01(L) defines a management level employee as "an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required" on the public employer's behalf "to assist in the preparation for the conduct of collective negotiated agreements, or have a major role in personnel administration."

{¶12} According to the factual findings of SERB's ALJ, the Fire Department, consisting of approximately 835 firefighters, has four Assistant Fire Chiefs; each headed

one of four bureaus. In July 2007, Ronnise Handy was hired into a newly created position as the Fire Department's Executive Officer, and from that point she handled all administrative matters in the Fire Chief's absence. Before the new position was created, the Assistant Fire Chiefs served as Acting Fire Chief in the Fire Chief's absence; none had so served since Handy was hired. Similarly, the Assistant Fire Chiefs no longer represented the Fire Chief in his absence at the weekly division head meetings with the City Manager; Handy did so. The Assistant Fire Chiefs testified they also have no authority to make expenditures or purchases; those requests must go through Handy's office.

{¶13} The Assistant Fire Chiefs further testified all grievance settlements had to meet the approval of the Fire Chief; the Assistant Fire Chiefs had no authority to settle any grievances without such approval. Although the Assistant Fire Chiefs and the District Fire Chiefs served as hearing officers at pre-disciplinary hearings, their authority was limited. After the hearing, they could recommend a penalty, sometimes first discussing the penalty with the Fire Chief. The recommendation, however, first was sent to the Fire Chief for review, then the Law Department, and then to the City Manager. Often the Fire Chief changed the recommended discipline, so that, as an example, the Fire Chief amended the recommendation in all but one of the last eight to ten cases Assistant Fire Chief Kuhn heard.

{¶14} Nor do the Assistant Fire Chiefs interpret the Collective Bargaining Agreement; they only ensure its express terms are followed. If interpretation is necessary, the Assistant Fire Chiefs call on the Labor Relations Manager in the Human Resources

Department. Assistant Fire Chiefs, however, conduct performance reviews for the District Fire Chiefs who serve under them, while District Fire Chiefs review Captains, Captains review Lieutenants, and Lieutenants review the firefighters.

{¶15} Similarly, the Assistant Fire Chiefs testified they do not make policy for their bureaus; rather, they clear any changes in policy with the Fire Chief before implementing them. Indeed, they testified to several instances where the Fire Chief overruled their suggestions. For example, Assistant Fire Chief DeMasi recommended that, to control internet usage, no personal computers be allowed on the fire department property; the Fire Chief overruled him and did not adopt his proposal. A second instance involved Assistant Fire Chief Kuhn, whom the Fire Chief instructed to write a letter to vendors explaining why a special events rate could not be set; the Fire Chief twice revised the letter. In the same way, when a new squad was created, Assistant Fire Chief Corbett, a board member, reviewed the candidates and sent an e-mail listing the results per the candidates' score; after the e-mail was sent, the Fire Chief changed the selection process, and the list was changed.

{¶16} Employing the R.C. 4117.01(L) definition of management level employee as one who formulates public policy on behalf of a public employer or reasonably directs policy implementation, SERB, through its ALJ, concluded the Assistant Fire Chiefs did not develop or implement any employer-wide policy. Evidence in the record supports that conclusion. All the Assistant Fire Chiefs testified that any of their suggestions concerning policy change subsequent to Handy's hire were discussed with the Fire Chief, but he made the final decision; they noted examples where the Fire Chief overruled their

suggestions. Even if policymaking includes making recommendations that the employer subsequently adopts, as in *In re City of Wilmington* (Apr. 27, 1997), SERB No. 94-007, the Assistant Fire Chiefs' duties at the time of the hearing cannot be said to include formulating policy, as the Fire Chief often overruled their suggestions.

{¶17} R.C. 4417.01(L) also defines a management level employee as one who may reasonably be required on behalf of the public employer to assist in preparing to conduct negotiations regarding collective bargaining agreements. The Labor Relations Manager in the Human Resources department for the City testified she, instead, was on the negotiating teams for the City for the last three contracts with the firefighters. Although two Assistant Fire Chiefs were involved in the process for the contracts in both 2001 and 2003, they did not participate in the 2005 contract because they believed R.C. 4117.20 prohibited them as members of the Union, though not in the bargaining unit, from sitting on management's negotiation team. Thus, the Assistant Fire Chiefs, after the 2003 contract, no longer assisted in preparing to conduct negotiations regarding collective bargaining agreements.

{¶18} Finally, R.C. 4117.01(L) defines a management level employee as one who has a major role in personnel administration. According to the testimony, the newly created position of Executive Officer handled the administrative matters. Even in more specific instances where Handy was not primarily responsible, the Assistant Fire Chiefs did not have administrative authority. For example, at the time of the hearing they lacked the authority to settle grievances, as all grievance settlements had to meet the approval of the Fire Chief. The prescribed procedure directed that the Assistant Fire Chiefs and the

District Fire Chiefs serve as hearing officers at pre-disciplinary hearings and recommend a penalty, sometimes first discussing the penalty with the Fire Chief. The recommendation, however, then was forwarded for review to the Fire Chief, who often changed the recommended discipline, as illustrated in the noted testimony of Assistant Fire Chief Kuhn.

{¶19} In an effort to circumvent the result such evidence allows, the City contends the Assistant Fire Chiefs handle administrative matters that are outside the responsibilities of the Executive Officer, noting the Executive Officer cannot take charge at a fire scene. The City argues the Assistant Fire Chiefs thus properly are considered management level employees. The evidence, however, reflects that the City follows incident command at a fire scene, or a system where the highest ranking officer on the scene is the incident commander and is in charge of the scene. If the Fire Chief were not present, the Assistant Fire Chief, if present, would be in charge. If the Assistant Fire Chief were not at the scene, the next in command would assume that role. Because some who could be in charge of the scene were also members of a collective bargaining unit, the Assistant Fire Chief's role as incident commander does not compel the conclusion the City proposes.

{¶20} The City nonetheless argues this case is similar to *Twinsburg Fire Fighters, Local 3630 v. SERB* (Oct. 23, 2001), C.P. No. 00CVF11-10059, where the issue was whether captains of the fire department were management level employees; both SERB and the common pleas court concluded they were. *Twinsburg*, however, presents considerably different facts because the duties of the captains in *Twinsburg* differed

significantly from those of the Assistant Fire Chiefs here. The *Twinsburg* captains recommended changes to the Standard Operating Procedures and Guidelines that were adopted, updated the personnel manual, and even re-wrote the driver's training manual without needing approval of the content. They enforced discipline, were in charge of fire safety programs and safety committees, and represented management during contract negotiations. By contrast, the Assistant Fire Chiefs could perform virtually nothing without the Fire Chief's approval.

{¶21} Despite other evidence in the record which may allow a different result than the one SERB reached, the record contains reliable, probative, and substantial evidence that the Assistant Fire Chiefs are not management level employees, but public employees. The common pleas court did not abuse its discretion in affirming SERB's order. The City's first assignment of error is overruled.

IV. Second Assignment of Error

{¶22} The City's second assignment of error contends the Assistant Fire Chiefs should not have been allowed to claim they were not management level employees, as they contracted with the City for higher pay and benefits in consideration of their management level duties and responsibilities for the City.

{¶23} On March 29, 2006, the Assistant Fire Chiefs entered into an agreement with the City Manager which became part of an ordinance City Council passed. Under the agreement, the Assistant Fire Chiefs received a pay and benefit package that automatically set the Assistant Fire Chiefs' salary at 16 percent above the base salary of a District Fire Chief. The agreement provides that the "benefit package is provided to the

Assistant Fire Chiefs in consideration of the fact that the Assistant Fire Chief classification is a non-bargaining unit, executive level management employee with fiduciary duties and responsibilities to the City of Cincinnati." The Assistant Fire Chiefs testified that they did not agree with characterizing them as "executive level management employees with fiduciary duties and responsibilities," but they had been negotiating and attempting to raise their level of pay and benefits for some time and felt allowing such language was their only option.

{¶24} The City contends the Assistant Fire Chiefs violate the spirit of the collective bargaining laws of Ohio when, to achieve personal gain, they subscribe to a written contract that explicitly justifies compensation due to their management level duties, but later repudiate the same terms to allow them to be a bargaining member of the union. The City argues that, at a minimum, the Assistant Fire Chiefs' actions in signing a written agreement contrary to their evidence before SERB is sufficient to demonstrate the evidence SERB relied on is unreliable, self-serving and unsupportable.

{¶25} The trial court dismissed the City's argument, concluding the issue of whether each Assistant Fire Chief was a "management level employee" must be determined under the language of R.C. Chapter 4117. R.C. 4117.10(A) provides that "Chapter 4117. of the Revised Code prevails over any and all other conflicting laws, resolutions, provisions, present or future," except as R.C. Chapter 4117 or the General Assembly otherwise specifies. See also *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 170. Accordingly, the common pleas court did not err when it applied R.C. Chapter 4117, not the parties'

agreement or a city ordinance, to determine whether the Assistant Fire Chiefs were management level employees. The City's second assignment of error is overruled.

{¶26} For the foregoing reasons, the City's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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