[Cite as *Kost v. Cleveland State Univ.*, 2008-Ohio-2633.]

Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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ERIK L. KOST

Plaintiff

v.

CLEVELAND STATE UNIVERSITY

Defendant

Case No. 2007-02327-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Erik L. Kost, stated he was employed at defendant, Cleveland State University ("CSU"), from January, 2003 to September, 2006. Plaintiff related that during the final months of his employment with CSU his job title was "Project Manager, Division of Enrollment Services." Plaintiff recalled he met with his immediate supervisor, Edward E. Mills, CSU Vice-Provost of Enrollment Services, on August 1, 2006, to give notice that he was accepting another job and was, consequently, voluntarily terminating his employment with CSU. Plaintiff also recalled that at the time he informed Mills of his intention to leave, he had accumulated vacation hours, "in excess of the CSU separation pay out limit (176 hours)." According to plaintiff, he conferred with Mills on August 3, 2006, to discuss 1) the specific date he was leaving employment at CSU and, 2) the completion of pending work projects. Additionally, plaintiff related he talked with Mills about using his vacation hours in excess of the CSU pay out limit. Plaintiff maintained that during the course of the August 3, 2006, conference Mills agreed to retain him on the CSU payroll on vacation from Friday, August 18, 2006 through October 3, 2006, a period of thirty-two working days or 256 hours (holiday excluded). Plaintiff pointed out that in exchange for the authorization to receive excess vacation pay he agreed to be available to be called into work (while being paid vacation time) for the work weeks August 21-August 25, 2006 and August 28-September 1, 2006. Also plaintiff noted that he agreed to "be available by phone

through October 3, 2006 for consultation if needed."

{¶2} On August 7, 2006, plaintiff submitted a formal letter of resignation addressed to Edward E. Mills. Plaintiff submitted an unsigned copy of the letter in which he expressed his intent to resign from employment effective October 3, 2006, fifty-seven days from August 7, 2006. On August 15, 2006, plaintiff sent e-mail correspondence to Mills referring to the stated plan regarding the use of accumulated vacation time and seeking confirmation of the October 3, 2006, employment separation date. Plaintiff recorded, "I will work through Thursday August 17 and will then be on vacation through Tuesday October 3. I will complete all necessary exit procedures through HR and will complete all transition activities that we discussed." The "HR" reference in this e-mail presumedly means the CSU Department of Human Resources Development and Labor Relations ("HRD"). Mills responded to plaintiff's August 15, 2006, e-mail on August 16, 2006, writing, "I'm assuming that you worked out all the vacation time etc. and that this takes you to Oct. 3rd." No other statements drafted by Edward E. Mills are contained in the claim file.

{¶3} On September 14, 2006, plaintiff received a letter generated from the CSU HRD (dated September 11, 2006). Plaintiff submitted a copy of this letter signed by Robert J. Pietrykowski, Assistant Vice President for Human Resources. In this letter, Pietrykowski forwarded written notice to plaintiff that CSU was officially terminating his employment effective September 1, 2006. Specifically, plaintiff was informed that "[t]he purpose of this letter is to advise you that September 1, 2006 shall be the effective date of your employment separation from Cleveland State University." Pietrykowski acknowledged that the fact plaintiff had already submitted a letter of resignation on August 7, 2006, "with the advance effective date of October 3, 2006," although the last day plaintiff actually worked was August 17, 2006. In the September 11, 2006, letter Pietrykowski related that he had conversed with plaintiff's supervisor, Edward Mills, and had been informed that plaintiff had "no work-related responsibilities, duties, projects or assignments extending beyond August 17th." Pietrykowski, apparently acting in his

capacity as the CSU Assistant Vice President for Human Resources, advised plaintiff that a decision had been made to grant him paid vacation leave time from August 18 through September 1, 2006, and to consider the September 1, 2006 date as the effective date of plaintiff's official separation from employment with CSU. Also, Pietrykowski informed plaintiff that he was due to receive additional payment for one hundred seventy-six hours of accumulated vacation time representing, "the maximum payment to a separating employee pursuant to Section 8.5.10.1.3. of the University's Professional Staff Policies."[1] Furthermore, plaintiff was informed of other benefits (medical, dental, vision) he would receive through September 30, 2006.

{¶4} Plaintiff contended that defendant, through the actions of HRD in terminating his employment on September 1, 2006, breached a contract he had negotiated with CSU employee, Edward Mills. Plaintiff asserted that Mills, as an agent of defendant, had authority to enter into binding contracts on behalf of CSU. Plaintiff reasoned that his conversation with Mills and subsequent purported agreement regarding the use of accrued vacation leave constituted a binding contract which HRD breached by terminating his employment over four weeks short of his intended agreed-upon termination date. Plaintiff filed this complaint seeking to recover $2,500.00 in damages representing unpaid vacation and holiday hours, unpaid accrued vacation, and unpaid insurance benefits for October 2006, Plaintiff paid the $25.00 filing fee to this court and requested reimbursement of that amount as compensable costs.

{¶5} Defendant specifically denied that plaintiff entered into a contract with a CSU employee/agent "concerning his terms and conditions of employment," particularly the pay-out of unused vacation hours. Defendant asserted that plaintiff's terms and conditions of employment with CSU were governed solely by a collective bargaining agreement ("CBA") between CSU and the Service Employees International Union

[1] Section 8.5.10.1.3 of the Cleveland State University Staff Policies titled PAYOUT UPON TERMINATION provides: At termination of employment, payments for unused vacation leave to a

("SEIU"), effective July 1, 2003 through June 30, 2006 and extended. A copy of the CBA, titled "Agreement Between Cleveland State University and Service Employees International Union, District 119 WV/KY/OH, AFL-CIO" was submitted by defendant. Defendant maintained that plaintiff, as a CSU employee represented by the SEIU, was subject to the CBA provisions regarding any dispute over wages including vacation pay. Essentially defendant asserted that the CBA controlled the specific situation presented by plaintiff. Defendant related the CBA "contains a section which provides a grievance process and provides for a final and binding arbitration of grievances." See CBA Article VIII.[2] Furthermore, defendant related that the CBA contains language regarding

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maximum of twenty-two (22) days shall be made.

[2] "Article VIII

"Grievance Procedure

"Section 1. It is mutually understood that the prompt presentation, adjustment, and/or answering of grievances is desirable in the interest of sound relations between the employees and the University. The prompt and fair disposition of grievances involves important and equal obligations and responsibilities, both joint and independent, on the part of the representatives of each party to protect and preserve the Grievance Procedure as an orderly means of resolving grievances.

"Section 2. A grievance is a dispute concerning the wages, fringe benefits, hours, and working conditions set forth in this Agreement or the interpretation and/or application of and/or compliance with any provision of this Agreement or University rules or policies. Any bargaining unit member or the Union may bring a grievance under this procedure. A grievance may be withdrawn by the Union at any time.

"When such grievances arise, the following procedure shall be observed:

"Step 1. An employee shall first present a grievance in writing to the employee's designated supervisor within ten (10) working days of the event upon which the grievance is based in order to achieve a resolution. The grievant may be accompanied by a Union representative at this Step 1 meeting. The designated supervisor shall respond in writing to the employee and the Union within ten (10) working days of the date of the Step 1 meeting. If a resolution is reached, the parties shall sign a mutual release indicating a settlement of the grievance. A resolution of a grievance at Step 1 shall not be precedent setting. The Department of Human Resources Development and Labor Relations ('Department of Human Resources' or 'HRD'), the employee's Department Head or other appropriate administrator, and the Union shall be notified of any Step 1 meeting and any subsequent adjustment by the designated supervisor if an HRD or Union representative was not present at the meeting. Such adjustments shall not be inconsistent with the terms of this Agreement. If the matter cannot be resolved through the Step 1 meeting process, the employee who wishes to pursue the grievance further shall follow the steps below.

"Step 2. If the grievance is not satisfactorily settled in Step 1, the grievant and/or the Union may file a written appeal with the University's Vice President for Administration or designee within ten (10) working days after receipt of the Step 1 response. The Vice President or designee shall schedule a meeting with the grievant, the employee's Department Head or other appropriate administrator, and/or a Union representative within ten (10) working days after receipt of the appeal. The Vice President or

designee shall issue a written decision to the grievant within ten (10) working days from the date that the meeting was held. A copy of said response shall be sent to the Union representative.

"In the event of a suspension or discharge, a grievance can be initially submitted by the Union or grievant to the Vice President for Administration or designee within ten (10) working days of the suspension or discharge.

"Step 3. If the grievance is not satisfactorily settled in Step 2, the Union may submit the matter to arbitration by so notifying the Vice President for Administration or designee in writing within ten (10) working days after the next regularly scheduled Union Executive Board meeting, but no later than forty-five (45) calendar days after receipt of the Step 2 response.

"Section 3. Mediation. The parties may mutually agree to pursue mediation of a grievance in accordance with the Rules of the Federal Mediation and Conciliation Service ('FMCS') or through private mediator mutually appointed by the parties, within the forty-five (45) calendar day period at Step 3, prior to written notification by the Union to the Vice President for Administration or designee of the Union's intent to arbitrate. Such an agreement among the parties will be confirmed in writing. If mediation is utilized, the Union need not notify the Vice President or designee of the Union's intent to arbitrate until twenty-one (21) calendar days after the conclusion of mediation.

"A. If mediation through FMCS is pursued, the mediation will be pursued and conducted in accordance with the Rules of the FMCS in effect on the date that the request for mediation was sent. The mediation will be conducted within thirty (30) calendar days of the appointment of a mediator.

"B. Any party may end mediation at any time after participation in the mediation process by giving written notice to the mediator and to the other party or parties. The mediator may withdraw at any time by giving written notice to the parties.

"C. The fees and expenses of mediation, if any, will be borne equally by the University and the Union.

"Section 4. Arbitration. The Union shall notify the University of its intent to appeal the grievance to arbitration. Upon written notice of the Union's intent to arbitrate a grievance, the parties shall proceed to arbitration pursuant to the following procedure.

"A. Within sixty (60) calendar days of the ratification of this Agreement, the parties shall meet and submit names and resumes of potential arbitrators to jointly create a panel of six (6) arbitrators. The parties must agree on the list of arbitrators selected. Once per year during this Agreement, the parties will meet to review the panel of arbitrators and determine the continued use of the existing list of panel members. The parties shall endeavor to select arbitrators who will hold hearings within thirty (30) calendar days of their selection and who will render a decision within thirty (30) calendar days from the conclusion of the hearing.

"B. Upon receipt of a notice to arbitrate, the arbitrator may be selected by mutual consent of the University and the Union from the panel. If the parties cannot agree, they shall choose an arbitrator by alternatively striking names from the panel until one (1) name remains as the arbitrator. The order of striking shall be determined by a coin toss. The arbitrator shall be notified as soon as possible of his selection and a hearing shall be held, if possible, within thirty (30) days of the arbitrator's confirmation that he has accepted the appointment as arbitrator. The arbitration procedure and hearing shall be governed by the American Arbitration Association's then applicable rules and regulations.

"C. If the need for an arbitrator arises and the University and the Union have not selected an arbitration panel or are unable to select a panel, the American Arbitration Association shall submit up to three (3) panels of arbitrators to each party and the arbitrator will be chosen and the matter shall proceed in accordance with the Association's then applicable rules and regulations.

"D. In the event a matter proceeds to arbitration, the arbitrator shall have jurisdiction only over the matter(s) submitted. The arbitrator shall have no authority to alter in any way the terms and conditions of this Agreement or University Rules or Polices.

provision for pay-out of accrued vacation time upon separation from employment. See CBA Article XXI, also Article XL.[3]

{¶6} Defendant explained that plaintiff, while working at CSU, was classified as "Professional Staff-SEIU" and "SEIU Grade 6." Defendant submitted a copy of a Personnel Action Form ("PAF") referencing plaintiff's employment status at CSU. The PAF (dated September 1, 2006) compiled by the CSU HRD lists plaintiff's salary plan as "Professional Staff-SEIU" and sets his pay grade at "SEIU Grade 6." A hand-written notation on this September 1, 2006, PAF states "replaces PAF printed on August 11, 2006." Defendant did not submit a copy of the August 11, 2006, PAF regarding plaintiff's employment status. The September 1, 2006, PAF records plaintiff's job title as "Project Manager (Admin)" in the Enrollment Services Department address "UC400"

"E. The fees and other expenses of the arbitration and arbitrator shall be shared equally. Any University employee called as a witness by either side will continue to receive the regular rate of pay while attending such hearing for those hours the employee would have been scheduled to work.

Section 5. Final and Binding. The Grievance Procedure set forth herein shall be the exclusive method of reviewing and settling grievances between the University and the Union and/or between the University and an employee(s), and by invoking this procedure, the Union and the University waive the right to litigate or resolve such grievances in any other forum or by any other procedure. All decisions of arbitrators and all pre-arbitration grievance settlements reached by the Union and the University shall be final, conclusive, and binding on the University, the Union, and the employee(s) involved.

"Section 6. Limitations. This grievance procedure shall not limit the right of any employee to present a grievance and have it adjusted without intervention of the Union, as required by the Ohio Revised Code Section 4117.03(A)(5), as long as the adjustment is not inconsistent with the terms of this Agreement and provided that the Union shall have notice of and the opportunity to have a representative present at the final adjustment proceeding."

[3] "Article XXI

"Vacation Leave

"Section 4. Maximum Accumulation. Vacation leave accumulation may not exceed 44 days at any time within a fiscal year. On June 30 each year, employees may carry over a maximum of thirty (30) days (240 hours) of accumulated vacation leave to the next fiscal year. The Vice President for Administration or designee may grant exceptions to the vacation leave carryover limitation at his/her discretion.

"Upon termination of employment, employees are entitled to pay for up to a maximum of twenty-two days.

"Article XL

"Retirement and Resignation

"C. Vacation Pay Out. Accumulated but unused vacation time up to a maximum of twenty-two (22) days will be paid upon termination of employment, retirement, or death. Payments shall be deposited according to the employee's most recent payroll direct deposit instructions."

and notes that plaintiff was considered a "salaried exempt-administrative" employee classified as professional staff. The September 1, 2006 PAF listed plaintiff's employment status as terminated due to resignation effective October 3, 2006.

{¶7} Defendant contended that due to plaintiff's status as a bargaining unit employee represented by the SEIU his dispute over vacation pay may not be pursued in this court. Defendant pointed out that plaintiff, as a public employee covered under the terms of a CBA, was required to pursue the particular wage dispute through the grievance and arbitration procedures outlined in the agreement. Defendant observed R.C. 4117.10(A) of the Ohio Public Employee's Collective Bargaining Act provides that a CBA between a state employer and a representative union, "governs the wages, hours, and terms and conditions of employment covered by the agreement." Also, defendant explained that this statutory section states "[i]f the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to the grievance procedure." Defendant noted that Ohio law is well-settled that a public employee covered under a CBA must follow the grievance and arbitration procedures outlined in that agreement as the exclusive remedies for wage disputes and disputes over terms of employment. See *Olsieski v. Northeast Ohio Regional Sewer District* (1993), WL76901 (Ohio App. 8 Dist.). Defendant further noted that the court in *Olsieski* wrote, "when a labor contract sets forth a grievance procedure to be used in resolving disputes between an employer and an employee, these procedures must be exhausted prior to resorting to the courts." Plaintiff, in the instant action, did not follow any grievance procedure regarding his dispute over wages and therefore, defendant essentially maintained that by not pursuing this exclusive mandated remedy plaintiff is barred from bringing an action in this court.

{¶8} Again, defendant pointed out that plaintiff's claim distinctly pertains, "to his wages, hours, and terms and conditions of employment" and consequently, the claim is grievable under contract subject to the CBA grievance and arbitration procedure.

Defendant asserted that plaintiff's sole exclusive remedy to seek recovery of his unpaid vacation benefits was to file a grievance as provided by the CBA. See *Ryther v. Gahanna*, WL1274212 (Ohio App. 10th Dist.), 2005-Ohio-2670. In *Ryther*, the court held the exclusive remedy to resolve a public sector labor dispute is to utilize the grievance procedure in accordance with the CBA and courts do not have jurisdiction to resolve any such disputes based on wages, hours, and terms and conditions of employment. Defendant contended that plaintiff's action clearly concerns his wages, hours, and terms and conditions of employment, therefore making the basis of the claim subject to the grievance procedure outlined in the CBA. Defendant stated, "[p]laintiff cannot evade this process by attempting to establish a separate and discreet 'contract' claim concerning his wages, hours, and terms and conditions of employment in a 'contract' that he allegedly negotiated individually with one of [d]efendant's employees." Defendant contended that plaintiff's claim asserting breach of contract is essentially an attempt to avoid or circumvent the grievance procedure applicable to the issue presented. Defendant observed that plaintiff cannot avoid the compulsory grievance process under circumstances where the dispute to be addressed is a covered provision of the CBA. See *Mayfield Heights Fire Fighters v. DeJohn* (1993), 87 Ohio App. 3d 358, 622 N.E. 2d 380. Defendant explained that plaintiff was subject to the terms of the CBA and his claim regarding vacation pay was contemplated under the grievance procedure of the CBA. Therefore, defendant in essence has asserted that this court does not have jurisdiction to determine plaintiff's action on the merits.

{¶9} Plaintiff specifically denied that he was a union employee covered under the CBA between SEIU and defendant. In support of his contention that he was not a union member, plaintiff referred to the September 11, 2006 employment separation letter he received from CSU employee Robert Pietrykowski, particularly pointing to the section acknowledging that he was due to receive payment for one hundred seventy-six hours of vacation time. Pietrykowski wrote, "[t]he payment for one seventy-six (176) vacation hours represents the maximum payment to a separating employee pursuant to

section 8.5.10.1.3 of the University's Professional Staff Personnel Policies." Plaintiff pointed out that section 8.5.1 of the Professional Staff Personnel Policies handbook provides, "The Policies . . . apply to all contract Professional Staff employees of the University and all other unclassified contract personnel not included under the Faculty and Librarian Personnel Policies, or covered by the University's Collective Bargaining Agreements with the AAUP or SEIU." Plaintiff insisted that defendant, by referencing Professional Staff Personnel Policies handbook to govern the payment of unused vacation hours, effectively admitted he was not a bargaining unit member and consequently subject to the CBA between CSU and SEIU. Plaintiff pointed out that his job classification at CSU was specifically excluded from the CBA.[4] Plaintiff explained, at the time of his resignation, that he was a supervisor of four full-time personnel at CSU. Plaintiff asserted that defendant maintains a document (employee performance review) at the CSU Human Resources department which lists him the immediate supervisor of the employee being reviewed. Also plaintiff observed that the CBA (Article VI-Check off

[4] "8.5 Professional Staff Personnel Policies

"8.5.1 Professional Staff Personnel Policies.

"The policies, originally effective as of July 1, 1996, and updated September 18, 2002, apply to all contract Professional Staff employees of the University and all other unclassified contract personnel not included under the Faculty and Librarian Personnel Policies, or covered by the University's Collective Bargaining Agreements with the AAUP or SEIU, except that those Professional Staff employees who report directly to the President are not covered by Sections 8.5.5, 8.5.8.3, and 8.5.8.4; these Professional Staff employees serve at the will of the President.

"8.5.2 Definitions.

"The following are definitions of words and phrases used in these policies.

"8.5.2.1 Professional Staff - Professional Staff employees of the University and all other unclassified contract personnel not included under the Faculty and Librarian Personnel Policies, or covered by the University's Collective Bargaining Agreements with the AAUP or SEIU which includes both part-time and full-time employees:

"A. Part-time - A part-time employee is one whose appointment is designated as part-time and whose regularly assigned workweek averages fewer than 40 hours per weeks. A party-time professional staff employee must not be assigned to work more than 32 hours on average over a fiscal year.

"B. Full-time - A full-time employee is one whose appointment is designated as full-time and whose regularly assigned workweek is 40 hours per week over a period of an academic or fiscal year."

and Fair Share Fees (Section 1-8)[5]) contains requirements for union membership. Plaintiff denied that he ever complied with certain requirements for union membership, which included signing a union authorization card and having union dues deducted from his pay check. Plaintiff submitted copies of his pay stubs from CSU for the period August 1, 2006 to September 30, 2006. No deductions for SEIU membership dues were noted on the copies of the submitted pay stubs. In further support of his position that he was not a member of SEIU, plaintiff reported that he had a conversation on May 1, 2007 with SEIU Vice President and Membership Chair, Rita Grabowski, who apparently informed him that he was not eligible for SEIU membership while employed at CSU. Plaintiff did not provide any written statement from Rita Grabowski regarding the May 1, 2007 conversation.

{¶10} However, plaintiff did submit a document titled "Cleveland State University Bargaining Unit Change Report (Run Date 9/18/06)," which he stated was sent to him

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[5] "Article VI

"Checkoff and Fair Share Fees

"Section 1. The University will deduct any initiation fees and dues levied in accordance with the Constitution and Bylaws of the Union from the pay of members of the bargaining unit upon receipt from the Union of individual signed authorization cards executed by the member for that purpose and bearing his signature.

"Section 2. The University's obligation to make deductions shall terminate automatically upon receipt of revocation of authorization within the thirty (30) day period prior to the termination of this contract or upon the termination of employment or transfer of an employee to a job classification outside the bargaining unit.

"Section 3. All employees who are covered by this agreement and who are not members of the Union and who have been employed by the University for sixty (60) days or more shall pay a fair share fee not greater than the dues paid by members of the Union. Said fair share fee shall be paid by payroll deduction as provided in this Article.

"Section 4. All authorized deductions will be made from the employee's pay on a regular monthly basis in the first and second paycheck of each month. The University shall deduct from the first and second paycheck of each month of each non-member of the recognized bargaining unit a fair share fee in an amount determined by the Union, but not greater than the amount of monthly Union dues. All deductions shall be transmitted to the Union no later than the 15th day following the end of the month in which the deduction is made together with a list of the members of the bargaining unit paying such dues or fees by payroll deduction, and upon receipt the Union shall assume full responsibility for the disposition of all funds deducted.

"Section 5. The Union shall furnish the name, title, and address of the authorized person or organization to whom the authorized deductions shall be sent by the University."

by Rita Grabowski. The submitted report recorded data concerning plaintiff's employment status and classification at CSU that reflected changes between the dates August 16, 2006 to September 15, 2006. This report, processed on September 1, 2006, recorded that plaintiff terminated his employment with CSU through resignation effective September 2, 2006. Plaintiff's employment status listed on the report at the time of termination-resignation was Grade 06 SEIU Project Manager in the CSU Enrollment Services Department. Additional employment status information under the classification, "Actions: Lateral Move, Title Change, Change in Bargaining Unit," was included in the report. The report reflected that plaintiff's job classification was moved effective December 16, 2005 from a nonunion Grade 06 Assistant University Registrar in the CSU Admissions Office to a SEIU Grade 06 Project Manager in the CSU Admissions Office. Plaintiff stated that this Bargaining Unit Change Report, "clearly shows the defendant moving the plaintiff into the union the same day the defendant terminated his employment (9/1/06)." Plaintiff contended that defendant deliberately manipulated entries after he ceased working at CSU to reflect union affiliation when he had never been subject to SEIU representation at any time during the course of his employment. Plaintiff contended that he had no knowledge of defendant's post-employment relationship actions regarding his alleged union membership until he received defendant's investigation report. Plaintiff denied that he was ever notified of any union affiliation while he was working at CSU. Plaintiff denied that he was at any time during the course of his employment up to his separation date subject to the terms and conditions of the CBA between SEIU and CSU.

{¶11} Plaintiff reasserted his position that he entered into a contract with his immediate supervisor Edward E. Mills to be carried on the CSU payroll from August 17, 2006 through October 2, 2006, on paid vacation leave. Plaintiff acknowledged that the described contract which he negotiated with Mills was not a written contract. Plaintiff again contended that the existence of a purported contract was confirmed by e-mail from Edward E. Mills when he noted on August 16, 2006, "Hi Erik, I'm assuming that

you worked out all the vacation time etc. and that this takes you to Oct. 3rd. Is that right?" Plaintiff asserted Mills, acting in his capacity as a Vice Provost of Enrollment Services, had the authority to bind CSU to an agreement granting a benefit package in the form of payment for unused vacation time.

{¶12} After the request for payment of all unused vacation had been denied by defendant through notification correspondence from CSU Assistant Vice President for Human Resources and Chief Negotiator, Robert J. Pietrykowski, plaintiff related that he scheduled a telephone conference with Pietrykowski to discuss the matter. Plaintiff related that during the telephone conference on September 25, 2006, he and Pietrykowski were unable to resolve any issues regarding payment for additional unused vacation time. According to plaintiff, during this conversation, "Pietrykowski acknowledged that he had discussed the contract in question with Mills and acknowledged that he was fully aware that Mills had authorized the contract in question." Other than his own recollection of the conversation, plaintiff did not submit any evidence to corroborate any alleged admission by CSU employee, Pietrykowski.

{¶13} Defendant filed a supplement to the original investigation report insisting that plaintiff had been a union member of SEIU since on or about April 13, 2006, and was therefore subject to the conditions and terms of the CBA between CSU and SEIU. On December 1, 2005, plaintiff submitted a Reclassification Request Form to change his position title from Assistant University Registrar to Associate Director-Admissions (Systems). In the body of the Reclassification Request Form, a copy of which defendant filed, was written the requested new position assignment would be a "senior office level management position" consisting of "new higher classification technical job duties." Defendant stated that the requested reclassification was submitted "pursuant to the policies and procedures for Classification Action Requests contained at CSU's Professional Staff Compensation Program Manual." An entire copy of this manual was attached to the investigation report supplement. Reclassification of a job from a nonunion position to a union position was not addressed anywhere in this fourteen page

document, although reclassification is addressed in the CBA, Article XIV, Section 3. A copy of plaintiff's professional staff job description for his requested reclassified job was submitted. Plaintiff and his immediate supervisor at the time, C. Richard Arndt (Dean of Undergraduate Recruitment and College Relations) both signed the proposed job description on March 27, 2006, acknowledging it as an "accurate depiction of the position's duties."

{¶14} Defendant related plaintiff's request to review his job classification was granted, a determination was made, and a notice of reclassification was sent to plaintiff on April 13, 2006. Defendant submitted a copy of this notice drafted by CSU employee, Jean McCafferty, a Compensation Analyst in the Department of Human Resources Development and Labor Relations. McCafferty informed plaintiff that a determination was made to reclassify his job position as a Project Manager in the CSU Undergraduate Admissions Department and to make the reclassified position a union job subject to SEIU District 1199 representation. In summary, defendant determined that plaintiff was "not responsible for staff supervision or evaluation" and therefore, his job employment position could not be considered a traditional management-type job. Contained in the notice was the following: "In accordance with the SEIU/District 1199 contract, the affected employee, the Union and/or the supervisor/department head may submit an appeal of this decision. A written appeal must be submitted to the Union President and the Director of Compensation for review within ten (10) University working days of the employee's receipt of the HRD written decision." Defendant related that plaintiff filed an appeal of the April 13, 2006 Classification Notice on April 26, 2006.

{¶15} Defendant submitted a copy of plaintiff's written appeal from the determination of the CSU HRD to reclassify his job as a union position. Plaintiff's appeal essentially disputed the determination that his job did not encompass traditional management responsibilities. Plaintiff stated that his new duties at CSU were "to help research, develop and lead the integration of new initiatives (technical and non-technical) involving recruitment, admissions and student services functions for the

Division of Enrollment Services and Undergraduate Admissions." Plaintiff described his work assignment as "the lead technical manager" or "technical expert for systems related matters." Also, plaintiff noted that his responsibilities included "overseeing all enrollment related reporting activities for the office" and "coordinating and overseeing the reporting and technical activities of the System Administrators in Undergraduate Admissions." Plaintiff generally considered his position as a projects manager and believed that such position should not have been placed within the SEIU structure.

{¶16} Defendant related that plaintiff met with CSU Director of Compensation, Maria Krasniansky on May 25, 2006 to discuss his appeal and subsequently withdrew the appeal of the Classification Notice on June 7, 2006. Defendant submitted copies of CSU produced documents as evidence to establish that plaintiff withdrew his appeal and accepted his classification into a union job position.

{¶17} On or about August 23, 2006, Jean McCafferty, CSU Compensation Analyst, sent a memo to Edward Mills, Vice Provost for Enrollment Services, Michael Droney, Vice President of Information Services, and John Boyle III, Vice President for Business Affairs and Finance, requesting their signed approval of plaintiff's employment reclassification request. In this memo, McCafferty noted, "because Mr. Kost no longer supervises staff, his position will become part of the SEIU/D 1199 bargaining unit. Professional staff compensation guidelines state that an employee's salary rate does not change in the case of lateral transfers. However, the change to a bargaining unit position requires payment of dues or a fair share fee. Therefore, to counter any loss of income resulting from deduction of dues or fair share fee, Mr. Kost's salary will be adjusted." Mills, Droney, and Boyle all signed and returned the memo thereby approving the content which reclassified plaintiff's position into the SEIU. The signed and approved memo was apparently returned to McCafferty on August 25, 2006 eight days after plaintiff last worked at CSU (August 17, 2006) and seven days prior to the effective date of his separation from employment (September 1, 2006). Due to the reclassification of plaintiff's position into the SEIU, his yearly salary rate was adjusted

from $42,000 to $42,735.

{¶18} Defendant observed that plaintiff was issued two pay checks, one of "which included retroactive pay December 16, 2005 through August 31, 2006, the period during which (p)laintiff's Reclassification Request was being processed," with the second representing "payment of unused vacation." Defendant asserted that plaintiff received and cashed the first check on or about September 15, 2006. The second check, defendant claimed, was received and cashed on or about September 29, 2006. Defendant stated that this second check for plaintiff's unused vacation pay "for his position as a Project Manager in Undergraduate Admissions, SEIU/D 1199 Included." Defendant produced documentary evidence to indicate both checks were negotiated.

{¶19} Defendant again contended that the facts of this claim establish that plaintiff was classified as a union member of the SEIU at the time of his separation from employment and was consequently bound by the terms and conditions of the CBA between CSU and SEIU. As defendant pointed out that the terms and conditions of the CBA provided for resolution of wage disputes, including accrued vacation pay and that, therefore, this court is without jurisdiction to hear such disputes. Defendant asserted that despite plaintiff's argument that he was not in the union due to the fact no union dues or "Fair Share" deductions were shown on his pay stub, or that he did not sign a union authorization form, his position was indeed a bargaining unit position. Defendant related that the relevant section of the CBA, Article VI, states, "All employees who are covered by this agreement and who are not members of the Union and who have been employed by the University for sixty (60) days or more shall pay a fair share fee not greater than the dues paid by members of the Union." Defendant explained that the CBA "does not provide for a retroactive deduction of 'Fair Share' from an employee's pay check" and that, therefore, defendant interpreted the fair share payment language of Article VI of the CBA to apply prospectively or sixty days after a CSU employee was classified as a union member. Defendant pointed out that in plaintiff's particular situation CSU would have been required to deduct a fair share amount from plaintiff's

pay check sixty days after his position had been reclassified. Plaintiff was first reclassified as an SEIU member for the pay period covering September 1, 2006 through September 15, 2006. Defendant calculated plaintiff's reclassification date as September 1, 2006 and consequently calculated the date when his fair share obligation came due as sixty days from September 1, 2006 or November 1, 2006. Defendant observed that plaintiff left employment at CSU before his fair share obligation came and that, consequently, no payment of a fair share was ever deducted from a pay check plaintiff received.

{¶20} Defendant asserted that plaintiff was indeed covered by the terms of the CBA between CSU and SEIU when he separated from employment, despite plaintiff's argument that sufficient evidence exists to indicate plaintiff was considered Professional Staff, subject to the provisions of the CSU Professional Staff Personnel Policies. Particularly, defendant referenced plaintiff's reliance on the correspondence that he received from CSU Assistant Vice President for Human Resources, Robert Pietrykowski, (dated September 11, 2006) wherein Pietrykowski informed plaintiff that his unused vacation pay owed was calculated in accordance with the Professional Staff Personnel Policies rather than the CBA. Defendant contended that Pietrykowski made a simple mistake when he noted in the September 11, 2006 letter that plaintiff was due payment for unused vacation pursuant to the Professional Staff Personnel Policies. Defendant related both Article XXI of the CBA and Section 8.5.10.1.3 of the Professional Staff Personnel Policies provide for a pay out maximum of twenty-two days of unused vacation when a CSU employee separates from employment.[6] Defendant noted that plaintiff received payment for all unused vacation that was due to him,

[6] Article XXI Section 4 of the CBA between CSU and SEIU addresses unused vacation entitlement providing: "Upon termination of employment, employees are entitled to pay for up to a maximum of twenty-two days."

Section 8.5.10.1.3 of the CSU Professional Staff Policies states:

"8.5.10.1.3 Payout Upon Termination. At termination of employment, payments for unused vacation leave to a maximum of twenty-two (22) days shall be made."

whether he was subject to the CBA or the Professional Staff Personal Policies. According to defendant, plaintiff received all permitted payments for all unused vacation. Defendant essentially maintained that plaintiff failed to prove he suffered any damages when he was paid for all unused vacation he was entitled to receive.

{¶21} Furthermore, defendant argued that plaintiff failed to establish any grounds for recovery of damages based on a breach of contract claim. Defendant contended that plaintiff's claim for breach of contract is without merit. Contrary to plaintiff's assertion, defendant related that CSU Vice Provost for Enrollment Services, Edward Mills, lacked any authority to enter into a binding contract with plaintiff to pay him for all vacation time he had accumulated. Defendant explained that payment of unused vacation for separating CSU employment is governed by either the CBA or the Professional Staff Policies both of which set maximum pay out amounts at twenty-two days. Defendant stated, "[b]ased on [p]laintiff's letter of resignation, Mr. Pietrykowski established [p]laintiff's last day of employment as September 1, 2006 after confirming with Mr. Mills that [p]laintiff had no work-related responsibilities beyond August 17, 2006." Plaintiff was informed that he would receive the maximum allowable payment for vacation time. Defendant noted neither the CBA nor the Professional Staff Policies permit immediate supervisors to negotiate employment contracts with individual employees. Defendant stated, "CSU's Department of Human Resources Development and Labor Relations has the sole responsibility for ensuring uniform compliance with all employment policies, procedures and collective bargaining agreements." In essence, defendant asserted that plaintiff's supervisor, Mills had no authority to negotiate a binding employment contract with plaintiff and consequently, there was no contract formed. Defendant maintained that the CBA between SEIU and CSU was the only employment contract controlling plaintiff's employment situation and plaintiff was bound by the terms and conditions of this CBA, particularly, the grievance and arbitration procedures.

{¶22} Plaintiff filed a response to defendant's supplement to the original

investigation report. In this response, plaintiff acknowledged that he received notification on or about April 13, 2006 that his job position had been reclassified as a union position. Plaintiff further acknowledged that he appealed this reclassification and subsequently withdrew his appeal which in effect ended the reclassification process. However, plaintiff still denied that he was ever a union member subject to the provisions of the CBA between CSU and SEIU. Plaintiff pointed out the final approval of his job reclassification was signed on August 23, 2006 and August 24, 2006, a week after his last physical appearance at CSU. Plaintiff stated that he was unaware of his union membership although he acknowledged the fact that he was aware of his reclassification into the union and was aware of the fact that he had dropped his appeal of that reclassification, which essentially meant that this job position would eventually be considered union. Nevertheless, plaintiff insisted that he lacked specific knowledge of the union job classification and was consequently prevented from pursuing union representation to grieve or arbitrate his dispute over payment of unused vacation.

{¶23} Additionally, plaintiff claimed that he was unaware the pay rate for his last two pay checks from CSU had been adjusted to reflect the "union rate." Plaintiff related that his pay checks were negotiated through direct deposit and that he had no way to prevent the deposit. Plaintiff disputed the implication that the negotiation of the pay checks amounts to constructive notice of his union membership.

{¶24} Furthermore, plaintiff asserted that the termination letter which he received from Robert Pietrykowski constitutes clear proof that his entire employment at CSU up to termination was considered a non-bargaining position exempt from union status. Plaintiff stated that Pietrykowski, "made no mention to any union affiliation." Plaintiff further stated, "the letter specifically instructed the Plaintiff to contact Mr. Pietrykowski." A review of the letter establishes that plaintiff was being informed through defendant's Department of Human Resources Development and Labor Relations that his employment position was CSU was being terminated effective September 1, 2006, and that he would receive vacation pay for the period August 18, 2006 through September

1, 2006 with an additional payment due for twenty-two days worth of unused vacation. Pietrykowski closed the letter with the following: "Please feel free to contact me with any questions you may have regarding the foregoing." The letter did not instruct plaintiff regarding any course of action he could follow to initiate dispute resolution.

{¶25} Plaintiff again asserted that he negotiated contract terms with CSU Vice Provost for Employment Services, Edward Mills, for total payment of all unused vacation. Plaintiff contended that the agreement he negotiated was valid despite the fact that all provisions for payment of unused vacation are addressed in either the CBA or CSU Professional Personnel Staff Policies. Plaintiff disputed that defendant's position that CSU supervisors are not permitted to negotiate individual terms and conditions of employment with CSU employees. Plaintiff did not offer any evidence showing Edward Mills, acting in his capacity as CSU Vice Provost for Employment Services, had any authority under statute, administrative code authority, regulator authority, CBA authorization, or authority outlined in the CSU Professional Staff Personnel Policies to enter into an employment benefits contract.

{¶26} After reviewing all the evidence in the claim file the court finds that defendant pursuant to the CBA between CSU and SEIU had the authority to reclassify plaintiff as a covered bargaining unit employee. Further, the court finds that defendant exercised such authority to reclassify plaintiff as a bargaining unit employee and that plaintiff was aware of the effect of this reclassification when he withdrew his appeal of that reclassification. Therefore, at the time that defendant's HRD notified plaintiff of the effective date of his separation from employment, plaintiff was a covered bargaining unit employee who was required to follow the dispute resolution process outlined in the CBA. Article VIII of the CBA contains a detailed grievance procedure culminating in final and binding arbitration of complaints and disputes between bargaining unit employees and CSU. Article VIII, Section 2 describes a grievance as "a dispute concerning the wages, fringe benefits, hours, and working conditions set forth in this Agreement or the interpretation and/or application of and/or compliance with any

provision of this Agreement or University rules or policies." Plaintiff's claim, which essentially concerns a dispute over the date of his employment separation from CSU, is the type of dispute contemplated by the grievance procedure outlined in the CBA. This court does not have jurisdiction to decide matters that are subject solely to a final and binding grievance procedure.[7] See *Lowe v. Ohio Dept. of Adm. Serv.* Ct. of Cl. No. 2002-04143, 2004-Ohio-2766.

{¶27} Assuming that plaintiff was not a bargaining unit employee subject to the terms and conditions of the CBA, plaintiff has failed to produce sufficient evidence to prove that a valid enforceable contract was entered into between him and defendant. Evidence has shown that plaintiff's supervisor, Edward Mills, although an agent of defendant, was not authorized to bind defendant to the purported contract to retain plaintiff on the CSU payroll on vacation leave. It appears that the authority to retain plaintiff from August 18, 2006 to October 3, 2006 rested with the CSU Human Resources Development and Labor Relations Department. Plaintiff, in order to have his vacation pay plan approved needed to obtain approval authorization from HRD. HRD, not Edward Mills, had the ultimate authority to set plaintiff's separation date from employment. HRD accepted plaintiff's resignation and set the effective date of his separation from employment as September 1, 2006. Plaintiff in his own e-mail to Edward Mills (dated August 15, 2006) seemingly acknowledged the authority of HRD when he recorded, "I will complete all necessary exit procedures through HR." Plaintiff was paid for all unused benefits owed to him and any agreement between him and Edward Mills was invalid and unenforceable.

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[7]R.C. Chapter 4117 establishes a framework for resolving public sector labor disputes by creating procedures and remedies to enforce those rights. R.C. 4117.10(A) provides that a collective bargaining agreement between a public employer and the bargaining unit "controls all matters related to the terms and conditions of employment and, further, when the collective bargaining agreement provides for binding arbitration, R.C. 4117.10(A) recognizes that arbitration provides the exclusive remedy for violations of an employee's employment rights." *Gudin v. Western Reserve Psychiatric Hosp.* (June 14, 2001), Franklin App. No. 00AP-912; See *Oglesby v. City of Columbus* (Feb. 8, 2001), Franklin App. No. 00AP-544.

Court of Claims of Ohio

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ERIK L. KOST

Plaintiff

v.

CLEVELAND STATE UNIVERSITY

Defendant

Case No. 2007-02327-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, plaintiff's claim is DISMISSED. Court costs are assessed against plaintiff.

_____
DANIEL R. BORCHERT
Deputy Clerk

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