[Cite as *Am. Assn. of Univ. Professors--Kent State Chapter v. Kent State Univ.*, 2011-Ohio-2592.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS - KENT STATE CHAPTER,	:	**O P I N I O N**
Petitioner-Appellee,	:	**CASE NO. 2010-P-0054**
- vs -	:	
KENT STATE UNIVERSITY,	:	5/27/11
Respondent-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 00921.

Judgment: Affirmed.

Cornelius J. Baasten, Baasten, McKinley & Co., L.P.A., 4150 Belden Village Street, N.W., #604, Canton, OH 44718-3651 (For Petitioner-Appellee).

Christopher F. Carino, Brouse & McDowell, 500 First National Tower, 388 South Main Street, Akron, OH 44311 (For Respondent-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Kent State University ("University"), appeals from the judgment of the Portage County Court of Common Pleas granting American Association of University Professors, Kent State Chapter's ("Association"), appellee herein, request to compel arbitration on an underlying grievance filed in March 2009. For the reasons discussed in this opinion, the judgment of the trial court is affirmed.

{¶2} The Association and the University are parties to a Collective Bargaining Agreement ("CBA"). The CBA sets forth each party's rights and obligations as well as procedures for addressing grievances, which the CBA defines as:

{¶3} "[A] claim based upon an event or condition that affects the terms and conditions of employment stated in and governed by this Agreement and that arises from the interpretation, meaning, or application of any of the provisions of the Agreement."

{¶4} Once a grievance is filed, the CBA sets forth a series of procedures for addressing the allegations. If preliminary methods of resolving the dispute fail, the grievance is submitted to arbitration.

{¶5} On March 30, 2009, the Association filed a grievance with the University's Associate Provost of Faculty Affairs, in accordance with the procedures set forth in the CBA. The grievance asserted the University violated Article XVIII, Section 1 of the CBA when it suspended Faculty Professional Improvement Leaves, also known as "sabbaticals," which, according to the Association, had been previously approved for the academic year 2009 and 2010. The grievance also asserted the University violated Article XVII, Section 2 of the CBA when it suspended allegedly prior approved Maintenance of Faculty Research Support for the same period. The record indicates the University neither scheduled a hearing on the grievance nor provided the Association with a written disposition of the same. As a result, and in accordance with the CBA, the Association filed an appeal of the grievance to the American Arbitration Association ("AAA").

{¶6} On May 15, 2009, the AAA acknowledged receipt of the Association's demand for arbitration and submitted, via letter, a list of potential arbitrators to both

parties. The AAA stated the parties would have 10 calendar days from the date of the letter to return the list. On May 22, 2009, however, the University requested an extension of time, until June 12, 2009, to respond to the "List for Selection of Arbitrators," purportedly "to appoint counsel to handle this matter." On June 12, 2009, the University advised the Association that it was refusing to arbitrate the grievance.

{¶7} Pursuant to the University's decision, the Association filed a complaint to enforce the arbitration agreement in the Portage County Court of Common Pleas. The court scheduled a hearing on the complaint for July 29, 2009. On July 1, 2009, the University filed a motion for a continuance, asserting the Association's responses to its interrogatories would be due on the date of the scheduled hearing. The Association opposed the continuance, arguing R.C. 2711.03 contemplates a speedy determination of whether arbitration should be compelled which would be "*** thwarted if [the University] is permitted to belatedly assert a scheduling conflict and to delay a scheduled hearing in order to engage in unnecessary and specious discovery." The hearing to compel arbitration was nevertheless rescheduled for October 19, 2009.

{¶8} On October 14, 2009, the Association filed a memorandum in support of its complaint to compel arbitration. The record does not specifically reflect what, if anything, occurred during the October 19, 2009 hearing. Nevertheless, on October 28, 2009, the University filed its memorandum in response to the Association's memorandum to compel. A status conference was subsequently scheduled for March 2, 2010.

{¶9} At the status conference, the University argued the underlying grievance had become moot. The court requested the parties to submit briefs on the issue of mootness. After considering the parties' respective arguments, the trial court granted

the Association's request to compel arbitration. The University filed this timely appeal and assigns two errors for our review. Its first assignment of error alleges:

{¶10} "The Trial Court erred in determining that the underlying controversy was not moot."

{¶11} Under this assignment of error, the University asserts that the trial court erred because, even if an arbitrator resolved the grievances in the Association's favor, the time had passed for it to obtain the relief sought, viz., Faculty Professional Improvement Leaves and Maintenance of Faculty Research Support for the academic year 2009-2010. Because the Association cannot obtain the relief it sought, the University contends the matter has become moot.

{¶12} In response, the Association contends the issue is not whether the relief initially sought can be awarded, but whether the University violated the terms and conditions of the CBA. If an arbitrator resolved the matter in the Association's favor, it contends, he or she has the authority to fashion a suitable remedy, regardless of the relief sought in the formal grievance. Since an arbitrator would not be limited to awarding faculty leaves to the 2009-2010 academic year, the issue presents a real controversy to be resolved by compelling arbitration.

{¶13} After reviewing the merits of each position, we believe the trial court properly ruled in the Association's favor.

{¶14} This court has observed that actions are moot:

{¶15} "*** [W]hen they are or have become fictitious, *** hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations. ***. 'A moot case is one which seeks to get a judgment on a pretended

controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.' ***" (Citations omitted.) *Culver v. City of Warren* (1948), 84 Ohio App 373, 393.

{¶16} The United States Supreme Court has observed:

{¶17} "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.* (1960), 363 U.S. 593, 597.

{¶18} Similarly, in Ohio, it is well-settled that an arbitrator has broad authority to fashion a remedy for a contractual violation. *Board of Trustees v. FOP, Ohio Labor Council* (1998), 81 Ohio St.3d 269, 273, citing *Gen. Tel. Co. of Ohio v. Communications Workers of Am., AFL-CIO* (C.A. 6, 1981), 648 F.2d 452, 457. So long as an arbitrator's remedy draws its essence from a CBA, it will not be disturbed. *FOP, Ohio Labor Council*, supra.

{¶19} In this case, of course, arbitration has not yet taken place. Nevertheless, the foregoing principles demonstrate that, to the extent an arbitrator finds a party in violation of a CBA, he or she possesses the discretion to craft an award that is fair and appropriate in light of the agreement. Simply because the remedies initially sought by the Association are no longer specifically viable does not imply the controversy is "dead" or hypothetical.

{¶20} The University analogizes the facts of this case with election cases in which a party seeks to have his or her name placed on a ballot and the election was held before the case could be decided. See, e.g., *State ex rel. Todd v. Felger*, 116 Ohio St.3d 207, 2007-Ohio-6053. Such cases are deemed moot because a petitioner's only possible remedy, i.e., being placed on the ballot of a particular election, ceases to exist once the election in question is over. We do not feel the instant matter parallels an election case.

{¶21} It is undisputed that the Association, in its grievance, requested that faculty members whose leave applications had been previously "judged to be sufficiently meritorious" be "awarded Faculty Professional Improvement Leaves for academic year 09/10." The Association similarly requested that all faculty members who had been selected to receive "an academic year 09/10 Research and Creative Activity Appointment" be allowed "to take the academic year Research and Creative Activity Appointment awarded." Although the Association limited its *requested* remedy to a form of "specific performance," we are not prepared to rule this is the *only possible* relief available.

{¶22} As highlighted above, an arbitrator is commissioned to reach a fair resolution of a dispute in relation to applicable provisions of a collective bargaining agreement. An arbitrator accordingly possesses significant latitude in fashioning an adequate and proper remedy given the nature and context of a particular violation. While we need not speculate on the remedial options available to an arbitrator in this case, it suffices to say that, if the arbitrator determines the grievance has merit, he or she, as a matter of law, has great discretion in exercising his or her remedial powers. In order for an arbitrator to accomplish his or her duties, we believe this discretion

transcends and is not limited to what a petitioner requests or prays for in a formal grievance. Given this conclusion, we hold the trial court did not err in declaring the matter was not moot based upon the limited relief requested in the grievance.

{¶23} The University's first assignment of error is accordingly overruled.

{¶24} The University's second assignment of error alleges:

{¶25} "The Trial Court erred in compelling the parties to submit to arbitration."

{¶26} Under this assigned error, the University asserts the trial court erred in committing the matter to arbitration because, even if the matter was not moot, the arbitrability of the grievance was a matter for the trial court to adjudicate, not an arbitrator. In the University's view, the dispute failed to meet the definition of a "grievance" as defined in the CBA and thus was not a matter contemplated for arbitration. According to the University, the trial court therefore erred in compelling arbitration.

{¶27} In *Council of Smaller Enters. v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, the Supreme Court of Ohio discussed the role of the court in determining the arbitrability of a dispute:

{¶28} "'[T]he question of arbitrability -- whether an *** agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.' Id. [*AT & T Technologies, Inc. v. Communications Workers of Am.* (1986)], 475 U.S. [643,] 649." (Emphasis removed.) *Council of Smaller Enters.*, supra, at 666.

{¶29} Accordingly, a court is responsible for determining whether parties are obligated to arbitrate a dispute pursuant to the pertinent agreement. See, e.g., *Bd. of*

Library Trustees, Shaker Hts. Pub. Library v. Ozanne Constr. Co., Inc. (1995), 100 Ohio App.3d 26, 30. If the agreement requires arbitration, however, the arbitrator determines all issues of procedural arbitrability, i.e., whether the party demanding arbitration has complied with all procedural requirements and conditions set forth in the agreement itself. Id.; see, also, *John Wiley & Sons, Inc. v. Livingston* (1964), 376 U.S. 543, 557. ("Once it is determined *** that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.")

{¶30} Initially, we agree that the substantive arbitrability of the allegations in the grievance is a matter for judicial determination. The University's argument, in this respect, is merely a restatement of the law of arbitration in Ohio. We disagree, however, that the Association's methodology in filing its grievance affects the substantive arbitrability of the claims. The University's argument that the Association's formal complaint failed to meet the definition of a "grievance" is based upon the University's apparent belief that the CBA does not permit a party to include two purported violations in one formal grievance. This challenge does not go to the arbitrability of the claims alleged; instead, it challenges whether the Association's grievance was procedurally adequate to initiate the arbitration process.

{¶31} A review of the substantive allegations set forth in its March 30, 2009 grievance demonstrates the claims arose from the University's purported violation of certain sections of the CBA; namely, the misapplication or misinterpretation of Article XVIII, sections 1 and 2, provisions governing Faculty Professional Improvement Leaves and Maintenance of Faculty Research Support. A review of the arbitration process set forth in the agreement reveals these allegations were subject to arbitration if not

resolved through other preliminary formal or informal means. See Article VII, Section 1(C) and (D). It is well-settled that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *AT & T Technologies, Inc.,* supra, at 655. There can be no doubt that the violations alleged in the March 30, 2009 grievance were items which the parties agreed to submit to arbitration under the CBA if other alternative methods of resolution failed. We therefore hold the trial court did not err in compelling arbitration in this matter.

{¶32} The University's second assignment of error is overruled.

{¶33} For the reasons discussed in this opinion, the University's two assignments of error are overruled and the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.