[Cite as *Field Local Teachers Assn., OEA/NEA v. Field Local School Dist. Bd. of Edn.*, 2012-Ohio-862.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

FIELD LOCAL TEACHERS ASSOCIATON, OEA/NEA,	:	**O P I N I O N**
Plaintiff-Appellant/ Cross-Appellee,	:	**CASE NO. 2010-P-0086**
- vs -	:	
FIELD LOCAL SCHOOL DISTRICT BOARD OF EDUCATION,	:	
Defendant-Appellee/ Cross-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2009 CV 1527.

Judgment: Affirmed.

Ira J. Mirkin and *Charles W. Oldfield*, Green, Haines & Sgambati Co., L.P.A., 16 Wick Avenue, Suite 400, P.O. Box 849, Youngstown, OH 44501-0849 (For Plaintiff-Appellant/Cross Appellee).

Matthew J. Markling and *Patrick Vrobel*, McGown & Markling Co., L.P.A., 1894 North Cleveland-Massillon Road, Akron, OH 44333 (For Defendant-Appellee/Cross-Appellant).

MARY JANE TRAPP, J.

{¶1} Field Local School Teachers Association ("Union") appeals from a judgment of the Portage County Court of Common Pleas Court affirming an arbitration award in favor of Field Local School District Board of Education ("Board") in their dispute regarding whether the Board is permitted to evaluate the teachers seeking

tenure outside of the evaluation schedule set forth in the collective bargaining agreement. We conclude the trial court did not err in affirming the arbitration award.

Substantive Facts and Procedural History

{¶2} This case involves the evaluation of teachers in the Field Local School District who are employed under either Limited Contract or Continuing Contracts (tenure). The Limited Contracts can be for a term of one year, three years, or five years. The latter two types are called the Extended Limited Contracts, and teachers under the Extended Limited Contracts are eligible for Continuing Contracts after meeting certain qualifications. The dispute concerns the timing of evaluations for teachers seeking Continuing Contracts.

{¶3} The Union and the Board are parties to a collective bargaining agreement, "Master Agreement between the Field Local Teachers Association and the Field Local School District Board of Education" ("CBA"). The CBA sets forth an evaluation schedule in Article 30, but contains no provisions addressing the process by which the teachers obtain Continuing Contracts.

{¶4} At the start of the 2008-2009 school year, Superintendent David Brobeck issued a memorandum stating his intention to evaluate teachers eligible for Continuing Contracts, regardless of whether a teacher is due to be evaluated under the Article 30 schedule. In November of 2008, the Union began to file grievances contesting the management's right to evaluate teachers eligible for Continuing Contracts at any time other than what is set forth in the CBA. On December 22, 2008, the Union filed a demand for arbitration through the American Arbitration Association. A hearing was held on May 6, 2009, and the issue presented to the arbitrator was: Does the Board

violate the parties' agreement when it evaluates teachers seeking Continuing Contracts during years when they are not otherwise scheduled to be evaluated?

{¶5} The arbitrator issued his Opinion and Award answering the question in the negative, concluding that the CBA does not prohibit the Board from evaluating teachers seeking a Continuing Contract outside the evaluation schedule set forth in the CBA. The Union filed a complaint in the trial court to vacate the arbitration award. The trial court affirmed the award, and the Union appealed from the judgment. Its sole assignment of error states:

{¶6} "The trial court erred when it denied the Union's motion to vacate the arbitration award."

Judicial Deference in Reviewing an Arbitration Award

{¶7} R.C. 2711.10 governs when a trial court may vacate an arbitration award. It states:

{¶8} "In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

{¶9} "(A) The award was procured by corruption, fraud, or undue means.

{¶10} "(B) Evident partiality or corruption on the part of the arbitrators, or any of them.

{¶11} "(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

{¶12} "(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

{¶13} A court's review of an arbitrator's decision is limited. *Trumbull County Sheriff's Office v. Ohio Patrolmen's Benevolent Assn.*, 11th Dist. No. 2002-T-0137, 2003-Ohio-7207, citing *Bd. of Edn. of the Findlay City School Dist. v. Findlay Edn. Assn.,* 49 Ohio St.3d 129 (1990). *See also Madison Local School Dist. Bd. of Edn. v. OAPSE/AFSCME Local 4*, 11th Dist. No. 2008-L-086, 2009-Ohio-1315, ¶9 (a court has a very limited role in reviewing a binding arbitration award).

{¶14} "An arbitrator's decision is presumed valid and thus enjoys great deference." *Madison Local School*, citing *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 83-84 (1986). "We presume the arbitrator's award is valid and determine only whether there are valid claims of fraud, corruption, misconduct, or an imperfect award, and whether the arbitrator exceeded his authority." *Trumbull Cty. Sheriff's Office* at ¶17, citing R.C. 2711.10 and *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum & Plastic Workers of America*, 42 Ohio St.2d 516 (1975), paragraph two of the syllabus.

{¶15} "In an arbitration involving a collective bargaining agreement, an arbitrator exceeds his or her authority only when the award fails to draw its essence from the collective bargaining agreement." *Madison Local School* at ¶13, citing *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union*, 131 Ohio App.3d 751, 760 (1st Dist.1998).

{¶16} "An arbitration award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful." *Trumbull Cty. Sheriff's Office* at ¶19, quoting *Mahoning Cty. Bd. of Mental Retardation*, paragraph one of the syllabus.

{¶17} Conversely, "an arbitrator's award departs from the essence of a collective bargaining agreement when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement." *Trumbull Cty. Sheriff's Office*, quoting *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emp. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177 (1991), syllabus. "Once a reviewing court determines that the arbitrator's award draws its essence from the parties' contract and is not unlawful, arbitrary or capricious, the reviewing court has no authority to vacate the award pursuant to R.C. 2711.10(D)." *Marra Constructors, Inc. v. Cleveland Metroparks Sys.,* 82 Ohio App.3d 557, 563 (8th Dist. 1993).

{¶18} In *Hillsboro v. Fraternal Order of Police, Ohio Labor Counsel, Inc.*, 52 Ohio St.3d 174 (1990), the Supreme Court of Ohio cautioned against the courts exceeding their limited power to review the arbitrator's award and substituting their interpretation of the parties' agreement for that of the arbitrator. It stated:

{¶19} "When a provision in a collective bargaining agreement is subject to more than one reasonable interpretation and the parties to the contract have agreed to submit their contract interpretation disputes to final and binding arbitration, the arbitrator's interpretation of the contract, and not the interpretation of a reviewing court, governs the rights of the parties thereto. This is so because the arbitrator's interpretation of the

contract is what the parties bargained for in agreeing to submit their disputes to final and binding arbitration. The arbitrator's interpretation must prevail regardless of whether his or her interpretation is the most reasonable under the circumstances." *Id*. at 177-178.

{¶20} As the court in *Hillsboro* further elaborated:

{¶21} "A judge reviewing an arbitrator's award may completely disagree with the arbitrator's interpretation of the contract. However, the degree of judicial restraint necessary for a reviewing court to exercise in reviewing an arbitrator's award may, nevertheless, require the judge to deny a motion to vacate the arbitrator's award." *Id.* at fn. 5.

{¶22} "The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Stow Firefighters v. City of Stow*, 193 Ohio App.3d 148, 2011-Ohio-1559, quoting *Summit Cty. Bd. of Mental Retardation & Dev. Disabilities v. Am. Fedn. of State, Cty. & Mun. Emp.,* 39 Ohio App.3d 175, 176 (9th Dist.1988).

{¶23} "Contracting parties who agree to submit disputes to an arbitrator for final decision have chosen to bypass the normal litigation process. If parties cannot rely on the arbitrator's decision (if a court may overrule that decision because it perceives factual or legal error in the decision), the parties have lost the benefit of their bargain." *Stow Firefighters* at ¶24, quoting *Automated Tracking Sys. Inc. v. Great Am. Ins. Co.*, 130 Ohio App.3d 238, 243 (9th Dist.1998).

{¶24} "The continued vitality of the arbitration system of dispute resolution can only be ensured through judicial restraint." *Hillsboro* at 178. "[A] reviewing court also must be sensitive to upholding an arbitrator's award whenever it is possible to do so." *Id*. "Judicial deference in arbitration cases is fundamentally based on the recognition that the parties have contracted to have their dispute settled by an arbitrator they have chosen in lieu of committing the matter to the courts." *Madison Local School* at ¶10, citing *United Paperworkers Internatl. Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). "It therefore stands to reason that the parties have agreed to accept the arbitrator's view of the facts and the meaning of the contract regardless of the outcome." *Id*. "If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Madison Local School* at ¶11 (citations omitted).

{¶25} Finally, our review of a trial court's confirmation of a binding arbitration award is deferential. "[A]n appellate court cannot consider the substantive merits of the award unless the record shows that a material mistake or extensive impropriety occurred during the arbitration proceedings." *McGarry & Sons, Inc. v. Marous Bros. Constr., Inc.*, 11th Dist. No. 2009-L-056, 2010-Ohio-823, ¶30 (citations omitted).

The Dispute Centers on the Applicability of Article 30 of the Agreement and R.C. 3319.11

{¶26} Pursuant to R.C. 3319.11, teachers may request to be considered for Continuing Contract after they meet certain requirements, including obtaining advanced professional degrees and having taught three years within the last five years in the district.

{¶27} Article 30 of the CBA sets forth the schedules for evaluations. It specifies the years in which teachers under one-year, three-year, and five-year Limited Contracts, as well as those under Continuing Contracts, are to be evaluated. The CBA also provides that its evaluation provision supersedes R.C. 3319.111, the statute that governs teacher evaluations.

{¶28} When the request for tenure comes in a year in which the teacher is otherwise scheduled for evaluation under Article 30 of the CBA, there is no controversy regarding the timing of the tenure evaluation. When the request comes in a year in which the teacher is *not* otherwise scheduled to be evaluated, however, the parties disagree as to whether such "out of cycle" teachers could be evaluated for tenure purposes. The issue before the arbitrator was whether the Board violated the CBA when it sought to evaluate teachers seeking Continuing Contracts during years when they were not otherwise scheduled for evaluation.

{¶29} The Union argued that, by specifically excluding R.C. 3319.111 in Article 30 of the CBA, the CBA also excluded the use of the teacher evaluation procedures delineated in R.C. 3319.11.

{¶30} The arbitrator found that while the Union was correct in its assertion that Article 30 of the CBA means exactly what it says, that is, by setting forth the specific years in which a teacher may be evaluated, evaluations in other years are specifically excluded. The arbitrator, however, also found that the contract itself does not specify the "substantive requirements or the procedures" by which a Limited Contract teacher becomes a Continuing Contract teacher. Because such standards and procedures are necessary and despite language in the CBA that it was the parties' intent to supersede

"Ohio law with respect to any topic regarding evaluation addressed in Ohio Revised Code Section 3319.111," the arbitrator determined R.C. 3319.11 is "necessarily incorporated by reference in the parties' contract."

{¶31} We will examine both Article 30 and the code sections at issue.

A. The CBA Provision Regarding Evaluation

{¶32} Article 30 of the CBA is titled "Teacher Evaluation Procedures." Section (B) sets forth the times for such evaluation. It states the following, in pertinent part:

{¶33} "B. Teachers to be evaluated:

{¶34} "1. The Evaluation and Observation schedule for teachers with a one-year Limited Contract shall consist of two (2) complete cycles each year.

{¶35} "2. The Evaluation and Observation schedule for teachers with a three-year Limited Contract shall consist of two (2) complete cycles in the third year of the contract.

{¶36} "3. The Evaluation and Observation schedule for teachers with a five-year Limited Contract shall consist of one (1) complete cycle in the third year and two (2) complete cycles in the fifth year of the contract.

{¶37} "4. Continuing Contract shall consist of one (1) cycle every third year."[1]

{¶38} Therefore, according to the schedule set forth in Article 30, the teachers with a one-year Limited Contract are evaluated each year; those with a three-year Extended Limited Contract are evaluated in the third year of their contract; and those with a five-year Extended Limited Contract are evaluated in the third and fifth years of their contract. Those with Continuing Contracts are evaluated every third year.

1. According to Article 30(A), an "observation and evaluation cycle" consists of two pre-observation meetings, two observations, one post-observation meeting, and one summary evaluation.

{¶39} Furthermore, Paragraph (H) of Article 30 states: "It is the intention of the parties that this procedure supersedes Ohio law with respect to any topic regarding evaluation addressed in the Ohio Revised Code 3319.111."

{¶40} Two Revised Code sections pertain to the instant dispute. They cross-reference each other and have not been drafted in a manner for easy deciphering.

B. R.C. 3319.111: the Evaluation Statute

{¶41} R.C. 3319.111, titled "Evaluation of teachers under limited contracts," sets forth the procedure for evaluation for teachers. The gist of the statute is that evaluation is required "at least twice in the school year in which the board may wish to declare its intention not to re-employ the teacher." The statute moreover provides for the various deadlines for the evaluation, the qualifications of the evaluating person, and the evaluation procedures. The following provision is particularly pertinent to this appeal:

{¶42} "(A) Any board of education that has entered into any limited contract or extended limited contract with a teacher pursuant to section 3319.11 of the Revised Code *shall evaluate such a teacher in compliance with the requirements of this section in any school year in which the board may wish to declare its intention not to re-employ* the teacher pursuant to division (B), (C)(3), (D), or (E) of section 3319.11 of the Revised Code." (Emphasis added.)

C. R.C. 3319.11: the Tenure Statute

{¶43} The CBA has no affirmative or definitive provisions addressing the process by which an eligible teacher attains tenure (Continuing Contracts or "continuing service status"). The Revised Code sets forth certain provisions for tenure in R.C.

3319.11 in a manner which, as the arbitrator in this case noted frustratingly, "defies facile summarization."

{¶44} R.C. 3319.11, titled "Eligibility for continuing service status; limited contract; notice of intent not to re-employ," states, in part relevant to the instant appeal:

{¶45} "(A) As used in this section:

{¶46} "(1) 'Evaluation procedures' means the procedures adopted pursuant to division (B) of section 3319.111 [3319.11.1] of the Revised Code.

{¶47} "(2) 'Limited contract' means a limited contract, as described in section 3319.08 of the Revised Code, that a school district board of education or governing board of an educational service center enters into with a teacher who is not eligible for continuing service status.

{¶48} "(3) 'Extended limited contract' means a limited contract, as described in section 3319.08 of the Revised Code, that a board of education or governing board enters into with a teacher who is eligible for continuing service status."

{¶49} "(B) Teachers eligible for continuing service status * * * shall be those teachers qualified as described in division (D) of section 3319.08 of the Revised Code, who within the last five years have taught for at least three years in the district or center * * *."

{¶50} "(1) Upon the recommendation of the superintendent that a teacher eligible for continuing service status be reemployed, a continuing contract shall be entered into between the board and the teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. If the board rejects * * * the recommendation of the superintendent * * * and the

superintendent makes no recommendation to the board pursuant to division (C) of this section [offering a two-year extended limited contract], the board may declare its intention not to reemploy the teacher by giving the teacher written notice * * *. *If evaluation procedures have not been complied with pursuant to division (A) of section 3319.111* [3319.11.1] of the Revised Code or the board does not give the teacher written notice * * * of its intention not to reemploy the teacher, the teacher is deemed reemployed under an extended limited contract for a term not to exceed one year * * *.

{¶51} "(2) If the superintendent recommends that a teacher eligible for continuing service status not be reemployed, the board may declare its intention not to reemploy the teacher by giving the teacher written notice * * * of its intention not to reemploy the teacher. *If evaluation procedures have not been complied with pursuant to division (A) of section 3319.111* [3319.11.1] of the Revised Code or the board does not give the teacher written notice * * * of its intention not to reemploy the teacher, the teacher is deemed reemployed under an extended limited contract for a term not to exceed one year * * *.

{¶52} "* * *.

{¶53} "(C)(3) * * * If a board rejects by a three-fourths vote of its full membership the recommendation of the superintendent of an extended limited contract for a term not to exceed two years, the board may declare its intention not to reemploy the teacher by giving the teacher written notice * * * of its intention not to reemploy the teacher. *If evaluation procedures have not been complied with pursuant to division (A) of section 3319.111* [3319.11.1] of the Revised Code or if the board does not give the teacher written notice * * * of its intention not to reemploy the teacher, the teacher is deemed

reemployed under an extended limited contract for a term not to exceed one year * * * ." (Emphasis added.)

{¶54} Three sections of R.C. 3319.11 reference R.C. 3319.111(A), which is the section requiring a board to evaluate a teacher in any year the board wishes to declare its intention *not* to reemploy the teacher. Therefore, essentially, R.C. 3319.11 requires a teacher seeking a Continuing Contract to be evaluated if the board wishes "to declare its intention not to reemploy the teacher"; if the evaluation is not performed, the teacher is "deemed reemployed under an extended limited contract for a term not to exceed one year."

{¶55} In other words, R.C. 3319.11 – by referencing 3319.111(A) – permits the Board to non-renew a teacher seeking tenure *only when* an evaluation has been performed in the year. Meanwhile, the CBA provides for an evaluation schedule for teachers under contracts of various durations, which, by the parties' agreement, "supersedes Ohio law with respect to any topic regarding evaluation addressed in R.C. 3319.111." The apparent conflict, coupled with CBA's complete silence on the procedure by which a teacher obtains tenure, gives rise to the parties' dispute: whether the board is permitted to evaluate teachers eligible for Continuing Contracts when they seek such a contract in a year they are not scheduled for evaluation under Article 30.

The Parties' Respective Positions

{¶56} As noted earlier, the Union argues the Board has no right to evaluate teachers outside the parameters of the evaluation provision of the CBA, because that provision covers *all* matters regarding evaluation. It maintains that the specification of

the years in which evaluations are made necessarily excludes the authority of the Board to make evaluations in other years.

{¶57} The Board asserts that the lack of provisions regarding the tenure procedure in the CBA means there is no bargained agreement on this issue, and therefore, R.C. 3319.11 applies, which requires evaluation in the year a teacher seeks Continuing Contract if the board intends not to offer such a contract. In addition, the Board argues the Management Clause in the CBA provides a management right to evaluate a teacher in the "out-of-cycle" year when the teacher asks to be considered for a Continuing Contract in such a year.[2]

The Arbitrator's Interpretation of CBA

{¶58} The arbitrator applied the principle of expressio unius est exclusio alterius, which means the express inclusion of one thing implies the exclusion of the other. *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, ¶42. The arbitrator stated that "[b]y specifying the years in which a teacher is authorized to be evaluated the Union obtains the protection that the teachers may not be evaluated in the other years." However, the arbitrator reasoned that because the CBA itself does not specify the substantive requirements or the procedures by which a teacher moves from being under a Limited Contract to a Continuing Contract, R.C. 3919.11 (the tenure statute) necessarily applies to govern all matters in the tenure procedure, and thus, the statute is "necessarily incorporated by reference in the parties' contract." The arbitrator stressed that "[o]bviously it is necessary to have such substantive standards and procedures" for tenure.

2. Article 2(A) provides explicit rights to the Board, including to "[d]irect, supervise, evaluate, or hire employees."

{¶59} The arbitrator moreover found the repeated references in R.C. 3319.11 to R.C. 3319.111(A) – which requires evaluation before the board can discontinue a teacher's contract – makes evaluation an intrinsic part of R.C. 3319. 11, such that those references cannot be excised by an arbitrator on the basis of an interpretation of Article 30 of the CBA.

{¶60} To support his interpretation that evaluation can be made in the years not specified in Article 30 for a teacher seeking tenure, the arbitrator pointed to Article 30(H), which states that the parties intend the evaluation procedure outlined in Article 30 to supersede Ohio law regarding evaluation addressed in R.C. 3319.111 (the evaluation statute). The arbitrator reasoned that this provision reflects that the parties knew how to draft a contractual term to expressly supersede statutory provisions when they desired. The fact that the CBA does not contain a similar provision superseding R.C. 3319.11 (the tenure statute) indicates that R.C. 3319.11 governs tenure matters, which includes the requirement for evaluation.

{¶61} Essentially, the arbitrator interpreted the silence of the CBA on tenure to mean the parties have not negotiated terms regarding the tenure procedure. Therefore, the tenure procedure is, by default, governed by R.C. 3319.11, which is, in his words, "necessarily incorporated in the parties' agreement." Because R.C. 3319.11, by way of referencing R.C. 3319.111(A), requires evaluation before the Board can discontinue a teacher's contract, the Board is permitted to evaluate a teacher outside of the schedule set forth in Article 30.

The Trial Court Affirmed the Arbitration Award

{¶62} The Union asked the trial court to vacate the arbitration award, claiming the arbitrator exceeded his powers, or imperfectly executed his powers. The trial court upheld the arbitration award, finding the arbitration award drew its essence from the CBA, and was not unlawful, arbitrary, or capricious, and thus, the arbitrator did not exceed his authority.

{¶63} On appeal, the Union asserts the arbitrator exceeded his authority in that (1) he interpreted a statute instead of the terms of the collective bargaining agreement; (2) he added terms to the collective bargaining agreement by finding that R.C. 3319.11 was "necessarily incorporated by reference in the parties' agreement;" (3) the award conflicted with the express terms of the agreement; and (4) the award was not rationally related to the terms of the collective bargaining agreement.

Statutes Versus Collective Bargaining Agreements

{¶64} The Union argues that an arbitrator may not rely on rules or statutes extraneous to a collective bargaining agreement when interpreting a collective bargaining agreement, and that the arbitrator in this case exceeded his authority when he applied or interpreted a statute. The Union apparently believes R.C. 3319.11 is "extraneous" to this case. However, looking to the applicable statutes is sometimes necessary when interpreting a collective bargaining agreement. The relationship between provisions of a collective bargaining agreement and the statutes are set forth in R.C. 4117.10(A), which states, in pertinent part:

{¶65} "(A) An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. * * * Where no

agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees."

{¶66} In *Streetsboro Edn. Assn. v. Streetsboro City School Dist. Bd. of Edn.*, 68 Ohio St. 3d 288 (1994), the Supreme Court of Ohio explained R.C. 4117.10(A):

{¶67} "R.C. 4117.10(A) sets out the relationship between provisions of a collective bargaining agreement and state or local laws. R.C. 4117.10(A) first provides that a collective bargaining agreement 'governs the wages, hours, and terms and conditions of public employment covered by the agreement.' From this it logically follows that if no state or local law makes a specification about a matter (i.e., if there is no conflict between the agreement and a law), then the agreement governs the parties as to that matter. Conversely, if a collective bargaining agreement makes no specification about a matter (i.e., if there is no conflict between a law and the agreement), then R.C. 4117.10(A) further provides that state and local laws generally apply to a public employer and its public employees regarding 'wages, hours and terms and conditions' of employment.

{¶68} "When a provision in a collective bargaining agreement addresses a subject also addressed by a state or local law, so that the two conflict, R.C. 4117.10(A) delineates whether the collective bargaining provision or the law prevails. To do this, R.C. 4117.10(A) specifies certain areas in which laws will prevail over conflicting provisions of collective bargaining agreements. Consequently, where a provision of a collective bargaining agreement is in conflict with a state or local law pertaining to a

specific exception listed in R.C. 4117.10(A), the law prevails and the provision of the agreement is unenforceable. However, if a collective bargaining provision conflicts with a law which does not pertain to one of the specific exceptions listed in R.C. 4117.10(A), then the collective bargaining agreement prevails. *See State ex rel. Rollins v. Cleveland Hts.-University Hts. Bd. of Edn.*, 40 Ohio St.3d 123 (1988), paragraph one of the syllabus (collective bargaining agreement prevails over conflicting law unless the law falls within an exception listed in R.C. 4117.10[A]). *See also Cuyahoga Falls Edn. Assn. v. Cuyahoga Falls City School Dist. Bd. of Edn.*, 61 Ohio St.3d 193 (1991), paragraph two of the syllabus; *Jurcisin v. Cuyahoga Cty. Bd. of Elec.*, 35 Ohio St.3d 137, 143 (1988).

{¶69} "Hence, the analysis employed to resolve whether the collective bargaining agreement or the state or local law prevails is straightforward: (1) Initially, we examine the relevant provision of the collective bargaining agreement and the relevant state or local law, and ask whether the agreement and the law conflict. (2) If there is a conflict, we then ask whether the conflicting law pertains to one of the areas listed in R.C. 4117.10(A). The law prevails if the two questions above are answered in the affirmative. If that is the case, the conflicting provision in the collective bargaining agreement is unenforceable." *Streetsboro Edn. Assn.* at 290-291.

{¶70} The evaluation and tenure statutes, R.C. 3319.111 and R.C. 3319.11, are not the specific exceptions delineated in R.C. 4117.10(A). Therefore, whether there *is* an agreement in the CBA regarding "the matter" lies at the heart of the instant dispute. If one interprets the CBA to manifest the parties' agreement in "the matter," the CBA

provision governs; conversely, if the CBA does not reflect an agreement, R.C. 3319.11 (the tenure statute) governs.

When Faced with Two Equally Plausible Interpretations

{¶71} The Board and the arbitrator interpreted the CBA to contain no agreement regarding *tenure*. Therefore, R.C. 3319.11, the applicable statute on tenure, controls the tenure procedure, including any requisite evaluation. If the CBA is interpreted in this manner, then the arbitrator did not exceed his power in determining that R.C. 3319.11 is implicitly incorporated in the parties' CBA. As that statute requires evaluation in the year a teacher seeks tenure as part of the tenure procedure, a teacher seeking tenure can be evaluated in a year not specified in Article 30 of the CBA.

{¶72} An equally plausible interpretation of the CBA, the one advocated by the Union, is that the CBA contains the parties' agreement on *all evaluation matters*. Under this interpretation, the CBA provision (Article 30) governs *any* evaluation, regardless of whether a teacher is seeking tenure, and therefore, the arbitrator exceeded his authority in incorporating R.C. 3319.11 into the CBA.

{¶73} Mindful of the highly deferential standard applied to an arbitrator's interpretation of a collective bargaining agreement, we cannot fault the trial court for refusing to vacate the arbitrator's award in this case. The arbitrator determined there was a lack of provision regarding the tenure process in the CBA, and thus R.C. 3319.11 (the tenure statute) governs such a process. Because that statute makes evaluation an intrinsic part of the tenure procedure – by its repeated references to R.C. 3319.111(A), which requires evaluation in the year the board decides to not to reemploy a teacher,

the arbitrator believed the requirement of evaluation in the tenure statute could not be excised on the basis of Article 30.

{¶74} If the references to evaluation in R.C. 3319.11 were excised, the arbitrator essentially would have to re-write R.C. 3319.11 regarding the tenure procedure. The arbitrator stated: "[s]uch a re-writing is obviously not within the powers of the arbitrator." As the arbitrator also pointed out, the CBA expressly provides that the evaluation provision supersedes R.C. 3319.111, therefore, the fact that there is *no* provision stating the same regarding R.C. 3319.11 (the tenure statute) would appear to reflect the parties' intention that R.C. 3319.11, of which evaluation is an intrinsic part, to govern the tenure procedure.[3]

{¶75} Given the foregoing, we cannot conclude the arbitrator's award failed to draw its essence from the CBA, or that the award was unlawful, arbitrary, or capricious. Although we recognize the interpretation of the CBA espoused by the Union is not unreasonable, we cannot substitute our interpretation for that of the arbitrator. Because the arbitrator did not exceed his authority, the trial court properly denied the Union's request to vacate the arbitration award. The assignment of error is without merit.

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3. In *Naylor v. Cardinal Local School Dist. Bd. of Edn.*, 69 Ohio St.3d 162 (1994), appellant was a teacher under a Limited Contract eligible for a Continuing Contract. After the school board decided not to re-employ her, she filed an action in the court complaining the school board failed to comply with the statutory evaluation procedures under R.C. 3319.111 (the tenure statute) prior to its nonrenewal of her contract. The school board asserted the collective bargaining agreement already provided nonrenewal and evaluation procedures and that, by virtue of R.C. 4117.10, the provisions of the agreement prevailed over R.C. 3319.11 and 3319.111. *Id*. at 164. The court of appeals agreed, holding that the board's adherence to the evaluation procedures set forth in the collective bargaining agreement fulfilled the evaluation requirements of R.C. 3319.111. The Supreme Court of Ohio reversed, determining that while the board was bound by the provisions of the collective bargaining agreement, it was also bound by the statutory evaluation procedures contained in R.C. 3319.111. The court held that in failing to adopt the evaluation procedures set forth in R.C. 3319.111, the school board acted improperly in its decision not to re-employ plaintiff. *Naylor* is not directly on point, however, because the CBA in the instant case specifically states R.C. 3319.111 is superseded.

Cross appeal

{¶76} In the arbitration award, the arbitrator ruled that the costs associated with the arbitration should be divided between the parties in accordance with Article 7(G) of the CBA, which provides that the losing party pays for 75% of the costs. The Board filed a motion/counter-complaint at the trial court seeking modification of the arbitration award to assess all costs to the Union. The Board argued the arbitration costs should be borne by the Union because the Union filed for arbitration with the American Arbitration Association instead of the Federal Mediation and Conciliation Service, in violation of Article 7(G) of the CBA.

{¶77} The trial court denied the Board's request to require the Union to pay all arbitration costs, finding "during the pendency of this case, the School Board's attorneys withdrew their opposition to going forward on the arbitrator's decision in this case. This acquiescence moots the School Board's arguments here."

{¶78} The board raises two assignments of error in its cross-appeal:

{¶79} "[1.] The Portage County Court of Common Pleas erred when it failed to modify and/or correct the July 14, 2009 Arbitration Award which impermissibly imposes the costs of arbitrating a grievance submitted in violation of the Master Agreement between Appellee-Cross-Appellant Field Local School District Board of Education and Appellant-Cross-Appellee Field Local Teachers Association, OEA/NEA.

{¶80} "[2.] The Portage County Court of Common Pleas erred in holding that Appellee-Cross-Appellant Field Local School District Board of Education's arguments are rendered moot by its acquiescence to the Arbitrator's decision."

{¶81} The two assignments of error are related and we address them together.

{¶82} The Board relies on Article 7(G)(1) of the CBA for their claim that the Union submitted their grievances to the wrong arbitration association. Article 7(G)(1) provides: "If the grievant is not satisfied with the disposition of the grievance * * * the grievant (through the Association) may request a hearing before an arbitrator under the rules of the Federal Mediation and Conciliation Service."

{¶83} Article 7(G)(2) of CBA states: "*Once the arbitrator has been selected*, he/she shall proceed with arbitration of the grievance in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association. * * *." (Emphasis added.)

{¶84} Reading the two sections together, the CBA appears to authorize the selection of an arbitrator under the rules of the Federal Mediation and Conciliations Service ("FMCS"); "once the arbitrator has been selected," the arbitration would then proceed in accordance with the rules of the American Arbitration Association ("AAA"). Thus, under a literal reading of these provisions, it would appear the Union should have selected an FMCS arbitrator, and then proceeded with the arbitration under the AAA rules.

{¶85} However, there is no provision in the CBA or case law supporting the Board's claim that a party's submission of the dispute to an unauthorized arbitrator requires the party to bear full costs of the arbitration. Moreover, the trial court found the Board's attorneys "withdrew their opposition to going forward on the arbitrator's decision in this case," and, on appeal, the Board does not contest that finding; therefore, the Board's claim regarding the costs based on allegedly unauthorized arbitrator is waived. The assignments of error in the cross-appeal are without merit.

{¶86} The judgment of the Portage County Court of Common Pleas Court is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.