**[Cite as *Donini v. Fraternal Order of Police*, 2009-Ohio-5810.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

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| MARTY V. DONINI, | : | |
| Plaintiff-Appellee, | | Case No. 08CA3251 |
| vs. | : | |
| FRATERNAL ORDER OF POLICE, | : | DECISION AND JUDGMENT ENTRY |
| Defendant-Appellant. | : | |

APPEARANCES:

COUNSEL FOR APPELLANT: Kay E. Cremeans and Paul L. Cox, Fraternal Order of Police, Ohio Labor Council, Inc., 222 East Town Street, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Chadwick K. Sayre, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Room 310, Portsmouth, Ohio 45662

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 11-2-09

ABELE, J.

**{¶ 1}** This is an appeal from Scioto County Common Pleas Court judgment that vacated an arbitration award against the Scioto County Sheriff, defendant below and appellee herein. The Fraternal Order of Police, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FAILED TO DISMISS THE MOTION TO VACATE AS BEING UNTIMELY FILED."

SECOND ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT VACATED THE ARBITRATION AWARD."

THIRD ASSIGNMENT OF ERROR:

"THE COMMON PLEASE COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FAILED TO CONFIRM THE ARBITRATION AWARD."

FOURTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FAILED TO AWARD INTEREST ON THE MONEY DUE THE GRIEVANT."

**{¶ 2}** On January 1, 2003, the parties entered into a Collective Bargaining Agreement (CBA). Six months later, appellee hired Linda Shannon to be a dispatcher at the Sheriff's office. On October 17, 2005, Shannon received a promotion to the position of Jail Deputy. The new position carried a one year probationary period that Shannon failed to satisfy. Consequently, appellee notified her that she would be removed and returned to her dispatcher position.

**{¶ 3}** Shannon filed a grievance pursuant to the CBA and the matter proceeded to arbitration. The initial issue was whether the case was actually arbitratable. The arbitrator concluded it was, and ultimately ruled in favor of Shannon and found that appellee violated the CBA when he removed her from the Jail Deputy position and placed her in the dispatcher position.

**{¶ 4}** Appellee commenced the instant action and requested that the arbitration award be vacated. Appellant responded with (1) a motion to dismiss the request as untimely, and (2) a request to affirm the award. The trial court's judgment found that

(1) appellee timely filed its motion to vacate the award, and (2) the arbitrator exceeded his authority by construing the CBA as allowing for arbitration of the dispute when the document's language excluded it under the circumstances present in this case. This appeal followed.

I

**{¶ 5}** Appellant asserts in its first assignment of error that the motion to vacate the arbitration award was untimely and the trial court erred by failing to dismiss it. We disagree.

**{¶ 6}** R.C. 2711.13 requires that a motion to vacate an arbitration award be filed no later than "three months after the award" is made. Here, the arbitrator made two separate awards in this case. The first, on February 14, 2007, determined that the matter was arbitrable. The second, on February 24, 2008, determined the merits of the arbitration. Appellant argues that to challenge the issue of arbitrability, appellee should have filed his motion to vacate within three months of the first award, rather than waiting until the entire case was completed (after the second award was issued).

**{¶ 7}** One difficulty is that R.C. chapter 2711 does not define the term "award." Our Tenth District colleagues recently considered this issue in reference to R.C. 2711.09 (confirmation of an arbitration award) and reasoned:

> "we turn to the question of whether the March 1, 2004 report was a final award. R.C. Chapter 2711 does not define what constitutes an award capable of being confirmed by the court of common pleas. However, R.C. 2711.10(D) authorizes a trial court to vacate an award where the arbitrator 'imperfectly execute[s]' his or her powers so 'that a mutual, final, and definite award * * * was not made.' By inference then, an award must be final in order to be subject to confirmation under R.C. 2711.09." (Emphasis added.)

The Twelfth District reached the same conclusion. See Reserve Recycling, Inc. v. East Hoogewerff, Inc., Cuyahoga App. No. 84673, 2005-Ohio-512, at ¶12.

**{¶ 8}** We find that reasoning persuasive and conclude that a party complies with R.C. 2711.13 if that party files a motion to vacate within three months of a "final" award. In the case sub judice, the February 14, 2007 award was not a "final" award as it did not resolve the merits of the arbitrable issue. Rather, the final award was issued on February 24, 2008, the arbitration award that actually decided the merits.

**{¶ 9}** We also point out that nothing in R.C. chapter 2711 suggests that the Ohio General Assembly intended to mandate piecemeal challenges in common pleas court to every single issue an arbitrator may decide. We believe that if the legislature intended for R.C. 2711.13 to allow for such a process, it would have written the statute to explicitly provide for that procedure. Moreover, to construe the word "award" to mean "final award" on all the issues also benefits (1) the parties who otherwise would be forced to wait an interminable time if every issue an arbitrator decides could be challenged in court, and (2) the courts will not need to devote scarce resources to piecemeal challenges but, rather, may consider all issues at once. This view weighs heavily in the interest of judicial economy.

**{¶ 10}** Appellant counters by citing Belmont Cty. Sheriff v. Fraternal Order of Police, Ohio Labor Council Inc., 104 Ohio St.3d 568, 820 N.E.2d 918, 2004-Ohio-7106, wherein the Fraternal Order of Police appealed a common pleas court decision to vacate an "interim award" made by an arbitrator finding that a dispute was arbitrable. Although we agree that the procedural posture of that case is somewhat curious, we are not persuaded that it is dispositive here. First, the precise issue in that case is how the question of how arbitrability was to be determined. Id. at the syllabus & ¶1.

Second, the Ohio Supreme Court's opinion does not address when a motion to vacate such an award must be filed. Indeed, R.C. 2711.13 is not mentioned in the opinion and nowhere does the Court endorse a piecemeal approach to challenging an arbitrator's decision in common pleas court. Finally, even though the Ohio Supreme Court allowed an "interim," interlocutory award to be appealed in Belmont Cty. Sheriff, we find nothing in that decision to suggest that an appeal could not also be filed from a "final" award as well. Thus, we see no conflict between our ruling and that case.

**{¶ 11}** For these reasons, we agree with the conclusion of the trial court that appellee timely filed the motion to vacate the arbitration award and hereby overrule appellant's first assignment of error.

II

**{¶ 12}** We jointly consider the three remaining assignments of error because they involve the merits of whether Shannon's probationary period removal is arbitrable. The arbitrator concluded that the matter is arbitrable. The trial court, however, viewed the matter differently. For the following reasons, we agree with the trial court's conclusion.

**{¶ 13}** To begin, as appellant correctly notes in its brief, the Ohio General Assembly has strictly limited the authority of a common pleas court to reject an arbitration award. Pursuant to R.C. 2711.10(D), common pleas courts may vacate an arbitration award only if "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made."

**{¶ 14}** In evaluating an arbitrator's decision, a reviewing court's role is limited to determining whether the award is unlawful, arbitrary, or capricious and whether it

"draws its essence" from the CBA. See Intl. Assn. of Firefighters, Local 67 v. City of Columbus, 95 Ohio St.3d 101, 102, 766 N.E.2d 139; Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc., 81 Ohio St.3d 269, 273, 690 N.E.2d 1262; Queen City Lodge No. 69, Fraternal Order of Police, Hamilton Cty., Ohio, Inc. v. Cincinnati (1992), 63 Ohio St.3d 403, 406, 588 N.E.2d 802. For an arbitration award to draw its essence from the CBA, there must be a rational nexus between the agreement and the award. Intl. Assn. of Firefighters, supra at 102. "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." Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emp. Assn., Local 11, AFSCME, AFL-CIO (1991), 59 Ohio St.3d 177, 572 N.E.2d 71, at the syllabus; also see Athens Cty. Commrs. V. Ohio Patrolmen's Benevolent Assn., Athens App. No. 06CA49, 2007-Ohio-6895, at ¶25.

**{¶ 15}** Despite this very restrictive standard of review, we conclude that in the case sub judice the trial court properly vacated the arbitration award. Article 8 of the CBA contains the grievance procedure. That article provides, inter alia, "[e]mployees may not appeal probationary removals through this grievance procedure." Id. at (D)(3)(I). Likewise, Article 9(K) of the CBA expressly states "[p]robationary removals . . . are not appealable." In the case sub judice, there is no question that Shannon had a probationary period for her new job, nor is there any question that she was removed during that probationary period from the new position and placed in her previous job as a dispatcher. Rather, the issue is whether those articles prohibited her from filing a grievance. The arbitrator ruled they did not because, after he reviewed Article 15 of

the CBA, he determined that these provisions apply only to "new hires" at the Sheriff's office, not existing employees promoted to new positions. The trial court, however, held that the arbitrator exceeded the scope of his authority by ignoring the unambiguous language of the contract and attempting to interpret those provisions when no interpretation was warranted.

**{¶ 16}** Our analysis begins with basic proposition that a CBA is a contract. See Carter v. Trotwood-Madison City Bd. of Edn., 181 Ohio App.3d 764, 910 N.E.2d 1088, 2009-Ohio-1769, at ¶4; Taylor Bldg. Corp. of America v. Benfeild, 117 Ohio St.3d 352, 884 N.E.2d 12, 2008-Ohio-938, at ¶50. Thus, the standard rules of interpreting contracts apply. See Taylor Bldg. Corp., supra at ¶37. When reviewing a contract, the objective is to carry out the intent of the parties. Jae Co. v. Heitmyer Bldrs., Inc., Franklin App. No. 08AP-1127, 2009-Ohio-2851, at ¶12; Waddell v. Frasure, Scioto App. No. 05CA3040, 2006-Ohio-6093, at ¶16. That intent is presumed to lie in the clear language in the contract. McLaughlin v. McLaughlin, 178 Ohio App.3d 419, 898 N.E.2d 79, 2008-Ohio-5284, at ¶16; Osbourne v. Ahern, Jackson App. No. 05CA9, 2005-Ohio-6517, at ¶17. When the words used in a contract are clear and unambiguous, courts need look no further than that language. Howard v. Howard, Pike App. No. 06CA755, 2007-Ohio-3940, at ¶14; Vorhees v. Jovingo, Athens App. Nos. 04CA16, 04CA17 & 04CA18, 2005-Ohio-4928, at ¶23.

**{¶ 17}** As the trial court in the instant case aptly noted, the CBA language is clear and unambigous. Articles 8(D)(3)(I) and 9(K) expressly exclude probationary removants from filing a grievance. We find nothing to contradict those provisions, nor do we find anything to expressly limit those provisions, to new hires rather than promoted employees. We also see nothing in Article 15 to restrict or contradict Articles

8(D)(3)(I) and 9(K).

**{¶ 18}** Appellant counters that the arbitrator is charged with authority to interpret the CBA terms as he thought best. Although we do not disagree with that view as an abstract proposition of law, limits do exist to the exercise of that authority. An arbitrator may not interpret a CBA in such a way as to contradict an agreement's express terms. Here, Articles 8(D)(3)(I) and 9(K) expressly state that grievances cannot be filed with regard to probationary removals. We do not believe that Article 15, on which the arbitrator seemed to rely, contradicts that position. We therefore agree with the trial court's conclusion that the determination of arbitrability is not supported by the clear, unambiguous language of the CBA and the trial court acted appropriately to refuse to confirm that award and to vacate it.

**{¶ 19}** Appellant also asserts that the trial court, in essence, "retried the case," undermined "the democratic process," and violated the Ohio policy to encourage arbitration. We believe, however, that the trial court's ruling, and our affirmance, supports the arbitration process by assuring that the actual agreement that the parties negotiated is enforced. Presumably, both sides were aware of, and both consented to, the CBA language. Each side has a contractual right to see that those terms are carried out. For these reasons, we hereby overrule appellant's second, third and fourth assignments of error.

**{¶ 20}** Having reviewed all of the errors assigned and argued in the briefs, and finding merit in none of them, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

**{¶ 21}** I agree that Article 8, "Grievance Procedures", and Article 9, "Discipline",

expressly declare that probationary removals are not subject to the grievance/appeal process of the CBA. See Article 8 (I) and Article 9 (K). These two articles do not make any distinction between "newly-hired" probationary employees and those who are serving a probationary period because of a promotion from a former position. However, Article 15, "Probationary Periods", treats new hires differently than promotional employees in at least one respect. Under Article 15 (A) new hires who are terminated during probation are not entitled to a pre-disciplinary hearing and "shall have no appeal over such removal". Article 15 (B) dealing with promotional employees indicates they are entitled to a return to their former position if they are terminated during probation. However, it is silent about their right to appeal their removal. Arguably, that silence in the presence of an express declaration in Article 15 (A) might create an ambiguity over promotional employees' rights to appeal if it were not for the language of Article 15 (C). That section, which starts out with the words "Any employee", indicates "probationary removals * * * are not grievable." Thus, I agree the CBA precludes arbitration of Ms. Shannon's probationary removal and return to her former position, notwithstanding the poorly-worded nature of the CBA in general and Article 15 specifically.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of

the Rules of Appellate Procedure.

Kline, P.J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs with Concurring Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.