[Cite as *State ex rel. Packard v. Coshocton Cty. Vocational School Dist. Bd. of Edn.*, 2004-Ohio-1324.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL. EVELYN PACKARD and EVELYN PACKARD

Relator-Appellant

-vs-

BOARD OF ED. OF THE COUNTY JT. VOCATIONAL SCHOOL DISTRICT

Respondent-Appellee

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 02 CA 22

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 01 CI 470
JUDGMENT:	Affirmed in part, reversed in part
DATE OF JUDGMENT ENTRY:	March 18, 2004

APPEARANCES:

For Relator-Appellant	For Respondent-Appellee
DENNIS L. PERGRAM MANOS, MARTIN, PERGRAM & DIETZ 100 Old West Wilson Bridge Road Suite 315 Columbus, Ohio 43085-2255	R. BRENT MINNEY PEPPLE & WAGGONER, LTD. Crown Centre Building 5005 Rockside Road, Suite 260 Cleveland, Ohio 44131-6808

Gwin, P.J.,

{¶1} Appellant Evelyn Packard appeals the decision of the Coshocton County Court of Common Pleas that denied her motion for partial summary judgment and dismissed her complaint for failure to state a claim upon which relief can be granted. Appellant also appeals the granting of the Board of Education of the Coshocton County Joint Vocational School District's ("Boards") motion for summary judgment. The following facts give rise to this appeal.

{¶2} The Board employed appellant under a one year teaching contract for the 1998-1999 school year. Prior to her employment by the Board, appellant had attained and continues to hold service retirement status with the State Teachers Retirement System. Appellant is also a member of the Coshocton County Career Center Educational Employees Association ("Association") and the bargaining unit represented by the Association. As a member of the Association, appellant was bound by the provisions of the collective bargaining unit represented by the Association and by the provisions of the collective bargaining agreements between the Board and the Association.

{¶3} The Board also re-employed appellant for the 1999-2000 school year under a one year limited teaching contract. However, on April 18, 2000, the Board, pursuant to the recommendation of the Superintendent, voted unanimously to non-renew appellant's one-year limited contract. On April 19, 2000, appellant received notice of the Board's decision by a hand-delivered letter.

{¶4} Thereafter, appellant filed several grievances against the Board claiming the Board violated various provisions of the collective bargaining agreement when it

decided not to renew her one year limited teaching contract. The Board denied appellant's grievances. The grievances were ultimately submitted to binding arbitration pursuant to the grievance procedure contained in the collective bargaining agreement.

{¶5} This matter proceeded to arbitration on November 9, 2000. At the arbitration, appellant requested that she be reinstated by the Board under a continuing contract, that she be awarded back pay and that she be awarded lost service credit. Appellant also maintained the non-renewal of her limited contract was not due to her lack of ability or low degree of professional competency or other good and just cause as required by the collective bargaining agreement.

{¶6} The arbitrator issued his decision sustaining the grievance. The arbitrator found the Board's evaluation of appellant did not meet the requirements set forth in the collective bargaining agreement because the review of the evaluation was not timely and did not provide appellant with an opportunity to improve her performance. Thus, the arbitrator ordered the Board to reinstate appellant under a limited contract for the remainder of the 2000-2001 school year and make her whole for all lost service credit. The arbitrator did not award appellant back pay.

{¶7} Pursuant to the arbitrator's decision, the Board reemployed appellant under a limited teaching contract for the remainder of the 2000-2001 school year and credited her with the appropriate sick leave and other lost service credit.

{¶8} During the spring of 2001, the Board and the Association began negotiations which resulted in a successor collective bargaining agreement that became effective July 1, 2001. This new collective bargaining agreement included Article 27 which governs the terms and conditions of employment of retired teachers.

{¶9} Thereafter, on June 27, 2001, under the first collective bargaining agreement, appellant again filed grievances against the Board demanding that she be employed under a continuing contract, be compensated based on the salary schedule and be provided with insurance benefits. The Board concluded appellant's grievances were not arbitratable because Article 27 of the collective bargaining agreement specifically deemed appellant ineligible for such demands and expressly stated that matters related to the employment of retired teachers were not grievable.

{¶10} Subsequently, on August 15, 2001, the Board issued appellant another one-year limited contract of employment for the 2001-2002 school year. On November 19, 2001, appellant filed a complaint in the Coshocton County Court of Common Pleas. In her complaint, appellant requested the Board to re-employ her under a continuing contract and allow her to advance on the salary schedule, award her insurance benefits, sick leave and back pay for the time period during which she was not employed by the Board.

{¶11} Appellant filed a motion for partial summary judgment on March 6, 2002. The Board filed a motion to dismiss and/or motion for summary judgment on March 27, 2002. In a judgment entry dated August 21, 2002, the trial court denied appellant's motion for summary judgment and granted the Board's motion to dismiss and motion for summary judgment.

{¶12} Appellant timely filed her notice of appeal and sets forth the following assignments of error for our consideration:

{¶13} "I. WITH RESPECT TO THE FIRST CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY

DISMISSING THIS CAUSE OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THIS CAUSE OF ACTION.

{¶14} "II. WITH RESPECT TO THE SECOND CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THIS CAUSE OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THIS CAUSE OF ACTION.

{¶15} "III. WITH RESPECT TO THE THIRD CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THIS CAUSE OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE SUMMARY JUDGMENT ON THIS CAUSE OF ACTION AND BY NOT GRANTING APPELLANT PARTIAL SUMMARY JUDGMENT.

{¶16} "IV. WITH RESPECT TO THE FOURTH CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THIS CAUSE OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH

RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THIS CAUSE OF ACTION.

{¶17} "V. WITH RESPECT TO THE FIFTH, SEVENTH AND NINTH CAUSES OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THOSE CAUSES OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THOSE CAUSES OF ACTION.

{¶18} "VI. WITH RESPECT TO THE SIXTH CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THIS CAUSE OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THIS CAUSE OF ACTION.

{¶19} "VII. WITH RESPECT TO THE EIGHT AND TENTH CAUSES OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THOSE CAUSES OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL

ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THOSE CAUSES OF ACTION.

{¶20} "VIII. WITH RESPECT TO THE ELEVENTH CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING THIS CAUSE OF ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND COMMITTED FURTHER PREJUDICIAL ERROR BY GRANTING APPELLEE, AND NOT APPELLANT, SUMMARY JUDGMENT ON THIS CAUSE OF ACTION."

"Standard of Review"

{¶21} Our review of the dismissal issue is a question of law. Therefore, we address this issue under a de novo standard of review. *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm. of Ohio*, 76 Ohio St.3d 521, 523, 1996-Ohio-298, citing *Indus. Energy Consumers of Ohio Power Co. v. Pub. Utilities Comm.* (1994), 68 Ohio St.3d 559, 563. In order to grant a motion to dismiss, in a civil case, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Cleveland Elec. Illuminating Co.* at 524, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

{¶22} It is based upon this standard that we review appellant's assignments of error.

II

{¶23} We will address Appellant's Second Assignment of Error first. Appellant's Second Assignment of Error concerns the second claim contained in her complaint. In

this claim, appellant argues she has a right to be made whole for lost service credit and back pay. We disagree.

{¶24} The record indicates the Board made appellant whole for her lost service credit as it pertains to the 2000-2001 school year. Appellant now claims that in order to be made whole, she is also entitled to back pay for her lost service time in order to be in full compliance with the arbitrator's award.

{¶25} We conclude appellant is not entitled to back pay for her lost service time. The arbitrator made no mention of back pay in his decision. Having failed to mention the issue of back pay in his decision, we conclude the arbitrator denied appellant's request for back pay. Thus, appellant's request for back pay seeks modification of the arbitrator's award, which we find is untimely under R.C. 2711.13.

I

{¶26} Appellant's First Assignment of Error concerns the first cause of action contained in her complaint. Appellant's first cause of action sought confirmation of the arbitrator's award pursuant to R.C. 2711.09. The trial court declined to confirm the arbitrator's award on the basis that it was not a request to confirm the arbitration award but, instead, a request to modify the arbitration award. Judgment Entry, Aug. 21, 2002, at 1.

{¶27} In light of our disposition of appellant's assignment of Error II finding that she was not entitled to an award for back pay relative to the 2000-2001 school year, and because all other aspects of the arbitrator's decision were complied with, we find any error in the trial court's failure to confirm the arbitration award to be harmless.

{¶28} Appellant's first assignment of error is overruled.

III, IV & VI

{¶29} Appellant's third, fourth and sixth assignments of error concern the third, fourth, and sixth causes of action in her complaint. These actions concern the breach of contract for the 2000-2001 school year, a request for a writ of mandamus and a request for declaratory judgment.

{¶30} Although the arbitrator's decision is based upon the procedural default's by appellee, appellant had requested both a continuing contract and back pay for the 2000-2001 school year. The arbitrator did not award either to appellant. Appellant did not file a motion to correct or modify the decision with the trial court. The effect of appellant's third, fourth and sixth assignments of error would be to modify his decision. Accordingly, we find the three-month statute of limitations contained in 2711.13 applies to these claims. Thus, the trial court properly dismissed appellant's causes of action.

{¶31} Appellant's third, fourth, and sixth assignments of error are overruled.

V, VII & VIII

{¶32} Appellant's fifth and seventh assignments of error concern her right to a continuing contract beginning in the 2001-2002 school year, her placement on the appropriate salary schedule and her eligibility for insurance benefits. Appellant's eighth assignment of concerns the effect of Article 27 of the Collective Bargaining Agreement that became effective July 1, 2001. For the following reasons, we sustain these assignments of error in part and overrule them in part.

{¶33} Article 17, Section I (C) of the collective bargaining contract in effect on June 27, 2001 states:

{¶34} "Regular limited contract shall be offered in the following manner:

… C. The third contract issued by the Board shall be for one or two years. A staff member coming to the Career Center after having attained continuing contract status elsewhere and having served two years at the Career Center is eligible for a continuing contract." (Exhibit 1 attached to appellant's complaint, filed November 19, 2001). The parties agree that appellant was eligible for a continuing contract.

{¶35} Article 12, Section II (B) of the original Collective Bargaining Agreement provides, in relevant part "… Should the Board decide to non-renew the contract of that teacher [serving under a limited contract], he/she will be notified in writing by April 30th." There is no dispute that the Board did not notify appellant that it was not renewing her contract by April 30, 2001.

{¶36} The final paragraph of the limited contract entered into by appellant and the Board on April 18, 2001 states: "Sec. 3319.12 Each board of education shall cause notice to be given annually not later than July 1 to each teacher who holds a contract valid for the succeeding year, as to the salary to be paid such teacher closing such year. Provisions of Section 3319.11, as to expiration, apply to all limited contracts." (Exhibit 4, attached to plaintiff's complaint, filed November 19, 2001).

{¶37} R.C. 3319.11 (D) provides:

{¶38} "(D) A teacher eligible for continuing contract status employed under an extended limited contract pursuant to division (B) or (C) of this section, is, at the expiration of such extended limited contract, deemed reemployed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless evaluation procedures have been complied with pursuant to division (A) of section 3319.11 of the Revised Code and the employing board, acting on the superintendent's

recommendation that the teacher not be reemployed, gives the teacher written notice on or before the thirtieth day of April of its intention not to reemploy such teacher. A teacher who does not have evaluation procedures applied in compliance with division (A) of section 3319.111 of the Revised Code or who does not receive notice on or before the thirtieth day of April of the intention of the board not to reemploy such teacher is presumed to have accepted employment under a continuing contract unless such teacher notified the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

{¶39} Any teacher receiving a written notice of the intention of a board not to re-employ such teacher pursuant to this division is entitled to the hearing provisions of division (G) of this section."

{¶40} Thus "[a] teacher employed under a limited contract shall automatically be deemed re-employed for the ensuing school year, absent timely receipt of notice of the action of the board of education of its intention not to reemploy him." *State ex rel. Peake v. Board of Education* (1975), 44 Ohio St. 2d 119, syllabus; *State v. Westerville City Board of Education* (1983), 4 Ohio St. 3d 206, 207. Because appellant was eligible for continuing service states pursuant to 3319.11, and because the Board failed to give appellant notice of non-renewal, appellant was automatically deemed re-employed for the 2001-2002 school year under a continuing contract. *State ex rel. Peake v. Board of Education, supra,* 44 Ohio St. 2d at syllabus; *State ex rel. Hura v. Board of Education Brookfield Local School District* (1977), 51 Ohio St. 2d 19, 21; *State ex rel Gandy v. Board of Education* (1971), 26 Ohio St. 2d 115.

{¶41} The question now becomes what effect, if any, does Article 27 of the Collective Bargaining Agreement that became effective July 1, 2001 have on appellant's status.

{¶42} It should first be noted that Article 27 does not expressly state that it is to apply retroactively.

{¶43} Article II, Section 28 of the Ohio Constitution prohibits retroactive laws. Using statutory construction as a guide, it has also been settled that the ban against retroactive legislation " 'include[s] a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws.' " *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 104-05. (citations omitted). Section 1.48 of the Ohio Revised Code requires the legislature, or rule making body to expressly state its intent in the body of the statute or rule that it is to apply to pending cases. Section 1.58 of the Ohio Revised Code preserves the rights accorded under a statute prior to its reenactment, amendment or repeal. In construing the predecessor to Section 1.58, the Ohio Supreme Court emphatically emphasized that the legislature must clearly express its intent that an amendment to a statute was to apply to pending cases. *Kelly v. State ex rel. Gellner* (1916), 94 Ohio St. 331, 338-339.

{¶44} As previously discussed, appellant was deemed re-employed under a continuing contract prior to the July 1, 2001 effective date of Article 27. As the Article does not expressly state it is to apply retroactively it cannot apply to appellant's status.

{¶45} A second problem exists with respect to Article 27 and the appellant. "Ohio's teacher tenure law provides teachers under continuing contracts with

expectation of continued employment. When that expectation is interfered with, minimal due process rights must be given." *Dorian v. Board of Education* (1980), 62 Ohio St. 23d 182, 185-86. (per curiam); See, also *Board of Regents v. Roth* (1972), 408 U.S. 564; *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532.

{¶46} A continuing contract held by a teacher cannot be invalidated by the board of education unless the provisions of R.C. 3319.16 are followed. *Phillips v. South Range Local S.D.* (1989), 45 Ohio St. 3d 66, 67; *State ex rel., Van Ausdale* (1949), 88 Ohio App. 175, 181.

{¶47} In the case at bar, to apply Article 27 would have the effect of divesting appellant of her continuing contract in contravention of R.C. 3319.16 and without due process of law. Article 27 purports to deny any grievance mechanism or court challenge. Thus appellant cannot avail herself of the due process protection afforded under R.C. 3319.16. The board of education would be permitted to invalidate a continuing contract without following the statutory procedures, and without due process of law.

{¶48} Based upon the foregoing, the trial court erred in granting appellee's motion to dismiss with respect to the fifth and eleventh causes of action. The trial court further erred in not granting appellant's motion for partial summary judgment on appellant's fifth and eleventh causes of action.

{¶49} Appellant's seventh, eighth, ninth, and tenth causes of action are not ripe for adjudication based upon the disposition that appellant is entitled to a continuing

contract for the 2001-2002 school year and the invalidity of Article 27 of the Collective Bargaining Agreement effective July 1, 2001 to appellant's case.

{¶50} For the foregoing reasons, the judgment of the Court of Common Pleas, Coshocton, County, Ohio, is hereby affirmed in part and reversed in part.

By: Gwin, P. J

Wise, J., and

Edwards, J., concur.