[Cite as *Dryden v. New Philadelphia Civ. Serv. Comm.*, 2005-Ohio-3919.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WALTER E. DRYDEN, RYAN F. MURPHY AND BRANDON WINNIE	:	JUDGES:
	:	Hon. John F. Boggins, P.J.
	:	Hon. Sheila G. Farmer, J.
Appellees	:	Hon. John W. Wise, J.
	:	
vs.	:	
	:	
NEW PHILADELPHIA CIVIL SERVICE COMMISSION	:	Case No. 2005AP020019
	:	
	:	
Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2005AA0100006
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 25, 2005

APPEARANCES:

For Appellant	For Appellees
ROBERT J. TSCHOLL 220 Market Avenue, South Suite 1120 Canton, OH 44702	DENNIS HAINES BARRY LAINE 16 Wick Avenue Suite 400 P.O. Box 849 Youngstown, OH 44501

Farmer, J.

{¶1} The City of New Philadelphia and the International Association of Firefighters, Local 1501 are parties to a collective bargaining agreement which covers the terms and conditions of employment for firefighters. Appellees, Walter Dryden, Ryan Murphy and Brandon Winnie, are union members covered under the agreement.

{¶2} On December 7, 2004, the City of New Philadelphia notified appellees they were laid off effective January 1, 2005. Appellees attempted to appeal the layoff to appellant, the New Philadelphia Civil Service Commission. By letter dated December 22, 2004, appellant notified the union it lacked jurisdiction to hear the appeal.

{¶3} On January 4, 2005, appellees filed an administrative appeal with the Court of Common Pleas for Tuscarawas County. Appellant filed a motion to dismiss for lack of jurisdiction on January 14, 2005.

{¶4} A hearing was held on February 7, 2005. By judgment entry filed February 14, 2005, the trial court found appellant had jurisdiction to entertain the appeal and remanded the matter to appellant for hearing.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶6} "THE COMMON PLEAS COURT'S DECISION THAT THE CIVIL SERVICE COMMISSION HAD JURISDICTION TO HEAR THE APPEAL WAS IN ERROR."

I

{¶7} Appellant claims the trial court erred in finding it had jurisdiction to hear appellees' appeal. We disagree.

{¶8} The issue presented is whether the Collective Bargaining Agreement used language "with such specificity as to explicitly demonstrate that the intent of the parties was to preempt statutory rights." *State ex rel. Ohio Association of Public School Employees/AFSCME Local 4, AFL-CIO v. Batavia Local School Dist. Bd. of Edn.,* 89 Ohio St.3d 191, syllabus, 2000-Ohio-130.

{¶9} In the support of this appeal, appellant argues the agreement contains specific references to layoffs and personal reduction as follows:

{¶10} "ARTICLE 12 - PERSONNEL REDUCTION

{¶11} "Section 1 - In the event of a personnel reduction, the Employee with the least seniority shall be laid off first. Employees shall be recalled in the order of seniority.

{¶12} "Section 2 - No new Employee shall be hired until all laid-off Employees have been given ample opportunity to return to work. Ample time shall be defined as two (2) weeks from the time of receipt of written recall notification. Laid-off Employees shall supply the Employer with their current address and phone number. Any recall notice will be sent via registered mail to the Employee's last known address."

{¶13} Because Article 23 of the agreement provides for final and binding arbitration, appellant argues it lacked jurisdiction to hear appellees' appeal pursuant to R.C. 4117.10 which states the following in pertinent part:

{¶14} "(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. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure."

{¶15} In support of appellant's theory, we are cited to our opinion in *Middleton v. State of Ohio ex rel. Davies,* Stark App. No. 2001CA00366, 2002-Ohio-3481, wherein this court found at ¶48, "the trial court lacked jurisdiction to interpret the Collective Bargaining Agreement prior to completion of this necessary predicate of the arbitration process." However, we do not find *Middleton* to be on all fours with the case sub judice. In *Middleton,* this court found the collective bargaining agreement at issue preempted the governing statutes regarding the interpretation of the term "vacancy" and whether the city was mandated to fill a vacancy. We concluded the interpretation of the contract was within the specific language of the collective bargaining agreement. In so deciding, we did not depart from the dictates of *Batavia,* but specifically followed it.

{¶16} Our scope is to determine if the agreement sub judice specifically excludes the right of appellees to appeal under R.C. 124.32, et seq. As the Supreme Court of Ohio did in *Batavia,* we must determine if any specific statutory right in R.C. 124.32, et seq. is omitted from the agreement.

{¶17} R.C. 124.324 and R.C. 124.328 specifically provide for statutory rights of an employee to displace another employer in a layoff situation. The agreement sub judice does not. R.C. 124.321 requires the appointing authority to fiscally justify a

layoff. The agreement under Article 7, Sections 1 and 2 does not. Therefore, at a minimum, two statutory rights are excluded or omitted from this agreement and the preemption of R.C. 4117.10 has no effect.

{¶18} Upon review, we find the trial court was correct in finding appellant had jurisdiction to hear the appeal.

{¶19} The sole assignment of error is denied.

{¶20} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, J.

Boggins, P.J. and

Wise, J. concur.

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JUDGES

SGF/jp 0707

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IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

WALTER E. DRYDEN, RYAN F. MURPHY AND BRANDON WINNIE	:	
Appellees	:	JUDGMENT ENTRY
vs.	:	
NEW PHILADELPHIA CIVIL SERVICE COMMISSION	:	
Appellant	:	CASE NO. 2005AP020019

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is affirmed.

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JUDGES