[Cite as *Univ. of Toledo Chapter, Am. Assn. of Univ. Professors v. Univ. of Toledo Bd. of Trustees*, 2012-Ohio-3618.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

University of Toledo Chapter, American Association of University Professors

Appellant/Cross-Appellee

v.

The University of Toledo Board of Trustees

Appellee/Cross-Appellant

Court of Appeals No. L-11-1222

Trial Court No. CI0201004496

DECISION AND JUDGMENT

Decided: August 10, 2012

* * * * *

Marilyn L. Widman, Amy L. Zawacki, and Elijah D. Baccus, for appellant/cross-appellee.

R. Scot Harvey, for appellee/cross-appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant/cross-appellee bargaining agent appeals a judgment of the Lucas County Court of Common Pleas affirming an arbitrator's decision that purported contractual workload violations by a university employer are beyond his authority to

arbitrate as a matter of law and denying both parties' petitions for a declaratory judgment. Because we conclude that consideration of the application of R.C. 3345.45 is a jurisdictional threshold issue that may be considered in a declaratory judgment action, we reverse.

{¶ 2} Appellant/cross-appellee ("appellant") is the University of Toledo Chapter of the American Association of University Professors, the collective bargaining agent for full-time tenure track and tenured faculty at the University of Toledo. Appellee/cross-appellant is the University of Toledo Board of Trustees, the governing body of this state university.

{¶ 3} Appellant and appellee are parties to a 2008 collective bargaining agreement which, inter alia, contains a provision governing faculty workload. In January 2009, the university provost promulgated "research active policies" for the 2009-2010 academic year. Appellant believed the policies set by the provost violated the faculty workload provisions contained in the collective bargaining agreement and initiated a grievance in each college in which the policies had been adopted. The grievances went to arbitration in November 2009.

{¶ 4} On March 12, 2010, the arbitrator found that he was without jurisdiction to hear faculty workload grievances because his jurisdiction was limited to the terms of the collective bargaining agreement which contained an express provision that an arbitrator could not render a decision that would be in violation of a statute. According to the arbitrator, because R.C. 3345.45 provides that state university faculty workloads are not a

subject for collective bargaining, he was without jurisdiction to arbitrate a contractual dispute on that issue.

{¶ 5} On June 10, 2010, appellant applied to the common pleas court to vacate the arbitrator's decision and concurrently filed a complaint for a declaratory judgment seeking the court's construction of R.C. 3345.45 in this circumstance. Appellant asked the court to reject the arbitrator's interpretation of the statute.

{¶ 6} Appellee subsequently filed an application to confirm the arbitrator's decision, an answer to appellant's declaratory judgment complaint and a counterclaim for declaratory judgment. Appellee asked the court to confirm the arbitrator's interpretation of the statute.

{¶ 7} The common pleas court found that the arbitrator acted within his authority in concluding that he was without authority to act and affirmed the arbitrator's decision. The court refused to consider the parties' complaints for declaratory judgment, deeming them "inappropriate" as R.C. Chapter 2711 is the exclusive remedy for appealing arbitration awards.

{¶ 8} From this judgment, appellant appealed and appellee cross-appealed. Appellant sets forth a single assignment of error:

> The trial court erred by refusing to consider the Appellant's/Cross-Appellee's declaratory judgment action.

{¶ 9} Appellee also sets forth a single assignment of error:

> The trial court erred to the prejudice of defendant-appellee/cross-appellant, The University of Toledo Board of Trustees, by failing to consider its claim for declaratory judgment premised on O.R.C. Chapter 2721 and by dismissing that claim for the reason that defendant-appellee/cross-appellant has also sought confirmation of an arbitration award pursuant to O.R.C. Chapter 2711.

{¶ 10} While not unique, it is certainly unusual for both parties to an appeal to seek the same remedy. Both appellant and appellee seek a declaration of the effect of R.C. 3345.45 on the ability to arbitrate faculty workload policies that have been incorporated into a collective bargaining agreement. True, the parties seek different outcomes, but at this point both complain that the trial court erred in concluding that a statutory application to vacate or modify an arbitration award forecloses a declaratory judgment action.

{¶ 11} Enacted in 1993, R.C. 3345.45 provides:

> On or before January 1, 1994, the Ohio board of regents jointly with all state universities * * * shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for

institutions to determine a range of acceptable undergraduate teaching by faculty.

On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section are not appropriate subjects for collective bargaining. Notwithstanding division (A) of section 4117.10 of the Revised Code, any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees.

{¶ 12} On June 8, 1994, the university trustees adopted a resolution declaring that, in satisfaction of R.C. 3345.45, the bargained for faculty workload policy contained in the collective bargaining agreement was consistent with the standard adopted by the board of regents. Substantively similar provisions were inserted into subsequent collective bargaining agreements, including the contract for 2008 through 2010.

{¶ 13} Appellants maintained that the 2009 provost's policy violated this provision and sought arbitration. The arbitrator, citing a contract provision that prohibits the rendering of a decision that violates state law, concluded that he was without jurisdiction by virtue of R.C. 3345.45.

{¶ 14} While the arbitrator began with the application of the statute, the common pleas court began with the deference owed an arbitration award on an application for confirming such an award. The court quotes at length our decision in *Eastwood Local School Dist. Bd. of Edn. v. Eastwood Edn. Assn.*, 172 Ohio App.3d 423, 2007-Ohio-3563, 875 N.E.2d 139 (6th Dist.).

{¶ 15} In *Eastwood*, we noted that at common law courts almost uniformly refused to vacate an arbitrator's award because of an error of law or of fact. *Id.* at ¶ 19. We continued, however, observing that:

> A more recent formulation of the strictures of judicial review of an arbitration award posits that, absent fraud, corruption or specific types of misconduct, the presumption of validity inherent in the award limits "* * * a reviewing court's inquiry [to] whether the arbitrator exceeded his authority * * *." [*Findlay Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 551 N.E.2d 186 (1990)] at paragraph one of the syllabus. "Once it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award * * * is at an end." Id. at paragraph two of the syllabus. "An arbitrator's 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." [*Mahoning Cty. Bd. of*

Mental Retardation v. Mahoning Cty. TMR Edn. Assn., 22 Ohio St.3d 80, 82, 488 N.E.2d 872 (1986)] at paragraph one of the syllabus. *Id.* at ¶ 20.

{¶ 16} The notion that an arbitration award might be overturned as contrary to law, with certain enumerated exceptions, was found to be superseded by statute in *Cincinnati v. Ohio Council 8, American Fed. of State, Cty. and Mun. Emp.*, 61 Ohio St.3d 658, 661-662, 576 N.E.2d 745 (1991). There the court held that, except for the specific provisions the legislature named in R.C. 4117.10(A), the provisions of a collective bargaining agreement between a public employer and public employees prevailed over conflicting state and local laws. *Id.* at 662. The expressly excepted provisions included laws pertaining to civil rights, affirmative action, unemployment compensation, workers compensation, retirement, educational requirements and the like. Applying the rules of statutory construction, the court reasoned that any laws not mentioned in the statute, could not preempt collective bargaining agreement provisions. *Id.*

{¶ 17} R.C. 3345.45 was enacted after *Cincinnati* and the legislature is presumed to be aware of prior judicial interpretation of existing statutes. *Doe v. White*, 97 Ohio App.3d 585, 591, 647 N.E.2d 198 (2d Dist.1994), citing *Cty. Bd. of Edn. v. Howard*, 167 Ohio St. 93, 146 N.E.2d 604 (1957). Moreover, R.C. 3345.45 is a special provision that prevails over the general, R.C. 1.51, and the statute expressly states the intent of the legislature that the provision takes precedence over R.C. 4117.10(A). From this, we conclude that the legislature intended R.C. 3345.45 to be an addition to the list of R.C.

4117.10 exceptions that may be overturned as contrary to law. The application of R.C. 3345.45, consequently, is reviewable by the common pleas court as a matter of law.

{¶ 18} As to whether a declaratory judgment action is an appropriate vehicle to determine the applicability of R.C. 3345.45, R.C. 2721.03 provides that when an individual's rights or legal relations are affected by a law, that party may have the construction or validity of such law declared by a court of record. *Pack v. Cleveland*, 1 Ohio St.3d 129, 438 N.E.2d 434 (1982), paragraph one of the syllabus. Construction of a statute is consequently a proper subject for a declaratory judgment.

{¶ 19} The common pleas court nonetheless rejected declaratory judgment for this case. Relying on *City of Galion v. Am. Fed. of State, Cty. and Mun. Emp.*, 71 Ohio St.3d 620, 646 N.E.2d 813 (1995), the court concluded consideration of R.C. 3345.45 would impinge on the exclusivity of R.C. Chapter 2711 as a remedy in reviewing arbitration awards.

{¶ 20} In *Galion* a city worker was fired after he was convicted of a felony. The employee grieved his termination and the matter proceeded to binding arbitration. The arbitrator sustained the employee's grievance, finding that he was entitled to reinstatement without back pay after completing court imposed probation.

{¶ 21} When the employee completed probation two years later, he sought reinstatement. The city refused reinstatement and instituted a declaratory judgment action, asking the court to construe the employment contract. *City of Galion v. Am. Fed. of State, Cty. and Mun. Emp.*, 3d Dist. No. 3-93-9, 1993 WL 394454 (Oct. 7, 1993). The

city later amended its complaint to include a motion to vacate or modify the arbitration award.

{¶ 22} The employee moved to dismiss for want of jurisdiction and counterclaimed with a request that the court issue a mandamus ordering the city to reinstate him and to confirm the arbitration award, if the court had jurisdiction. The court overruled the employee's motions and granted the city's motion for summary judgment. The common pleas court concluded that a declaratory judgment action was appropriate. *City of Galion*, 71 Ohio St.3d at 621.

{¶ 23} The appeals court found that the common pleas court lacked subject matter jurisdiction to consider the motion to vacate the arbitration award because the city failed to challenge the award within the time provided in R.C. 2711.13. Moreover, "the complaint for declaratory judgment did not set forth a cause of action based upon the bargaining agreement, but was grounded in R.C. 2711.10, and, thus, it too was filed untimely." *Id.* The appeals court certified a conflict to the Supreme Court of Ohio on the issue of whether R.C. 2711.13 is a statute of limitations. *Id.*

{¶ 24} The Supreme Court reviewed the certified question and the underlying question of "whether a party, when challenging an arbitration award, has the option of bringing an action for declaratory judgment as an alternative to the statutory remedy contained in R.C. Chapter 2711." *Id.* The court affirmed the court of appeals on the mandatory nature of the time period for challenging an arbitration award contained in R.C. 2711.13, *id.* at 622, and held that:

> R.C. Chapter 2711 provides the exclusive statutory remedy which parties must use in appealing arbitration awards to the courts of common pleas. An action in declaratory judgment cannot be maintained to circumvent the clear legislative intent of R.C. Chapter 2711. *Id*. at paragraph two of the syllabus.

{¶ 25} *City of Galion* is distinguishable from the present matter. Here there is no question of timeliness and the declaratory judgment action is not being used as a substitute for a request to vacate or modify an arbitration award. Indeed, there was no award, as such, but an arbitrator's determination that, as a matter of law, R.C. 3345.45 precluded arbitration. To hold that no review of this determination of any type may be had would deny an aggrieved party of any remedy.

{¶ 26} The application of R.C. 3345.45 to a collective bargaining agreement is a threshold issue that must be determined antecedent to the arbitration. A declaratory judgment is a method designed to determine the construction or validity of a statute, rule or ordinance. R.C. 2721.03. The failure to permit such consideration constitutes error. Accordingly, both appellant's and appellee's assignments of error are well-taken.

{¶ 27} Appellee invites us to construe the statute ourselves, if we decide such analysis is proper. This is an invitation we must decline, preferring that the issue be first heard by the common pleas court and a full record developed.

{¶ 28} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for proceedings on the

parties' cross-motions for construction of R.C. 3345.45. It is ordered that the costs of this appeal be divided equally by the parties pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE