[Cite as *Akron v. Akron Firefighters Assn.*, 2015-Ohio-994.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CITY OF AKRON	C.A. No. 27119
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
AKRON FIREFIGHTERS ASSOCIATION	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2012 08 4617

DECISION AND JOURNAL ENTRY

Dated: March 18, 2015

MOORE, Judge.

{¶1} Appellant, the City of Akron, appeals an order that confirmed an arbitration award of back pay to firefighter Timothy Semelsberger. This Court affirms.

I.

{¶2} In 2006, the Ohio Legislature enacted R.C. 9.481, which prohibits political subdivisions in the State of Ohio from establishing residency requirements. The statute became effective May 1, 2006. Because many municipalities required employees to reside within their borders at that time, numerous court challenges to the statute soon followed. In 2009, the Ohio Supreme Court upheld R.C. 9.481, effectively eliminating residency requirements for charter and non-charter municipalities throughout the state. *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597. The City of Akron was a party to the companion case heard by the Ohio Supreme Court.

{¶3} Almost six months after the effective date of R.C. 9.481, the City of Akron terminated the employment of firefighter Timothy Semelsberger for a violation of the residency

requirement within the City's Charter. Shortly thereafter, the City reinstated his employment subject to a last chance agreement that provided, in part:

> D. Mr. Timothy Semelsberger agrees that, by signing this Agreement, he acknowledges the fact that as a City employee, he is required to establish residence in the City of Akron and maintain residency during his employment with the City as provided for in Akron City Charter, Section 106(5b).
>
> E. Mr. Semelsberger is hereby warned that if he violates the provisions of Akron City Charter, Section 106(5b), he will be subject to discharge.

In 2008, the Akron Fire Department ordered another investigation into Mr. Semelsberger's residency, determined that he did not have a permanent residence within the City of Akron, and terminated his employment. Semelsberger grieved the termination unsuccessfully, and the Akron Firefighters Association advanced the grievance to arbitration on his behalf. After the Ohio Supreme Court upheld R.C. 9.481 – effectively invalidating Akron City Charter Section 106(5b) – the City offered to reinstate Mr. Semelsberger, but without any back pay. Mr. Semelsberger and the Union rejected the offer, and the arbitration proceeded.

{¶4} Although the initial filings with the arbitrator are not part of the record, it appears that the parties agreed that the arbitration would proceed in two stages: a hearing regarding whether the City terminated Mr. Semelsberger's employment without just cause and, if the arbitrator determined that to be the case, a later hearing on the extent to which Mr. Semelsberger was entitled to back pay. The arbitrator heard evidence about the termination in October 2011 and issued an award on January 30, 2012, finding that the City terminated Mr. Semelsberger without just cause and ordering the City "to reinstate the Grievant to his former position with all rights and privileges, which shall include no break in seniority" and to "make the Grievant whole for all loss of earnings." On May 17, 2012, after a second hearing, the arbitrator awarded Mr. Semelsberger $251,421.01 in back pay and ordered the City to "make the matching 25%

contribution to the Grievant's pension." The arbitrator declined to award interest and noted that the award reflected the fact that "[t]here is no doubt the Grievant would be entitled to more damages had the [Grievant] provided better documentation and corroborating evidence."

{¶5} The City filed an application to vacate or modify the back pay award. In a second action, the Union filed an application to confirm the reinstatement award and a request for the trial court to enter judgment awarding Semelsberger "pay, benefits, longevity payments, vacation, and the benefit of a retroactive pay raise for the weeks between the Arbitration Award of 1-30-2012 and 6-10-2012." The trial court consolidated the cases and issued a single decision in which it construed each of the parties' filings as pertaining to both arbitration awards, rejected the City's arguments in support of its motion to vacate or modify the back pay award, and confirmed the awards. The City has appealed.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING THE CITY OF AKRON'S MOTION/APPLICATION TO VACATE, MODIFY, OR CORRECT [THE] ARBITRATOR'S AWARD.

{¶6} The City's assignment of error argues that the trial court erred by (1) denying its application to modify or correct the arbitrator's award because the award contained a material miscalculation of figures and, as a result, did not render a final and definite award on the question presented; (2) by denying its application to vacate the award because the arbitrator exceeded or imperfectly executed his powers; and (3) by denying its application to vacate the award as against public policy. We disagree in each respect.

{¶7} Ohio's public policy strongly favors arbitration, as expressed in the Ohio Arbitration Act codified in R.C. Chapter 2711. *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d

411, 2011-Ohio-5262, ¶ 18. Consistent with this policy, R.C. Chapter 2711 limits the jurisdiction of trial courts once arbitration has been conducted. *See State ex rel. R.W. Sidley, Inc. v. Crawford*, 100 Ohio St.3d 113, 2003-Ohio-5101, ¶ 22. "An arbitration award may be challenged only through the procedure set forth in R.C. 2711.13 and on the grounds enumerated in R.C. 2711.10 and 2711.11. 'The jurisdiction of the courts to review arbitration awards is thus statutorily restricted; it is narrow and it is limited.'" *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, ¶ 10, quoting *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 173 (1985). In applying R.C. Chapter 2711, Ohio courts defer to arbitration awards and presume their validity. *Lauro v. Twinsburg*, 9th Dist. Summit No. 23711, 2007-Ohio-6613, ¶ 5. "When parties agree to binding arbitration, they agree to accept the result and may not relitigate the facts as found by the arbitrator." *Id.*, citing *Gingrich v. Wooster*, 9th Dist. Wayne No. 00CA0032, 2001 WL 22256, *5 (Jan. 10, 2001).

R.C. 2711.11

{¶8} A party to arbitration may apply for an order confirming an arbitration award and, unless the trial court grants a motion to vacate, modify, or correct the award, the trial court must confirm the award and enter judgment. R.C. 2711.09. R.C. 2711.11 provides that a court of common pleas may modify or correct an arbitration award "so as to effect the intent thereof and promote justice between the parties" in only three circumstances: (1) an evident material miscalculation of figures or mistake in the description of an item in the award; (2) an award upon a matter not submitted to the arbitrator that affects the merits of the decision upon the matter submitted; and (3) an imperfection in the form of an award that does not affect the merits of the controversy.

{¶9} A trial court's authority to modify an arbitration award because of material miscalculation or mistake extends only to errors apparent from the face of the award. *Arrow Uniform Rental, L.P. v. K & D Group, Inc.*, 11th Dist. Lake No. 2010-L-152, 2011-Ohio-6203, ¶ 51. A trial court may not review the evidence and reconsider the merits underlying the award:

> [A]ny error must appear on the face of the arbitration award, and * * * reviewing courts may not review the evidence to determine whether an arbitration award is against the manifest weight of the evidence. * * * [T]he type of errors in an arbitration award that warrant correction by a trial court are those that appear on the face of the award and are of a nature that can be corrected without the use of factfinding, discretion, or judgment on the part of the trial court.

Robert W. Setterlin & Sons v. North Market Development Authority, Inc., 10th Dist. Franklin No. 99AP-141, 1999 WL 1267340, *3 (Dec. 30, 1999), citing *Rathweg Ins. Assoc., Inc. v. First Ins. Agency Corp.*, 2d Dist. Montgomery No. 13184, 1992 WL 206764 (Aug. 18, 1992). The trial court's authority to correct and modify an arbitration award because of material miscalculation or mistake does not extend to the methodology chosen by the arbitrator, even if one party disagrees with that choice. *Arrow Uniform Rental* at ¶ 51. Consequently, when a party challenges the calculations present in an arbitration award because they disagree with the arbitrator's analysis or method, the trial court does not have the authority to modify the award. *Id.*

{¶10} When this Court reviews an order granting or denying a motion to modify an award under R.C. 2711.11, the scope of our analysis is necessarily narrow. With the understanding that the trial court itself cannot review the merits of an arbitration award, this Court reviews only the face of the trial court's order to determine whether it erred as a matter of law. *Lauro*, 2007-Ohio-6613, at ¶ 6-7. "The original arbitration proceedings are not reviewable." *Lockhart v. American Reserve Ins. Co.*, 2 Ohio App.3d 99, 101 (8th Dist.1981).

{¶11} In this case, the City has argued that the trial court erred by failing to modify the arbitration award due to a material miscalculation. Specifically, the City maintains that the back pay award was contrary to the evidence because the arbitrator wrongly evaluated an exhibit and, in the City's judgment, awarded more than was warranted based on the evidence. Neither of these arguments relate to a miscalculation evident from the face of the award. To the contrary, these arguments invited the trial court to reexamine the merits of the arbitration award by reviewing and evaluating the evidence presented to the arbitrator. To do so, however, is beyond the scope of a trial court's authority under R.C. 2711.11. *Arrow Uniform Rental* at ¶ 51; *Robert W. Setterlin & Sons* at *3. The trial court did not err in rejecting this argument.

{¶12} Finally, the City has argued that the trial court erred by failing to correct the award in order to reduce the amount of back pay that, in its opinion, is attributable to the Union's delay. The City has not identified any portion of R.C. 2711.11 under which the trial court was authorized to revisit the merits of the arbitration and modify the award on this basis. This issue was argued by the parties during the arbitration proceedings and considered by the arbitrator when he rendered his award. Had the trial court granted the City's motion in this respect, it would have in effect relitigated the matter submitted to the arbitrator on its merits. This is territory into which the trial court was not authorized to go. *See Miller*, 2002-Ohio-4932, at ¶ 10. The City and the Union agreed to binding arbitration as a dispute resolution mechanism when it agreed to the collective bargaining agreement. In doing so, "they agree[d] to accept the result and may not relitigate the facts as found by the arbitrator." *See Lauro* at ¶ 5.

R.C. 2711.10(D)

{¶13} The City's second argument is that the trial court erred by denying its motion to vacate the award under R.C. 2711.10(D), which provides that an award may be vacated if "[t]he

arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the matter submitted to them was not made." "[T]he statutory authority of courts to vacate an arbitrator's award is extremely limited." *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, ¶ 5. Consequently, reviewing courts are limited in their role to a determination of whether an award draws its essence from the relevant contract or whether the award is unlawful, arbitrary, or capricious. *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland*, 99 Ohio St.3d 476, 479 (2003), citing *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129 (1990), paragraph two of the syllabus. "So long as there is a good-faith argument that an arbitrator's award is authorized by the contract that provides the arbitrator's authority, the award is within the arbitrator's power, but an award 'departs from the essence of a [contract] 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.'" *Cedar Fair*, 2014-Ohio-3943, at ¶ 7, quoting *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL–CIO*, 59 Ohio St.3d 177 (1991), syllabus.

{¶14} Reviewing courts cannot review claims of factual or legal error with respect to the exercise of an arbitrator's powers. *Martin's Ferry City School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emps.*, 7th Dist. Belmont No. 12 BE 15, 2013-Ohio-2954, ¶ 18. "Once it is determined that the arbitrator's award draws its essence from the [agreement] and is not unlawful, arbitrary, or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end." *Board of Educ. of the Findlay City School Dist. v. Findlay Educ. Assn.*, 49 Ohio St.3d 129 (1990), paragraph two of the syllabus

(superseded by statute on other grounds as noted in *Cincinnati v. Ohio Council 8, American Fedn. Of State, Cty. & Mun. Emp., AFL-CIO*, 61 Ohio St.3d 658, 662 (1991)).

{¶15} The City has argued that the trial court should have vacated the award because (1) the arbitrator exceeded his authority by awarding back pay based on an exhibit that, according to the City, was not properly before him, and (2) the arbitrator failed to make a final and definite award because he did not reduce the back pay award as the City saw fit. Both of these arguments are based on the fact that during the arbitration, the Union introduced an exhibit that consisted of back pay calculations prepared by the City. The City did not object, nor did the parties discuss limiting the purposes for which that exhibit could be used. Regardless, however, the fact that the arbitrator based his award on this exhibit is not relevant to whether the arbitrator exceeded his powers or exercised them imperfectly under R.C. 2711.10(D).

{¶16} It is clear that the City disagrees with the substance of the award, but the City cannot obtain a review of factual or legal error with respect to the exercise of the arbitrator's powers by framing its arguments in terms of R.C. 2711.10(D). The City has not provided this Court with any argument demonstrating that the award did not draw its essence from the collective bargaining agreement, nor has it demonstrated that the award is unlawful, arbitrary, or capricious. It is not this Court's responsibility to construct those arguments on the City's behalf. *See Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998) ("If an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out."). The City's argument that the trial court erred by denying its motion to vacate the award is not well-taken.

Public Policy

{¶17} The City's final argument is that the trial court erred by denying its motion to vacate the award based on public policy. Specifically, the City has argued that the trial court should have vacated the award to the extent that the arbitrator awarded back pay to Mr. Semelsberger for a period of time when his certification as a firefighter/EMT had lapsed. We disagree.

{¶18} Courts are not vested with broad power to set aside arbitration awards as against public policy. *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 112 (2001), citing *United Paperworkers Internatl. Union, AFL-CIO v. Misco*, 484 U.S. 29, 42 (1987). To the extent that courts enjoy the limited power to refuse to enforce arbitration awards on public policy grounds, that ability arises out of contract law and is narrowly circumscribed:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983); *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-853, 92 L.Ed. 1187 (1948). That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. *E.g., McMullen v. Hoffman*, 174 U.S. 639, 654-655, 19 S.Ct. 839, 845, 43 L.Ed. 1117 (1899); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356-358, 51 S.Ct. 476, 477-478, 75 L.Ed. 1112 (1931). In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.
>
> In *W.R. Grace*, we recognized that "a court may not enforce a collective-bargaining agreement that is contrary to public policy," and stated that "the question of public policy is ultimately one for resolution by the courts." 461 U.S., at 766, 103 S.Ct., at 2183. We cautioned, however, that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations

> where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

(Emphasis in original.) *Misco* at 42-43. Consequently, courts may refuse to enforce an arbitrator's award reflecting an *interpretation* of a contract that is against public policy, but only in very limited circumstances. At a minimum, there must be a clear demonstration of an "explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.'" *Id.* at 42, quoting *W.R. Grace* at 766.

{¶19} In *Amalgamated Transit*, for example, the Ohio Supreme Court considered whether courts erred by refusing to enforce an arbitration award that ordered reinstatement of a transit employee who had been terminated following a positive drug test. The Court acknowledged the existence of a public policy against the use of controlled substances by public employees, but nonetheless concluded that it was error for the lower courts to refuse to enforce the reinstatement award on public policy grounds. *Id*. at 112-113. In doing so, the Court noted that competing public policies favored rehabilitation of substance abusers, that there was no clear public policy that prohibited the grievant's reinstatement, and that the award was otherwise reasonable. *Id.* at 114. *See also North Royalton v. Urich*, 8th Dist. Cuyahoga No. 99276, 2013-Ohio-2206, ¶ 34.

{¶20} In support of its position that the trial court should have vacated the back pay award on public policy grounds, the City directs our attention to various sources that require firefighters and EMTs to maintain certification as a condition of employment. The problem with this position is that the award at issue did not require the City to reinstate Mr. Semelsberger despite his lack of certification. Instead, the arbitrator awarded Mr. Semelsberger back pay for the period during which he had determined that the City had wrongfully terminated his

employment. It is true that Mr. Semelsberger allowed his certification to lapse during a portion of this timeframe. This Court must emphasize two things, however. First, there is no documented and well-defined public policy that prohibits the payment of back pay to a wrongfully terminated firefighter whose certification lapsed during his unemployment. Second, and of equal significance in the context of this case, is the fact that the City cannot use the cloak of public policy to seek a review of the merits of the arbitration award. In determining whether an award should be vacated on public policy grounds, the inquiry is focused on the face of the award, and "[a] court is not authorized to revisit or question the fact-finding or the reasoning which produced the award." *Aramark Facility Servs. v. Service Employees Internatl. Union, Local 1877, AFL CIO*, 530 F.3d 817, 823 (9th. Cir.2008).

{¶21} In this case, the arbitrator considered testimony about Mr. Semelsberger's duty to mitigate damages and the circumstances under which he allowed his certification to expire. As noted in the award, the arbitrator considered this information in the context of the City's determination to terminate Semelsberger despite what the arbitrator characterized as its questionable legality at the time. The arbitrator determined that when these circumstances were viewed together, the back pay award was warranted. The trial court declined to vacate the award in the absence of a well-defined public policy that required it to do so. This Court cannot conclude that the trial court erred in this respect.

{¶22} The trial court did not err by denying the City's motion to modify or correct the arbitration award, and it did not err by denying the City's motion to vacate the award. The City's assignment of error is overruled.

III.

{¶23} The City's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

CHERI B. CUNNINGHAM, Director of Law, and MICHAEL J. DEFIBAUGH and TAMMY L. KALAIL, Assistant Directors of Law, for Appellant.

WARNER MENDENHALL, Attorney at Law, for Appellee.