NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE 8TH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO, NO. CA-20-109351

CLEVELAND POLICE PATROLMEN'S ASSOCIATION
Plaintiff-Appellant

-vs-

CITY OF CLEVELAND
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

ATTACHMENTS

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

This matter involves the discharge of Cleveland Police Officer Timothy Loehmann in violation of the Cleveland Police Patrolmen's Association's (the Plaintiff-Appellant) and the City of Cleveland's (the Defendant-Appellee) Collective Bargaining Agreement ("CBA"). The Plaintiff-Appellant immediately filed a timely and proper grievance in accordance with the CBA. The CBA provides for the resolution of grievances in various steps culminating in arbitration. Unfortunately, the arbitrator incorrectly granted an Arbitration award to the Defendant Appellee when the arbitrator imperfectly performed his duties, the award did not draw its essence from the terms of the agreement, was contrary to the testimony and evidence presented at the hearing, and was contrary to the parties' CBA.

Subsequently, after the Plaintiff-Appellant filed a timely and proper Application to Vacate the Arbitration Award with Cuyahoga County Court of Common Pleas pursuant to R.C. § 2711.10-13. The Honorable Judge Joseph D. Russo erred in failing to grant the Plaintiff-Appellant's Application to Vacate the Arbitration Award, and issued a brief, one-page order, without specifically addressing any of the Plaintiff-Appellant's extensive arguments.

The Plaintiff-Appellant appealed this decision in the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District. Instead of considering the merits of the case outlined in the Plaintiff-Appellant's forty-one (41) page Brief in Support, the Appellate Court summarily ruled that the Trial Court lacked jurisdiction over the CPPA's application to vacate the arbitration award.

At no time does it appear that the Plaintiff-Appellant's arguments concerning the Arbitration process and Award received any substantial review from either the Trial Court or the Appellate Court. The Plaintiff-Appellant was denied a fair and impartial review of an unfortunately and unfairly political influenced process at all levels.

The Plaintiff-Appellant was erroneously denied appellate process in the 8th District due to a jurisdictional issue that the Trial Court chose to never address. The Appellate Court ruled that the Plaintiff-Appellant failed to timely and properly serve the Defendant-Appellee's Counsel, because the Plaintiff-Appellee served their Application to Vacate the Arbitration Award to the City of Cleveland Department of Law rather than to the attorney who previously represented the City of Cleveland from Zashin & Rich Co., LPA. For that reason, the Appellate Court decided that the Trial Court did not have jurisdiction to review the Plaintiff-Appellant's initial Application to Vacate the Arbitration Award. As a result, the Appellate Court did not review the merits of any of the Plaintiff-Appellant's arguments.

The Plaintiff-Appellant did properly and timely serve Counsel for the Defendant-Appellee with regards to all court filings at the Trial Court and Appellate Court levels. The City of Cleveland's Department of Law, who the Plaintiff-Appellant properly served with the Application to Vacate the Arbitration Award, represents the City of Cleveland in all criminal and civil matters. They have authority to hire associate counsel under the City of Cleveland's Charter and Codified Ordinances, which they exercised beginning with the Arbitration process. The City's Department of Law maintains active involvement in all of their Arbitration proceedings, even when outside counsel is retained. That does not change the fact the City of Cleveland's Department of Law is Counsel for the City of Cleveland, the Defendant-Appellee and opposing party in this matter, which is evidenced in all of the City's filings at the Trial Court and Appellate Court levels. Furthermore, the parties involved in this matter have engaged in numerous court actions. In all actions, the CPPA executed service in this manner. It has not become an issue until this Appellate Court ruling.

Unfortunately, hundreds of pages of issues, arguments, legal authorities, and exhibits appear to have been ignored because review of these arguments was denied in the Appellate Court for an erroneous service issue that was already rejected in the lower court. The Plaintiff-Appellant respectfully requests jurisdiction in this Honorable Court to establish that the Application to Vacate the Arbitration Award was properly and timely served, that the Trial Court did have jurisdiction to review the merits of this matter, and that the Appellate Court shall review the merits of this case. The Plaintiff-Appellant has worked tirelessly to prepare valid and comprehensive arguments with regards to this unfortunately politically influenced process and deserves appellate process to review the merits of this matter. This matter involves an issue that received global attention and that has been debated and discussed in all levels of our society for approximately the past eight (8) years.

STATEMENT OF CASE AND FACTS

The Cleveland Police Patrolmen's Association (hereinafter "CPPA") and the City of Cleveland (hereinafter "City") are parties to a collective bargaining agreement (hereinafter "CBA"). This CBA provides for the resolution of grievances through various steps culminating in Arbitration. This matter involves the City's decision to wrongfully discharge Patrol Officer Timothy Loehmann, the subsequent Arbitration and the Arbitrator's Award in favor of the City, and the Cuyahoga County Court of Common Pleas Honorable Judge Joseph D. Russo's (hereinafter "Trial Court") decision to confirm, and not to vacate, that Award. Ultimately, after the CPPA's timely and proper appeal to the Eighth District Court of Appeals for Cuyahoga County, Ohio (hereinafter "Appellate Court"), the Appellate Court decided to not review the merits of the Appeal, and instead ruled that the Trial Court lacked jurisdiction over the CPPA's application to vacate the arbitration award due to a service issue.

On April 11, 2017, the City conducted a flawed pre-disciplinary hearing before the City's Public Safety Director, who found that Patrol Officer Timothy Loehmann guilty of six (6) disciplinary specifications in his administrative charging letter for various allegations regarding his employment application. On May 30, 2017, the City wrongfully discharged Officer Loehmann. The CPPA timely filed grievance number 12-1-CPPA-33-17 on behalf of Officer Loehmann pursuant to the parties' CBA. On June 28, 2017, CPPA timely filed its Demand for Arbitration, arguing that the City did not have just cause to terminate Officer Loehmann. On December 1, 2018, after four (4) days of Arbitration, Arbitrator James E. Rimmel incorrectly granted an Arbitration Award to the Defendant Appellee in City of Cleveland and Cleveland Police Patrolmen's Association, AAA No. 01-17-003-7910 (December 1, 2018), while also reversing guilty findings in half of the disciplinary specifications.

On March 1, 2019, CPPA timely filed an Application to Vacate the Arbitration Award in the Trial Court, serving the City of Cleveland's Department of Law, as it has done in all prior legal matters, initiating Case No. CV-19-911950. The City filed an Application to Confirm on April 8, 2019. In the Trial Court, the parties submitted hundreds of pages of legal arguments, case law and legal sources, and exhibits through the Plaintiff-Appellant's Application to Vacate Arbitrator's Award, the Defendant-Appellee's Motion to Confirm Arbitration Award, the Plaintiff-Appellant's Brief in Support, the Defendant-Appellee's Reply Brief, and the Plaintiff-Appellee's Reply Brief. In response, The Honorable Judge Joseph D. Russo entered an order simply stating that:

> BASED UPON A REVIEW OF THE RECORD, THE COURT IS UNABLE TO FIND ANY OF THE FACTORS SET FORTH IN R.C. 2711.10 (A) THROUGH (D) AND 2711.11 (A) THROUGH (C) REQUIRING THIS COURT TO VACATE, MODIFY, OR CORRECT THE ARBITRATION AWARD OF ARBITRATOR JAMES E. RIMMEL IN CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION, AAA NO. 01-17-003-7910 (DECEMBER 1, 2018). THEREFORE, PURSUANT TO R.C.2711.09, THE ARBITRATION AWARD OF ARBITRATOR JAMES E. RIMMEL IN

CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION, AAA NO. 01-17-003-7910 (DECEMBER 1, 2018) IS CONFIRMED AND TO BE ENFORCED. COURT COSTS TO BE PAID BY PLAINTIFF CLEVELAND POLICE PATROLMEN'S ASSOCIATION. FINAL ORDER. R.C. 2711.15. COURT COST ASSESSED TO THE PLAINTIFF(S). PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE. NOTICE ISSUED

The Trial Court issued a uniform decision to not vacate the Arbitrator's Award under O.R.C. § 2711.10-11. In their Motion to Confirm Arbitration Award and Reply Brief, the City argued that the CPPA did not timely serve its application on their Counsel. In that same Motion, the Assistant Director of Law for the City of Cleveland's Department of Law is listed among their Counsel. There is no mention of any consideration given to the Plaintiff-Appellee's argument that service was improper and not timely, and thus procedurally defective, at the Trial Court level.

After the Trial Court rendered their decision, the CPPA timely and properly filed in the Appellate Court, initiating Cleveland Police Patrolmen's Association v. City of Cleveland, 8th Dist. Cuyahoga App. No. 109351, 2021-Ohio-702. Once again, the CPPA filed an extensive Brief containing well-supported legal arguments with regards to the Arbitrator's Award.

Ultimately, the Appellate Court ruled that the Trial Court had no jurisdiction to vacate, modify, or correct the Arbitration Award because there was not a timely motion to vacate. The Appellate Court opined that the CPPA's Application to Vacate Arbitration Award was not served on the "[C]ity's outside counsel" within three (3) months, thus failing to satisfy Civ.R.5(B)(1) and O.R.C. § 2711.13. This is apparently because, "when a party is represented by an attorney, service of a motion to vacate an arbitration award 'must be made on the attorney unless the court orders service on the party'" according to Civ.R.5(B)(1). The Appellant Court held that service

was made on the City of Cleveland's Department of Law and not "outside counsel" which is effectively service on the party rather than counsel. This issue was never discussed in oral arguments.

LAW AND ARGUMENT

PROPOSITION OF LAW: ***WHEN A MUNICIPALITY IS A PARTY IN A CIVIL CASE, AND IS REPRESENTED BY A LAW DEPARTMENT PURSUANT TO ITS CHARTER AND/OR CODIFIED ORDINANCES, INITIAL SERVICE UPON THE DEPARTMENT IS TIMELY AND PROPER***

The Appellate Court's opinion mistakes the "City's Law Department" as the "[D]efendant" in the lower court, or as the CPPA's opposing party. The City of Cleveland is in fact the "Defendant," at the Trial Court level. The City of Cleveland's Department of Law is Counsel for the City of Cleveland and the Law Department did receive timely and proper service, as the Appellate Court acknowledges in their Opinion. The "outside counsel" that did not receive initial service are actually associate counsel, originally employed by the City of Cleveland's Department of Law and Law Director for the limited purpose of Arbitration. The City of Cleveland through its Law Department maintains an active role in all of its cases that are assigned to associate counsel throughout the Arbitration process.

The City of Cleveland's Department of Law provides legal services to the City in all civil and criminal matters. According to the City of Cleveland, OH Code of Ordinances, Charter of the City of Cleveland, Chapter 15, § 83, the Director of Law "shall be the legal advisor of and attorney and counsel for the City, and for all officers and departments thereof in matters relating to their official duties. He shall prosecute or defend all suits for and in behalf of the City."

The City of Cleveland is the Defendant-Appellee in this matter and the Chief Assistant Director of Law for the City of Cleveland is listed among the representatives for the Defendant-Appellee in all of their Court filings, at the Trial Court and Appellate Court level.

The City of Cleveland's Department of Law utilized associate counsel throughout the arbitration process. The City of Cleveland, OH Code of Ordinances, Administrative Code, Chapter 125.01, further clarifies the Director of Law's role and Chapter 125.04 states that "[t]he Director of Law may, in special emergencies and out of the funds provided therefor by Council, employ associate counsel for special work relating to his or her office." Attorney(s) from the law firm of Zashin & Rich Co., L.P.A., served in this capacity.

This matter began with the Plaintiff-Appellant's filing of an Application to Vacate the Arbitration Award in the Cuyahoga County Court of Common Pleas, civil Case No. CV-19-911950, in which the City of Cleveland is the Defendant. Naturally, considering that the City of Cleveland, according to its Charter and Codified Ordinances, is represented in all civil cases by the City of Cleveland's Department of Law and Law Director, this action was timely and properly served on the City's Law Director. The Plaintiff-Appellant did not know, and would have no way to know, that the City of Cleveland's Law Department would employ associate counsel to handle this new case in the Court of Common Pleas. For that reason and for the reasons further stated above, the Plaintiff-Appellant properly served the Defendant-Appellant's Department of Law. Furthermore, that Department of Law, through an Associate Director of Law, has appeared as a representative for the Defendant-Appellee in all court filings. Consider also that the parties involved in this matter have engaged in numerous civil suits in the past. Never at any time has this manner of service become an issue. The "outside counsel" that was not served in the initial filing is serving as associate counsel employed by the Department of Law, so service to the Department of Law is still timely and proper regardless.

The Appellate Court states that a party serving an application to vacate an arbitration award must serve the City's "outside counsel" (Citing *Mun. Constr. Equip. Operators' Labor Council v.*

City of Cleveland, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 9 (8th Dist.)). The court in *Mun. Constr.* held that, "[t]he clerk of courts served the complaint on the City on November 2, 2010, but it was not served on outside counsel retained by the City in this matter," and goes on to say that service was not timely and proper for that reason. *Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 9 (8th Dist.)). This differs from the situation in this matter because here, service was made to the City's attorney, the Law Department, not to the city itself, and it is unclear from the opinon in that case who outside counsel was and if they were the attorneys of record at court. .

O.R.C. § 2711.13, which specifically governs motions to vacate an arbitrator's award, clearly states that, "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest." On December 1, 2018, the Arbitrator issued their award denying the CPPA's grievance. The CPPA served the Application to Vacate Arbitrator's Award on the City of Cleveland's Department of Law on March 1, 2019. The Department of Law functions as the City's Representative in all civil suits. This was done in accordance with the Ohio Revised Code.

Civ.R.5(B) states that "[w]henever a party is not represented by an attorney, service under this rule shall be made upon the party. If a party is represented by an attorney, service under this rule shall be made on the attorney unless the court orders service on the party." The Appellate Court held that O.R.C. § 2711.13 requires service as provided by Civ.R.5(B), and that because the Defendant-Appellee is represented by "outside counsel," service upon the Defendant-Appellee's Department of Law essentially constitutes service upon the Defendant rather than the attorney. This is incorrect. The Department of Law, and The Director of Law and their Assistants, serves as Counsel for the City of Cleveland and is not the Defendant-Appellee.

Furthermore, under Civ.R.5(B), service is effective on a party by serving that party's attorney, only when the attorney is an attorney of record in the trial court. *Ervin v. Patrons Mut. Ins. Co.*, 20 Ohio St. 3d 8, 484 N.E.2d 695, 20 Ohio B. 80, 1985 Ohio LEXIS 532 (1985). In *Ervin v. Patrons Mut. Ins. Co.*, the court held that service of an amended complaint upon the defendant's presumed counsel was insufficient because, "for purposes of Civ. R. 5(B), in order that service be effective on a party by serving that party's attorney, the attorney must be an attorney of record in the trial court." *Id.* Here, the Plaintiff-Appellant's Application to Vacate the Arbitrator's Award was served upon the Defendant-Appellee's Department of Law, their Counsel in all civil cases. While "outside counsel" appeared in the prior arbitrations and in subsequent filings, alongside the Assistant Director of Law for the Department of Law, Plaintiff-Appellant would be making a grave error in assuming their representation of the Defendant-Appellee in Court proceedings, because they were not yet attorneys of record in this matter.

The Appellate Court states that O.R.C. § 2711.13 "requires service as provided in Civ.R.5(B)," to establish that service of a motion to vacate an arbitration award "must be made on the attorney unless the court orders service on the party." *Cox v. Dayton Pub. Schools Bd. of Edn.*, 147 Ohio St.3d 298, 2016-Ohio-5505, 64N.E.3d 977, ¶15, quoting Civ.R.5(B)(1). While the Court in *Cox v. Dayton Pub. Schools Bd. of Edn.* does hold this, "[t]he court in Cox does not address how it came to the conclusion that defendant was represented by counsel, and whether the defendant had an attorney of record at the time of service was not a disputed issue before the Cox court," because it was not an issue in *Cox*, like it is in this matter. *Champion Chrysler Plymouth v. Dimension Serv. Corp.*, S.D.Ohio No. 2:17-cv-130, 2018 U.S. Dist. LEXIS 48281, at *11 (Mar. 23, 2018).

The Court in *Champion Chrysler Plymouth v. Dimension Serv. Corp* does not disagree with the holding in *Cox*, but it answers the question of whether the attorney who represented a party in an arbitration action is automatically its attorney of record for the present action, for purposes of proper and timely service *Id.* In *Champion,* the plaintiffs failed to correctly serve defendant, and instead served defendant's counsel from the arbitration proceedings their "Application for an Order Confirming an Award in Arbitration against Dimension." *Id.* However, the defendant's counsel in the arbitration's proceedings did not continue in that role at trial court, because the defendant retained a different firm, and was thus never the attorney of record. The court decided that "[a]n attorney becomes an attorney of record in the particular proceedings by his subscription of a pleading or paper served and filed in that action." *Id., Verber v. Wilson*, 1997 Ohio App. LEXIS 2428, 1997 WL 304403, at *5 (citing *Ervin*—generally) (citing McCormac, Ohio Civil [*12] Rules Practice (2d Ed. 1992) 137, Section 6.07).

In other words, the court in *Champion* held that the attorney who represented the party in the arbitration action was automatically the attorney of record, required to be served, so the plaintiff's service of defense counsel from the arbitration process did not satisfy Civ.R.5(B). *Id.; See also Citibank S. Dakota,* N.A. v. Wood, 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576, ¶ 18 (2d Dist.) ("an individual does not become an attorney of record simply because he or she may have previously represented one of the parties in another trial court action. This is true even where the prior representation or prior court action involved the same parties. Until such time as an attorney enters an appearance in the specific case being tried, Civ. R. 5 requires pleadings to be served on the party who is suing or is being sued.") According to *Champion*, the Plaintiff-Appellee would have made a grave error in assuming that the Cleveland Department of Law's associate Counsel would continue in their role post-arbitration for the purposes of service. Lastly,

the City has failed to demonstrate any alleged prejudice in the proper service of the Application to Vacate on the City of Cleveland's Law Department, further showing that their allegation has no merit and the Appellate' Court erred in its Opinion.

CONCLUSION

The Plaintiff-Appellant respectfully requests this Honorable Court accept jurisdiction of this matter, reverse the ruling of the Eighth District Court of Appeals, and adopt the State's proposition of law:

> WHEN A MUNICIPALITY IS A PARTY IN A CIVIL SUIT, AND IS REPRESENTED BY A LAW DEPARTMENT PURSUANT TO ITS CHARTER AND/OR CODIFIED ORDINANCES, INITIAL SERVICE UPON THE DEPARTMENT IS TIMELY AND PROPER.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal has been sent by regular U.S. Mail this 23rd day of April, 2021, to George S. Crisci, 950 Main Ave., 4th Floor, Cleveland, OH 44113, to Scott H. Dehart, 17 S. High St., Suite #900, Columbus, OH 43215, and to William Menzalora, 601 Lakeside Ave., Room 106, Cleveland, Ohio 44114.

/s/Henry J. Hilow.
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