

[Cite as *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, 2009-Ohio-6223.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92982**

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**CITY OF CLEVELAND**

PLAINTIFF-APPELLANT

vs.

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS  
LOCAL 38**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-659325

**BEFORE:** Stewart, J., Kilbane, P.J., and Boyle, J.

**RELEASED:** November 25, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Appellant, city of Cleveland, appeals from an order that denied its motion to vacate an arbitrator's decision to reinstate the employment of Cheryl Waiters, a member of appellee, International Brotherhood of Electrical Workers, Local 38. The city terminated Waiters after learning that she left a voicemail with a friend in which she made threatening remarks about two co-workers. The arbitrator upheld the union's grievance on grounds that the friend, whom the city relied upon as its primary witness, lacked credibility because, among other things, she refused to turn over the entire tape recording of her conversation with Waiters. The city raises issues concerning (1) the admission of a tape recording; (2) the arbitrator's bias; and (3) the court's refusal to issue findings of fact and conclusions of law. We find no error and affirm.

I

{¶ 2} Waiters, a union member whose employment was subject to the terms of a collective bargaining agreement, worked as an electrician at Cleveland Hopkins International Airport. During this time, she was also partners, both professionally and personally, with Carol Westerfield. Their business relationship ended on a bad note, with Waiters suing Westerfield for fraud.

{¶ 3} On the same day that Westerfield received the fraud complaint at her house, she contacted the airport commissioner, claiming that Waiters had earlier telephoned her, making threats against two airport co-workers. Westerfield told the airport commissioner's office that she had recorded Waiters's threats. A deputy commissioner for the airport spoke with Westerfield, and she agreed to meet with him to discuss her accusations. That meeting did not go forward, however, because Westerfield refused to meet with the deputy commissioner until her attorney authorized the meeting. The city tried calling Westerfield's attorney, but none of its telephone calls were returned. The city placed Waiters on administrative leave for violating its workplace violence policy.

{¶ 4} At the same time, the police began an independent investigation of Westerfield's accusations. When questioned by the police, Westerfield reiterated the threats made by Waiters, but when asked to give more specific information, she declined, saying that her attorney had told her not to discuss the matter with anyone because of the pending legal proceedings between her and Waiters.

{¶ 5} The city then terminated Waiters, finding her discharge justified in light of her past disciplinary history, the nature of the threats, and verification that Waiters owned a gun. Waiters filed a grievance seeking reinstatement. The city conducted a hearing and denied the grievance. The union demanded arbitration.

{¶ 6} Despite the pending legal proceedings between them, Waiters and Westerfield continued their personal relationship. However, a domestic dispute arose during which Westerfield called the police and complained that Waiters had threatened her with a gun. The police responded and confiscated a gun from Waiters, but did not file charges against her.

{¶ 7} At the arbitration, the city offered testimony to show that Waiters had a poor disciplinary record, and that other workers felt threatened by her. None of the allegedly threatened employees testified at the arbitration. One employee did testify that in 2005, Waiters threatened to “blow up” the airport, but the employee did not take this threat seriously and did not report it to his supervisors.

{¶ 8} Westerfield testified at the arbitration and described the personal and professional relationships she maintained with Waiters. She said that two to three years earlier, she heard Waiters twice make different threats to blow up the airport: one when she believed she had been the object of discrimination; the other when passed over for promotion. Westerfield testified that on the day she received service of the lawsuit filed by Waiters, she spoke by telephone with Waiters. After that call, Westerfield called the airport and asked it to help her because Waiters had a “mental disability” and Westerfield was tired of being the “whipping post here for something that’s going on out there with you guys.”

Westerfield then recounted how Waiters had threatened to “shoot that man,” although the identity of “that man” was never revealed.

{¶ 9} During cross-examination of Westerfield, the union asked her whether she had ever threatened Waiters’s job. Westerfield denied threatening Waiters. With no objection from the city, the union played a tape recording from part of a telephone conversation between Westerfield and Waiters in which Westerfield said, “[y]ou better answer — You better answer to the City. See what they tell you. What kind of problems you got coming. You keep messing with me.” Westerfield acknowledged that the tape recording was genuine, but claimed to have a complete recording of their conversation that she would make available to the arbitrator. She did not, however, provide that tape recording.

{¶ 10} Waiters testified and denied most of the allegations against her, including the allegation that she threatened airport employees.

{¶ 11} At the close of the hearing, the city asked the arbitrator to leave the hearing open so that it could play a voicemail message that Westerfield said had been contained on a “computer chip in a cell phone that had been received by the City.” The arbitrator asked the city to play the message, but the city could not because the cell phone needed to be activated. The arbitrator denied the request to keep the evidence open on grounds that the hearing had been closed and there had been no prior claim by the city that it had been in possession of the cell phone.

{¶ 12} The arbitrator upheld the grievance. In extensive findings, he found no just cause for Waiters's dismissal. Conceding that an off-premises threat of violence that was taken seriously by the person hearing the remark could lead to discipline up to discharge, the arbitrator framed the issue as whether Westerfield took Waiters's remarks as a serious threat "to shoot airport employees." For the arbitrator, this issue rested on Westerfield's credibility, for there was no independent corroboration of Westerfield's allegations. Key to her credibility was Westerfield's failure "to provide details of the alleged threats and failure to provide the City with the ability to hear the alleged 'tape' or 'voicemail' of the alleged threats by Waiters." He noted that Westerfield did not provide those recordings, despite having said that she would. He was critical of the city's position that Westerfield was excused from handing over the tapes on her attorney's recommendation, calling it "very strange legal advice." The arbitrator noted that "[c]onsistently **not** giving details \* \* \* does not support the conclusion that the witness is credible. It is a very simple matter to consistently say nothing." (Emphasis sic.) Concluding that "[t]here can be no more pertinent information than the voice-mail of the alleged threats," the arbitrator found that Westerfield's failure to provide the recording seriously undermined her credibility.

{¶ 13} The arbitrator went on to state other reasons for finding Westerfield lacked credibility: he found her allegations illogical; noted that she continually

used profane language despite saying that Waiters’s use of similar language was “disgusting”; found it unbelievable that Westerfield, having been threatened and sued by Waiters, would remain in an intimate relationship with her; and that Westerfield so many times claimed to have been telling the truth in her testimony that he thought “[t]he lady doth protest too much.”

{¶ 14} In the end, the arbitrator found that Westerfield was not credible and that “[t]here is no proof that Waiters is guilty of any conduct for which she may be punished.” He upheld the grievance and ordered her to be reinstated with back pay, subject to any “ordinary and customary Fitness-for-Duty Examination.”

## II

{¶ 15} The city first argues that the court erred by refusing to vacate the arbitrator’s decision because the arbitrator acted in manifest disregard for the law by allowing a tape recording into evidence without first requiring a proper foundation for its admission.

{¶ 16} We begin our discussion of this appeal by noting that voluntary termination of legal disputes by binding arbitration is favored by the law. *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 27. For this reason, courts have very limited authority to review arbitration awards. *Warren Edn. Assn. v. Warren City Bd. of Edn.* (1985), 18 Ohio St.3d 170; *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129. R.C. 2711.10 allows the court to review an

arbitration award only for fraud, corruption, misconduct, or improprieties of the arbitrator. *Russo v. Chittick* (1988), 48 Ohio App.3d 101, 104, citing *Goodyear Tire & Rubber Co. v. Local Union No. 200* (1975), 42 Ohio St.2d 516.

{¶ 17} The city urges us to employ a non-statutory, judicially created standard of review known as the “manifest disregard of the law” standard. The United States Court of Appeals for the Sixth Circuit explained this standard in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker* (C.A.2, 1986), 808 F.2d 930.

{¶ 18} “Manifest disregard of the law by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L.Ed. 168 (1953). It is not to be found in the federal arbitration law. 9 U.S.C. § 10. Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term ‘disregard’ implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well-established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the ‘manifest disregard’

standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." Id. at 933-934 (internal quotations omitted).

{¶ 19} We mentioned the manifest disregard of the law standard in *Cuyahoga Metro. Hous. Auth. v. SEIU Local 47*, Cuyahoga App. No. 88893, 2007-Ohio-4292 and *Suttle v. DeCesare* (July 5, 2001), Cuyahoga App. No. 77753. In both cases, the arguments offered under that standard were summarily rejected. On neither occasion, however, did we engage in any discussion as to whether the manifest disregard of the law standard is a viable means for vacating an arbitration award.

{¶ 20} In *Warren Edn. Assn.*, the supreme court stated: "[T]he vacation, modification or correction of an award may only be made on the grounds listed 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." We recently stated that "[t]he only instances in which the court should disturb an arbitration award are those that are specifically prescribed by R.C. 2711.10 and R.C. 2711.11." *NCO Portfolio Mgmt., Inc. v. Reese*, Cuyahoga App. No. 92804, 2009-Ohio-4201, at ¶10, citing *Schiffman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, Cuyahoga App. No. 86723, 2006-Ohio-2473, at ¶22.

{¶ 21} In *University Mednet v. Blue Cross & Blue Shield of Ohio* (1997), 126 Ohio App.3d 219, 231-232, we recognized that some federal courts have expanded the scope of review for arbitration awards to include a public policy exception, but rejected the application of that exception to Ohio law because “the Ohio State Supreme Court has refused to expand state court review beyond the clear terms of R.C. 2711.10.” We then expressly considered the application of a “manifest error” standard of review and likewise rejected it, stating:

{¶ 22} “As with appellant’s assertions regarding a violation of ‘public policy’ and consistent with the law of this state, this court will not expand the scope of our review of the arbitration award to include a separate and independent ‘manifest error’ standard. Again, our review is strictly limited to those certain prescribed circumstances set forth in R.C. 2711.10.” *Id.* at 232. See, also, *Selby Gen. Hosp. v. Kindig*, Washington App. No. 04CA53, 2006-Ohio-4383, at ¶30 (rejecting assertion that Ohio permits non-statutory grounds for vacating arbitration awards and affirming the statutory exclusivity of R.C. 2711.10).

{¶ 23} Consistent with *Warren Edn. Assoc.* and earlier precedent from this court, we continue to adhere to the proposition that R.C. 2711.10 provides the exclusive means for vacating an arbitration award. We therefore reject the city’s argument under the manifest disregard of the law standard of review.

{¶ 24} The city's second assignment of error complains that the court erred by denying its request to vacate the arbitration award because the arbitrator imperfectly executed his duties by claiming that the alleged tape recording of Waiters's threats was immaterial to his decision, yet nonetheless relied on it to reach his decision to uphold the grievance. The city maintains that if something is "immaterial" to an arbitrator's decision, then the arbitrator should not quote from that which he has deemed immaterial.

{¶ 25} R.C. 2711.10(D) provides that the court shall vacate an award on the application of a party if the court finds that "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." This ground in essence occurs when the arbitrator fails to arbitrate a validly presented issue.

{¶ 26} In his opinion, the arbitrator noted that the parties stipulated that the grievance was arbitrable and also stipulated the issue presented to the arbitrator: "Did the City have just cause to discharge the Grievant and, if not, what should be the remedy?" The arbitrator found that the city did not have just cause to dismiss Waiters and as a remedy ordered her reinstatement. This decision fully resolved those issues presented to the arbitrator, so he did not imperfectly execute his powers.

{¶ 27} The city's argument concerning the arbitrator's reliance on the tape recording after first claiming that it was "immaterial" appears to be nothing

more than an attempt to question the arbitrator's findings of fact. This is not a viable means of seeking to vacate an arbitration decision. When the city and union agreed to binding arbitration of disputes, they agreed to accept the result, even if it is legally or factually wrong. "If the parties could challenge an arbitration decision on the ground that the arbitrators erroneously decided the legal or factual issues, no arbitration would be binding." *Huffman v. Valletto* (1984), 15 Ohio App.3d 61, 63. Regardless of what the arbitrator might have first stated about the relevancy of the tape recording, he plainly found Westerfield's inability or refusal to produce that which she claimed would enhance her testimony to reflect poorly on her credibility. This is a factual conclusion that is beyond the scope of what the city can challenge in seeking to vacate an arbitration award.

#### IV

{¶ 28} In its third assignment of error, the city complains that the court should have vacated the arbitration award because the arbitrator showed bias against the city. It claims that bias is shown by the arbitrator's "attacks" on Westerfield's testimony and his refusal to give weight to any of the testimony offered by the city's other witnesses.

{¶ 29} The arbitrator considered the testimony of witnesses other than Westerfield in his decision, as shown by its detailed statement of facts that summarized the testimony of each witness.

{¶ 30} The city's argument really seems to be that the arbitrator did not consider the testimony of witnesses other than Westerfield when determining if Waiters's termination had been for just cause.

{¶ 31} The arbitrator likely did not give consideration to the city's other witnesses because they had no personal knowledge of the threats allegedly made by Waiters. Westerfield alone heard those alleged threats and she alone communicated those threats to airport management. None of the city's other witnesses had firsthand knowledge of the threats, so their testimony on the issue of just cause had no evidentiary value. Moreover, testimony by the city's other witnesses concerning Waiters's past conduct and disciplinary history was irrelevant to the issue of whether the city had just cause to terminate Waiters for these particular threats. Had the arbitrator relied on testimony from these other employees, he would have based his decision on conduct that was not the basis of dismissal.

{¶ 32} We understand that the city acted to respond to what it perceived to be an imminent threat of danger to its employees. The arbitrator acknowledged this same point, concluding that the city conducted an adequate investigation of the matter and had "good cause to do 'something' to make sure that no threats were carried out at the Airport." But the arbitrator also found that the lack of proof that Waiters actually made any threats did not mean that the city's cause to do "something" included the right to discharge. There could be no just cause

for dismissal when there was no proof, or insufficient proof, that Waiters made threats against airport personnel. This conclusion does not show any bias by the arbitrator.

V

{¶ 33} Finally, the city argues that the court erred by failing to issue findings of fact and conclusions of law when ruling on the motion to vacate the arbitration award.

{¶ 34} We summarily overrule this assignment. When parties voluntarily agree to submit their dispute to binding arbitration, they agree to accept the result, regardless of its legal or factual accuracy. *Cleveland v. Fraternal Order of Police, Lodge No. 8* (1991), 76 Ohio App.3d 755, 758; *Ford Hull-Mar Nursing Home, Inc. v. Marr Knapp Crawfis & Assoc., Inc.* (2000), 138 Ohio App.3d 174, 179. Findings of fact and conclusions of law under Civ.R. 52 are necessarily beyond the very limited scope of the court's review of an arbitration award — if the court cannot review any legal or factual conclusions made by the arbitrator, it would have no duty to issue findings of fact and conclusions of law. And even had there been some requirement to issue findings of fact and conclusions of law, the very detailed decision submitted by the arbitrator would have more than fulfilled any obligation under Civ.R. 52.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

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MARY EILEEN KILBANE, P.J., and  
MARY J. BOYLE, J., CONCUR