

IN THE SUPREME COURT OF OHIO

08-0535

OHIO PATROLMEN'S BENEVOLENT :
ASSOCIATION, :

Appellee, :

-vs- :

CITY OF MUNROE FALLS, :

Appellant. :

On appeal from the Summit County Court
of Appeals
Ninth Appellate District

Court of Appeals
Case No. 23898

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLEE OHIO PATROLMAN'S BENEVOLENT ASSOCIATION

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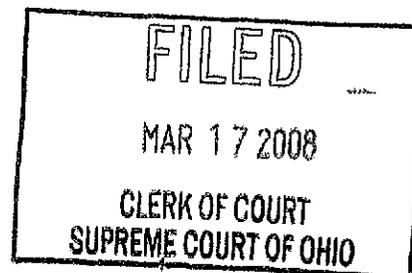


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST

This case presents three critical issues for all citizens and employees in the State of Ohio: (1) whether a Court of Appeals should be permitted to ignore valid standing precedent from the Supreme Court of the United States and decide a question of law contrary to that controlling precedent; (2) whether a Court of Appeals should be permitted to ignore valid standing precedent from the Supreme Court of Ohio and decide a question of law contrary to that controlling precedent, and; (3) whether a Court of Appeals should be permitted to hold that *res judicata* may be applied to an internal grievance proceeding where a quasi-judicial proceeding meeting was not held, ample opportunity to litigate the matter was not present and, a final judgment was not rendered.

In this case the court of appeals ignored very specific precedent from both the Supreme Court of the United States and the Supreme Court of Ohio in determining whether it is the court or the arbitrator that decides the arbitrability (or jurisdiction) of a grievance arising from a collective bargaining agreement. Such an act of ignoring standing precedent destroys the foundation upon which the federal and state court systems are built and is therefore a case of public or great general concern.

Also in this case, the court of appeals permits the decision of a Mayor, in a preliminary step of a grievance procedure arising from a collective bargaining agreement to be given preclusive effect, pursuant to the principle of *res judicata*, thereby prohibiting employees from exercising their collective bargaining rights to bring future grievances. Such power has never been so indiscriminately extended to such a matter as a grievance meeting. Never has such power been extended previously to an informal proceeding below the realm of an administrative proceeding of a judicial nature where the aggrieved party has had ample opportunity to litigate.

Extending the doctrine of *res judicata* to informal grievance meetings that are not administrative proceedings, are not quasi-judicial in nature and, where no ample opportunity to litigate exists defeats the very purpose of the doctrine and will forever harm employees and unions who are party to a collective bargaining agreement containing a grievance procedure with multiple preliminary steps prior to a final and binding determination by an arbitrator. Now, in the Ninth Appellate District for Summit County, such precedent allows the doctrine of *res judicata* to be applied at even the most informal of grievance meetings. Such a precedent shall prove horribly unjust in its application to every employee working under a collective bargaining agreement, contract, or dispute resolution process utilizing a similar grievance procedure. To avoid such detrimental effects, employees and unions will be forced to never allow an unsatisfactory preliminary grievance decision to go without appeal to arbitration lest the doctrine of *res judicata* be applied or, in the alternative, turn every informal grievance meeting into a full blown quasi-judicial hearing thus destroying the informal nature of the grievance process.

STATEMENT OF THE CASE AND FACTS

The Ohio Patrolmen's Benevolent Association (hereinafter "OPBA") and the City of Munroe Falls (hereinafter "City") are parties to a Collective Bargaining Agreement (hereinafter "CBA") in which, pursuant to R.C. § 4117.05, the OPBA is the exclusive representative of the Munroe Falls Part-Time Police Officers' bargaining unit (Exhibit # 1 to the Stipulations, R. 12). The CBA has effective dates of April 1, 2004 through March 31, 2007. The CBA contains several Articles addressing a variety of subjects, one of which, Article 8, addresses the grievance and arbitration of disputes that arise between the OPBA and the City.

On December 27, 2005, Officer J.T. McNicholas of the Munroe Falls Police Department filed a Grievance alleging a violation of Article 6, Section 1, 2, and 3 and, Article 4, Section 1 and 2 of the CBA, occurring on December 21, 2005, concerning part-time officers scheduling and classification on behalf of "all part-time bargaining unit members." (Exhibits 2 and 3 to the Stipulations, R. 12). After a grievance meeting with Chief Scott Bellinger, the Grievance was denied by Chief Bellinger on January 17, 2006. (Exhibit 6 to the Stipulations, R. 12). The Step 2 grievance meeting with the Mayor was held on February 16, 2006, no witnesses or evidence were presented by the Union or the City. The Grievance was denied by the Mayor on February 24, 2006. (Exhibit # 8 to the Stipulations, R. 12). The OPBA did not move the Grievance to Step 3 which is binding arbitration.

On March 17, 2006, Part-Time Police Officers Jeff Burgess and J. Alestock (hereinafter "Burgess," "Alestock" or collectively "Grievants") filed a grievance with the City alleging that the City violated Article 4 of the CBA, on March 17, 2006, concerning being denied "access to hours made available to Part-Time Bargaining Unit members, requested and available in schedule preference form for the April, 2006 Schedule." (Exhibits 9 and 10 to the Stipulations,

R. 12). The Grievances were filed with Police Chief Scott Bellinger as required in Step 1 of the grievance process defined in Article 8 of the CBA. On March 20, 2006, Police Chief Scott Bellinger denied the Grievances in writing (Exhibits 11 and 12 to the Stipulations, R. 12). On March 27, 2006, the Grievances were appealed to Step 2 of the grievance process with Mayor Larson as required in Step 2 of the grievance process defined in Article 8 of the CBA (Exhibit 13 to the Stipulations, R. 12). On April 3, 2006, Mayor Larson issued a letter setting a grievance hearing to occur on April 6, 2006 (Exhibit 14 to the Stipulations, R. 12). On April 3, 2006, OPBA Director J.T. McNicholas submitted a letter to Mayor Larson asking that the grievance hearing be rescheduled due to the unavailability of the OPBA attorney on April 6, 2006 (Exhibit 15 to the Stipulations, R. 12). On May 5, 2006, Mayor Larson conducted the grievance hearing and no witnesses or evidence were presented by the Union or the City. The Mayor issued a written decision in which he denied the grievances on May 8, 2006 (Exhibit 16 to the Stipulations, R. 12). On May 12, 2006, OPBA attorney Baker notified Mayor Larson in writing of the OPBA's intent to arbitrate the Grievances of Burgess and Alestock (Exhibit 17 to the Stipulations, R. 12). This notice is required by Step 3 of the grievance procedure as defined in Article 8 of the CBA.

Subsequent to the notice of intent to arbitrate the Grievances, the OPBA requested an arbitration panel consistent with the terms of Article 8 of the CBA. On numerous occasions the OPBA attempted to contact the City with regard to selection of an arbitrator in this matter and each time the City either failed to respond or, was not prepared to respond (Exhibit 18 to the Stipulations, R. 12). Finally, on August 14, 2006, the OPBA served the City with a Notice of Intent to Petition Court to Compel Arbitration as required by R.C. § 2711.03 (Exhibit 19 to the Stipulations, R. 12). The City continued to refuse to participate in the selection of an arbitrator.

On September 12, 2006, the OPBA filed a Complaint to Compel Arbitration with the trial court (R. 23).

On September 13, 2007, the trial court granted summary judgment in favor of the OPBA and denied the City's Motion for summary judgment, and determined that the matter should be referred to arbitration so that the arbitrator could determine whether the City's defenses were valid. The City appealed to the Summit County Court of Appeals, Ninth Appellate District on a single Assignment of Error, "The trial court erred by granting summary judgment to the [OPBA], and in denying summary judgment to Munroe Falls." The court of appeals granted the assignment of error and reversed the judgment of the trial court ordering that summary judgment be rendered in favor of the City.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Court of Appeals failed to follow binding precedent established by courts of higher jurisdiction in deciding a question of law.

The question of law at issue is, where a collective bargaining agreement expressly reserves a jurisdictional determination (i.e. arbitrability) for the arbitrator, may a court refuse to compel arbitration of the dispute, and instead, make an independent determination concerning the arbitrability of a grievance? The binding precedent on this question of law is supplied by both the Supreme Court of the United States and, the Supreme Court of Ohio.

The 1986 Supreme Court of the United States expressly stated that,

"...the question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate a particular grievance – is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."

AT&T Technologies, Inc. v. Comm. Workers of America (1986), 475 U.S. 643, 649 (Emphasis added).

The Collective Bargaining Agreement between the Parties in this case contains very specific language addressing the issue of arbitrability. The Collective Bargaining Agreement at Article 8, Section 4, states the following:

The question of arbitrability of a grievance may be raised by either party before the arbitration hearing of the grievance, on the grounds that the matter is not arbitrable or beyond the arbitrator's scope of authority or jurisdiction. The first question to be placed before the arbitrator will be whether or not the alleged grievance is arbitrable. If the arbitrator determines the grievance is within the purview of arbitrability, the alleged grievance will be heard on its merits before the same arbitrator.

(Exhibit 1 to the Stipulations at p. 7, R. 12).

It is more than evident that the Parties have clearly and unmistakably provided otherwise and specifically agreed that the arbitrator shall decide whether or not something is beyond his scope of authority or jurisdiction; the CBA explicitly does not leave this decision to a court. This was specifically brought to the attention of the court of appeals in the Appellee's Brief below (Appellee's Brief at pp. 5-6). Despite this information, the appeals court held that the issue of whether a controversy is arbitrable under an arbitration provision of a contract is a question of law for the court to decide. Under the precedent established by the Supreme Court of the United States the court of appeals was required to refer the question of arbitrability to the arbitrator.

In Belmont County Sheriff v. Fraternal Order of Police, Ohio Labor Council, Inc. (2004), 104 Ohio St.3d 568 the Supreme Court of Ohio addressed precisely the same question of law concerning who decides the issue of arbitrability, the court or the arbitrator. In the Belmont County Sheriff case, Article 7, of their collective bargaining agreement contained a provision that stated:

The question of arbitrability of a grievance may be raised by either party before the arbitration hearing of the grievance, on the grounds that the matter is non-arbitrable or beyond the arbitrator's jurisdiction. *The first question to be placed*

before the arbitrator will be whether or not the alleged grievance is arbitrable. If the arbitrator determines the grievance is within the purview of arbitrability, the alleged grievance will be heard on its merits before the same arbitrator.

(Id. at ¶ 15, *Emphasis* original).

Relying upon the precedent set forth in AT&T Technologies, Inc. v. Comm. Workers of America (1986), 475 U.S. 643, this Court stated,

In this case, we have concluded that Article 7 of the collective-bargaining agreement empowers the arbitrator to determine the issue of arbitrability because the parties have clearly and unmistakably provided for the arbitrator to hear the matter. Where the parties to a collective-bargaining agreement have clearly and unmistakably vested the arbitrator with the authority to decide the issue of arbitrability, the question of whether a matter is arbitrable is to be decided by the arbitrator. Therefore, the judgment of the court of appeals is hereby reversed, and the matter is remanded for further proceedings in accordance with this decision.

Belmont County Sheriff v. Fraternal Order of Police, Ohio Labor Council, Inc. (2004), 104 Ohio St.3d 568 at ¶ 18.

The applicable language in the collective bargaining agreement between the OPBA and the City at Article 8, Section 4 (quoted above) is **nearly identical** to that contained in the case before the Supreme Court of Ohio in Belmont County Sheriff. Under the precedent established by this Court, the court of appeals was required to refer the question of arbitrability to the arbitrator. The failure of the court below to follow established precedent of this Court and the Supreme Court of the United States is reversible error.

Proposition of Law No. 2: The doctrine of *res judicata* cannot be applied to preliminary grievance meetings between an Employer and a Union arising from a collective bargaining agreement.

This Court has previously held in Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals (1987), 31 Ohio St.3d 260 that, “This court has held that *res judicata*, whether issue preclusion or claim preclusion, applies to those administrative proceedings which are “of a judicial nature and where the parties have had an ample opportunity to litigate the issues

involved in the proceeding ***” Id at 377 quoting Superior’s Brand v. Lindley (1980), 62 Ohio St.2d 133, syllabus, see also Grava v. Parkman Township (1995), 73 Ohio St.3d 331.

The informal grievance steps defined in the collective bargaining agreement are not “quasi-judicial administrative proceedings” as they are not before any administrative board, committee, etc. The informal grievance steps are not “of a judicial nature.” This Court defined “quasi-judicial” by stating, “Proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence.” The M.J Kelley Co. v. City of Cleveland (1972), 32 Ohio St.2d 150, Syllabus #2. In the instant case, the court of appeals never determined that the grievance meetings were “administrative proceedings” nor did they ever determine that the grievance meetings were “quasi-judicial” in nature. It is absolutely imperative that the court of appeals make these determinations before the decision of the Mayor can be given preclusive effect under the principles of *res judicata*.

The collective bargaining agreement between the parties does not contain a requirement for notice, hearing and the opportunity for introduction of evidence in any preliminary step of the grievance procedure prior to binding arbitration. Moreover, the grievance meeting with the Mayor that was given *res judicata* effect by the court below there were no witnesses to present testimony and no introduction of evidence of any sort.. Finally, the parties do not have ample opportunity to litigate the issues involved in the proceeding during the informal grievance steps. In the instant case the Union only has had the opportunity to meet and discuss the grievance with the Employer, an adversary to the union. Opportunity to litigate obviously implies the ability to litigate before a neutral third party, not an adversary.

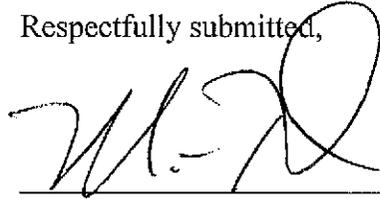
The potential for detrimental effect upon labor relations in the State of Ohio is astounding if the doctrine of *res judicata* is applied to informal grievance meetings between an Employer and a Union arising from a collective bargaining agreement. Collective bargaining agreements almost without exception provide for informal grievance “meetings” between the Employer and the Union to address grievable issues that arise under the collective bargaining agreement before formal final and binding arbitration. The collective bargaining agreement between the parties in this case is typical of just such an agreement. At the informal grievance steps the union presents the grievance to a representative for the Employer in a meeting. In the instant case, it is first to the Chief of Police and then secondly to the Mayor for a decision. The Chief and the Mayor are obviously not neutral third party decision makers and in fact, are by definition, the adversary to the union.

Further, it is typical in collective bargaining agreements to have a provision stating that if a grievance is not appealed to the next step, it is then considered resolved with the last answer provided by the Employer. Again, the Agreement between the parties in this case contains just such language (Exhibit # 1 at p. 6, to the Stipulations, R. 12). However, the Agreement further and specifically provides that it is at the arbitration level that recommendations of an arbitrator are “final and binding upon both parties.” (Exhibit # 1 at p. 7, to the Stipulations, R. 12). The difference between a grievance being “resolved” and an arbitrator’s recommendation being “final and binding” is obvious; hence, the term “final and binding” is not applied to both the decision resulting from an informal grievance meeting and the decision resulting from an arbitration decision. Consequently, the preclusive effect of *res judicata* cannot be given to the grievance answer of a Mayor at a preliminary step of the grievance procedure in a collective bargaining agreement.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellee requests that this court accept jurisdiction in this case so that the important issues will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEE OHIO PATROLMEN'S BENEVOLENT ASSOCIATION** has been served upon counsel for Appellants, Jack Morrison, Jr. Esq. AMER CUNNINGHAM, 159 South Main Street, Key Building, Suite 1100, Akron, Ohio 44308 via regular U.S. Mail, postage pre-paid, this 17th day of March, 2008.



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OHIO PATROLMEN'S
BENEVOLENT ASSOCIATION

STATE OF OHIO COURT OF APPEALS DANIEL M. HERRIGAN)ss: IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT 2008 FEB 20 AM 7:56

THE OHIO PATROLMEN'S BENEVOLENT ASSOCIATION SUMMIT COUNTY OCCUPATION COURTS C. A. No. 23898

Appellee

v.

CITY OF MUNROE FALLS, OHIO

Appellant

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2006-09-5788

DECISION AND JOURNAL ENTRY

Dated: February 20, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DANIEL M. HERRIGAN
2008 FEB 20 PM 1:25
SUMMIT COUNTY
CLERK OF COURTS

MOORE, Presiding Judge.

{¶1} Appellant, the City of Munroe Falls ("Munroe Falls"), appeals from the judgment of the Summit County Court of Common Pleas. This Court reverses the judgment of the trial court and enters judgment in favor of Munroe Falls.

I.

{¶2} Appellee, Ohio Patrolmen's Benevolent Association ("OPBA"), and Appellant, Munroe Falls, are parties to a Collective Bargaining Agreement ("CBA") in which, pursuant to R.C. 4117.05, the OPBA is the exclusive representative of the Munroe Falls Part-Time Police Officers bargaining unit.

{¶3} The Munroe Falls Police Department employs both full-time and part-time officers. As part of the CBA for part-time officers, the Munroe Falls Police Department agreed to a general shift schedule wherein full-time officers generally worked during the week and part-time officers generally worked during weekends. In November of 2005, Munroe Falls Police Chief Scott Bellinger notified officers that he was adding three more part-time shifts during the week. He informed part-time officers that these shifts would be available to them. In December of 2005, Chief Bellinger elected to schedule part-time officer Bob Post for all three shifts. In addition, he gave Officer Post the title of Part-Time Intermittent Patrol Officer.

{¶4} On December 27, 2005, James T. McNicholas, the OPBA Director for the Munroe Falls Police Department, filed a grievance on behalf of all part-time bargaining unit members. The grievance concerned (1) Chief Bellinger's decision to schedule Officer Post for all three shifts and (2) his decision to title Officer Post "Part-Time Intermittent Patrol Officer." The matter proceeded according to the grievance procedure set forth in Article 8 of the CBA. As required in "Step 1" of the grievance process, Chief Bellinger held a hearing on the grievance on January 13, 2006. Following the hearing, Chief Bellinger issued a written decision on January 17, 2006. In the decision, Chief Bellinger determined there was no merit to the grievance.

{¶5} The matter proceeded to a “Step 2” hearing before Mayor Frank Larson. The mayor denied the grievance via a letter dated February 24, 2006. Pursuant to “Step 3” of Article 8, if a grievance is not satisfactorily resolved in Step 2, the Union can make a written request that the grievance be submitted to arbitration. Under Step 3, “[a] request for arbitration by the Union must be submitted within ten (10) calendar days following the date the grievance was answered in Step 2 of the grievance procedure.” Further, “[i]n the event the grievance is not referred to arbitration by the Union within the time limits prescribed, the grievance shall be considered resolved based upon the second step reply.” The part-time officers did not demand arbitration of this grievance within ten days of the mayor’s decision.

{¶6} On March 17, 2006, part-time police officers Jeff Burgess and J. Alestock, filed a grievance with Munroe Falls alleging that it had violated Article 4 of the CBA, which concerns management rights. More specifically, the officers alleged that they were “[d]enied access to hours made available to Part-Time Bargaining Unit members, requested and available in schedule preference form for the April, 2006 Schedule.” The grievances were filed with Chief Bellinger. Chief Bellinger denied the grievances on March 20, 2006. OPBA Director Officer McNicholas, on behalf of Burgess and Alestock, appealed the grievances to Mayor Larson. On April 3, 2006, Mayor Larson issued a letter scheduling a grievance hearing for April 6, 2006. Also on April 3, 2006, Officer McNicholas submitted a

letter to Mayor Larson asking that the grievance hearing be rescheduled due to the unavailability of the OPBA attorney. Mayor Larson conducted a hearing on May 5, 2006. On May 8, 2006, Mayor Larson issued a written decision denying the grievances.

{¶7} OPBA attorney Matthew Baker notified Mayor Larson in writing on May 12, 2006 of OPBA's intent to arbitrate Burgess and Alestock's grievances. Thereafter, the OPBA requested an arbitration panel, as permitted under Article 8 of the CBA. On August 14, 2006, the OPBA served Munroe Falls with a notice of intent to petition the court to compel arbitration, as required by R.C. 2711.03. Munroe Falls refused to participate in the selection of an arbitrator. On September 14, 2006, the OPBA filed a complaint to compel arbitration with the trial court. On November 13, 2006, Munroe Falls answered the complaint and denied that the matter should be sent to arbitration. Munroe Falls asserted that the same matter had previously been grieved and resolved. The parties submitted cross-motions for summary judgment. On September 13, 2007, the trial court granted summary judgment in favor of the OPBA and denied Munroe Falls' motion for summary judgment, and determined that the matter should be referred to arbitration so that the arbitrator could determine whether Munroe Falls' defense was valid. Munroe Falls timely filed a notice of appeal from this decision, raising one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE [OPBA], AND IN DENYING SUMMARY JUDGMENT TO MUNROE FALLS.”

{¶8} In its sole assignment of error, Munroe Falls asserts that the trial court erred in denying summary judgment to it and granting summary judgment to the OPBA. We agree.

{¶9} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶10} Pursuant to Civil Rule 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶11} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support

the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶12} Here, the parties do not dispute the facts. Accordingly, we review only the parties' disputes regarding the trial court's application of the law. Munroe Falls first argues that the OPBA lacks standing to pursue the trial court action. Munroe Falls next contends that even if the OPBA has standing, its claim is barred by claim preclusion or res judicata.

{¶13} At the outset, we note that the parties dispute whether the trial court or the arbitrator should consider Munroe Falls' defenses. The trial court declined to consider Munroe Fall's defenses because it held that the arbitrator must decide "arbitrability" of the OPBA's claims. However, "[t]he issue of whether a controversy is arbitrable under an arbitration provision of a contract is a question of law for the court to decide[.]" *Stinger v. Ultimate Warranty Corp.*, 161 Ohio App.3d 122, 2005-Ohio-2595, at ¶9, quoting *Gaffney v. Powell* (1995), 107 Ohio App.3d 315, 319. Here, we find Munroe Falls' res judicata defense dispositive and therefore, we need not examine its other defenses. An appellate court applies

a de novo standard of review to a determination of whether an action is barred by res judicata. *Payne v. Cartee* (1996), 111 Ohio App.3d 580, 587. The application of the doctrine of res judicata is a question of law which a reviewing court resolves without deference to the decision of the lower court. *Id.* at 586; *Davis v. Coventry Twp. Bd. of Zoning Appeals* (Feb. 14, 2001), 9th Dist. No. 20085, at *1. As further explained herein, we find that the OPBA's claim is barred by the doctrine of res judicata and therefore, that they have no claim to pursue.

{¶14} This Court has stated that “[t]he doctrine of res judicata provides that ‘[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.’” *Perrine v. Patterson*, 9th Dist. No. 22993, 2006-Ohio-2559, at ¶22, quoting *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus. Further, application of res judicata requires that the identical cause of action shall have been previously adjudicated in a proceeding with the same parties or their privities in the first action, in which the party against whom the doctrine is sought to be imposed shall have had a full and fair opportunity to litigate the claim. *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 247; *Business Data Systems, Inc. v. Figetakis*, 9th Dist. No. 22783, 2006-Ohio-1036, at ¶11, quoting *Brown v. Vaniman* (Aug. 20, 1999), 2d Dist. No. 17503, at *4.

{¶15} We must first determine whether the parties in the two actions are the same or in privity with one another. The Ohio Supreme Court has explained

that “[w]hat constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required[.]” *Brown*, 89 Ohio St.3d at 248. The court further explained that

“In certain situations *** a broader definition of ‘privity’ is warranted. As a general matter, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.” (Internal citations omitted.) *Id.* at 248.

“[A] mutuality of interest, including an identity of desired result, creates privity” for res judicata purposes. *Id.*

{¶16} In this matter, the parties are in privity with one another. The first grievance, filed on December 27, 2005, was *filed on behalf of* all part-time bargaining members of the OPBA, concerning Munroe Falls Police Department’s decision to schedule Officer Post for three additional shifts. The second grievance, *filed by* part-time Officers Burgess and Alestock, concerned the identical matter as the first grievance. Any part-time officer of the Munroe Falls Police Department clearly shares a mutuality of interest with a party representing *all* part-time bargaining members of the OPBA. The relationship between the party who filed the first grievance and the party who filed the second grievance is so close that the second party – the individual officers - are subsumed within the first party – all part-time bargaining members of the OPBA. See *Brown*, 89 Ohio St.3d at 248.

{¶17} Munroe Falls points out that “[r]es judicata attaches when a claim was previously presented in arbitration or other alternative dispute resolution proceedings.” Here, the first claim was never arbitrated. After the grievance was denied at Steps 1 and 2, the OPBA did not further pursue the action. Pursuant to Article 8 of the CBA, “[i]n the event the grievance is not referred to arbitration by the Union within the time limits prescribed, the grievance shall be considered resolved based upon the second step reply.” Accordingly, as the Union did not demand arbitration of this first grievance within ten days of the mayor’s decision, the grievance was resolved after the second step.

{¶18} Munroe Falls cites *Johnson v. Metrohealth Medical Center*, 8th Dist. No. 82506, 2004-Ohio-2864, in support of its contention that Burgess and Alestock are in privity with the OPBA, and have already had the opportunity to air their grievance. In *Johnson*, the court found that an individual who first chose to use union representation to present her claim and then pursued the action in her individual capacity after the union was unsuccessful, was precluded from litigating the claim in her individual capacity. The union first pursued Johnson’s grievance and arbitration on her behalf. The *Johnson* court held that “allowing [the plaintiff] to pursue a personal claim after invoking union representation would give her an extra opportunity to litigate the same claim.” *Id.* at ¶30.

{¶19} Unlike *Johnson*, in the within matter, the Union did not pursue the first grievance to arbitration. However, under the CBA, there is no distinction

between a claim that proceeded to formal arbitration and one which was resolved by Step 2. Under the CBA, both a decision from a formal arbitration and a grievance resolved by Step 2 are final adjudications. Further, there is no dispute that both grievances concerned the same issue - Munroe Falls Police Department's decision to schedule Officer Post for three additional shifts. Accordingly, the judgment issued in Step 2 of the first grievance barred Officers Alestock and Burgess from pursuing their grievances which concerned the precise matter at issue in the first grievance. *Perrine*, supra, at ¶22, quoting *Grava*, 73 Ohio St.3d at syllabus. To find otherwise would enable each of the Munroe Falls part-time officers in turn to grieve the same issue, causing Munroe Falls to defend the same action repeatedly.

{¶20} Munroe Falls' assignment of error is sustained.

III.

{¶21} Munroe Falls' assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed. Summary judgment is hereby rendered in favor of Munroe Falls.

Judgment accordingly

The Court finds that 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(E). 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 Appellee.



CARLA MOORE
FOR THE COURT

SLABY, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JACK MORRISON, JR., and THOMAS R. HOULIHAN, Attorneys at Law, for Appellant.

MATTHEW B. BAKER, Attorney at Law, for Appellee.