IN THE SUPREME COURT OF OHIO

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION Appellant, vs. CITY OF MUNROE FALLS Appellee	**CASE NO.: 2008-0535** **On Appeal from the Summit County Court of Appeals, Ninth Appellate District, Case No. CA-23898**

APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

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FILED
APR 16 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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The Ohio Supreme Court "will grant a motion to certify **only** if there is a substantial constitutional question or if the case is of public or great general interest." Noble v. Colwell (1989), 44 Ohio St.3d 92, 94 (emphasis added); Section 2(B)(2)(e), Article IV of the Ohio Constitution; S.Ct. Rule II, §1(A)(2), (3). The Supreme Court limits its discretionary review to novel issues because "[n]ovel questions of law or procedure appeal not only to the legal profession but also to this court's collective interest in jurisprudence." Noble, supra at 94.

Cases of "public or great general interest" typically deal with weighty topics of statewide interest, such as public school funding, DeRolph v. State (1997), 78 Ohio St.3d 193, matters of first impression where the Supreme Court is asked to define the common law, Danziger v. Luse, 103 Ohio St.3d 337, 2004-Ohio-5227, or cases which require a novel application of this Court's Rules, Wilson v. Brush Wellman, Inc., 103 Ohio St.3d 538, 2004-Ohio-5847.

The issue in this case is neither weighty, nor of broad interest. It deals with the effect of a party's failure to comply with a contractual deadline under a collective bargaining agreement. The collective bargaining agreement at issue is between a small city of approximately 5,000 citizens, and a police bargaining unit containing fewer than ten officers. There is little likelihood that any decision arising from the particular contract language at issue would have any application to any other case but this. Accordingly, the Ninth District's holding is exceedingly narrow, and it is by no means a matter of "public or great general interest."

IV. STATEMENT OF CASE AND FACTS

The City of Munroe Falls is located in Summit County, near the City of Akron. It has a police force with both full-time and part-time police officers. The police officers are members of the Ohio Patrolmen's Benevolent Association ("OPBA") union, and have organized into several bargaining units. As part of the Collective Bargaining Agreement for the Part-Time Officers bargaining unit, the City agreed to a general shift schedule for full-time and part-time officers. The full-time shifts generally occurred during the week, and the Part-Time Officers had weekend shifts.

In November of 2005, Chief of Police Scott Bellinger decided to add three more shifts during the week, and he announced to the part-time officers that these shifts would be available. In December of 2005, Chief Bellinger assigned Part-Time Officer Bob Post for all three of these weekly shifts. Chief Bellinger also decided to appoint Officer Post as the Part-Time Intermittent Patrol Officer.

In response, the Part-Time Officers felt aggrieved, and on December 27, 2005, filed a grievance with the City pursuant to the terms of the Collective Bargaining Agreement. This grievance was later amended. The December 27, 2005 grievance and amended grievance were filed by James T. McNicholas, the OPBA Director for the Munroe Falls Police Department, "on behalf of All Part-Time bargaining Unit Members."

The December 27, 2005 grievance had two bases: (1) the scheduling of Part-Time Officers, and (2) the classification of Officer Post. The Part-Time Officers believed that (1) the additional shifts should be awarded by seniority, and (2) that there should be no "Intermittent Officer" classification. The Collective Bargaining Agreement contains a multi-stage grievance proceeding, with a "step 1" hearing before the Police Chief, a

"step 2" hearing before the mayor, and an arbitration of the grievance, if the OPBA makes a timely demand.

The greivance proceeded to a "step 1" hearing before Chief Scott Bellinger. Following the "step 1" hearing, Chief Bellinger issued a written decision, finding that there was no merit to the grievance. Following the "step 1" decision, the parties conferred and resolved that portion of the grievance that related to Officer Post's classification. However, the conflict regarding shift scheduling went on to a "step 2" hearing before Mayor Frank Larson. The Mayor denied the scheduling grievance by letter dated February 24, 2006.

Pursuant to Section 8 of the Collective Bargaining Agreement, if the Part-Time Officers disagreed with the outcome of the "step 2" proceeding, the Part-Time Officers were permitted to demand arbitration within ten days of the Mayor's decision. The Collective Bargaining Agreement expressly states that *"[a]ny grievance which is not submitted by the employee within the time limits provided herein shall be considered resolved upon management's last answer."* (Emphasis added). The Part-Time Officers did not demand arbitration of this grievance. As a result, on March 6, 2006, the Mayor's decision denying the grievance was final.

Later, on March 17, 2006, two of the Part Time Officers, Johnny Alestock and Jeff Burgess, refiled the very same scheduling grievance in their individual names. These grievances raised the identical scheduling issue that was previously raised in the December 27, 2005 grievance and amended grievance. The March 17, 2006 grievance was denied after a consolidated "step 1" hearing.

On March 27, 2006, Officer McNicholas demanded a "step 2" hearing on behalf of Burgess and Alestock. The Mayor, on May 8, 2006, denied the March 17, 2006 grievance after the "step 2" hearing. There were no new or additional grounds raised in support of the March 17, 2006 grievance which were not raised and decided in the December 27, 2005 grievance.

On behalf of Officers Burgess and Alestock, the OPBA then demanded arbitration of the March 17, 2006, which the city refused due to the resolution of the prior grievance. The OPBA then filed the subject suit seeking to compel the arbitration of the March 17, 2006 grievances. Munroe Falls answered the Complaint, and denied that the matter should be sent to arbitration, because the same matter had been previously grieved and resolved.

The parties agreed to submit the matter to the trial court upon motions. The parties entered into a stipulation as to the authenticity of certain documents and exchanged cross-motions for summary judgment. The trial court granted summary judgment to the OPBA on September 13, 2007, and ruled that the matter should be referred to arbitration, wherein the arbitrator could determine whether Munroe Falls' defense was valid.

Munroe Falls appealed to the Ninth District Court of Appeals. Munroe Falls argued that the OPBA's claim was extinguished as a matter of law due to the prior resolved grievance. The Ninth District agreed that the claim was extinguished, and as a result, there was no claim to refer to arbitration. Therefore, the Ninth District reversed the trial court.

V. LAW AND ARGUMENT

Appellant's Proposition of Law I:
The Court of Appeals failed to follow binding precedent established by courts of higher jurisdiction in deciding a question of law.

As a threshold matter, Appellant's first proposition of law is inappropriately phrased, because it could not serve as the syllabus of the case if it were adopted by the Court. Drake v. Bucher (1966), 5 Ohio St.2d 37, 39. Under this proposition of law, at page 7 of Appellant's Memorandum, the OPBA frames the following issue:

> 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 OPBA incorrectly frames the issue, because the Ninth District did not "make an independent determination concerning the arbitrability of a grievance." Instead, the Ninth District decided that the OPBA did not have a claim as a matter of law, so the issue of arbitrability was never reached. See February 20, 2008 Decision, ¶ 13 ("we find that the OPBA's claim is barred by the doctrine of res judicata and therefore, that they have no claim to pursue.")

The question of arbitrability has been defined by this Court as "whether an agreement creates a duty for the parties to arbitrate the particular grievance." Academy of Medicine of Cincinnati v. Aetna Health, Inc., 108 Ohio St.3d 185, 2006-Ohio-657, ¶12, quoting Council of Smaller Enterprises v. Gates, McDonald & Co. (1998), 80 Ohio St.3d 661 (internal punctuation omitted). It is true that under the terms of the Collective Bargaining Agreement, Munroe Falls agreed to have all questions of arbitrability decided by an arbitrator. But that does not mean that Munroe Falls agreed to abandon its legal defenses.

Here, the question of arbitrability was never reached, because the OPBA's claim was extinguished as a matter of law prior to the demand for arbitration. Legal issues which would bar arbitration should be resolved by a trial court as a matter of law. See Stinger v. Ultimate Warranty Corp., 161 Ohio App.3d 122, 2005-Ohio-2595, ¶9, (determining legal question of whether Ohio's Consumer Sales Practices Act bans arbitration); Vanyo v. Clear Channel Worldwide, 156 Ohio App.3d 706, 2004-Ohio-1793, ¶8 (determining legal question of unconscionability); Dunkelman v. Cincinnati Bengals, Inc., 158 Ohio App.3d 604, 2004-Ohio-6425 ¶20 (determining legal question of whether prior class action settlement barred current suit); Owens Flooring Co. v. Hummel Constr. Co. (2001), 140 Ohio App.3d 825, 829 (determining whether litigant was party to the contract).

It should be noted that the Illinois courts have specifically considered this issue and held that the question of whether or not *res judicata* bars labor arbitration is a question for the courts to decide. City of Rockford v. Unit Six of Policemen's Benevolent and Protective Ass'n of Illinois, 362 Ill.App.3d 556, 561, 840 N.E.2d 1283, 1288, 298 Ill.Dec. 848, 853 (Ill.App. 2 Dist., 2005) (police union's demand for arbitration barred by officer's prior failed challenge to discharge); Monmouth Public Schools, Dist. No. 38 v. Pullen,141 Ill.App.3d 60, 69, 489 N.E.2d 1100, 1106-1106, 95 Ill.Dec. 372, 378 (Ill.App. 3 Dist.,1985) (teacher's prior untimely grievance acted as res judicata bar to union's subsequent grievance on same issue).

The cases which the OPBA claims as binding precedent do not support the argument that arbitration was required in this matter. The OPBA cites to AT & T

Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415 (1986) and Belmont Cty. Sheriff v. Fraternal Order of Police, Ohio Labor Council, Inc. (2004), 104 Ohio St.3d 568, on pages 7 through 9 of its Memorandum. However, neither case dealt with a situation such as this, where events occurred prior to the demand for arbitration which extinguished the claim as a matter of law.

In AT & T Technologies, the U.S. Supreme Court was presented with a case concerning AT&T's decision to lay off 79 installers due to a lack of work. The union claimed that there was no lack of work, and demanded arbitration. Id. at 645-646. AT&T denied that the question of a lack of work was within the arbitration language of the collective bargaining agreement. Id. Fact finding regarding the alleged lack of work, and how that lack of work impacted the language of the contract, was necessary to resolve the dispute. Therefore, the question was an issue of true arbitrability: Did the language of the contract mandate arbitration of the claim? There was no discussion or consideration of whether or not a claim existed. The question was who was to hear the claim.

Similarly, in Belmont Cty., the underlying issue was whether appropriate PERS contributions were made by a sheriff's department under a collective bargaining agreement. The collective bargaining agreement had language which purported to bar an arbitrator from considering claims which arose under prior versions of the collective bargaining agreement. The sheriff argued that the claim arose under a prior collective bargaining agreement, and the union argued that the claim was continuing in nature, and thus within the purview of the then-current collective bargaining agreement. Id. at ¶3-5. Again, there was no suggestion, as in this case, that the union's claim had been

extinguished. Again, like AT & T Technologies, the question was arbitrability: under the language of the contract, who should hear the claim?

The present case is not a case of arbitrability. The question is not who should hear the claim, but whether or not a claim exists. The Ninth District found that the OPBA's claim was extinguished as a matter of law, under the doctrine of res judicata. Because the OPBA previously had unsuccessfully grieved the identical issue, the current refiled claim was barred. We never reach the issue of whether the OPBA's claim is arbitrable, because there is no claim.

While the OPBA claims that the Ninth District disregarded the dispute resolution mechanism found in the Collective Bargaining Agreement, in fact, the Ninth District upheld it. The arbitration provision is only one part of the larger dispute resolution mechanism contained within the contract. The parties chose to sign a contract which sets forth a multi-stage grievance process, with arbitration as a final step. The Collective Bargaining Agreement sets forth one element of that process as "[a]ny grievance which is not submitted by the employee within the time limits provided herein shall be considered resolved upon management's last answer."

As noted United Mine Workers of America, Dist. No. 2 v. Barnes & Tucker Co., 561 F.2d 1093, 1096 (3rd Cir.1977) "[i]t is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties." See Also General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co., 372 U.S. 517, 519, 83 S.Ct. 789 (1963), (supporting any "instrument for the definitive settlement of grievances.") Here, the contract provides for a definitive settlement of grievances if the OPBA or its individual officers fail to demand arbitration within ten days

of the Mayor's "step 2" grievance decision. Therefore, the OPBA's claim was extinguished as a matter of law eleven days after the February 24, 2006 step 2 decision.

If the OPBA were allowed to do what it proposes in this case, it would be permitted, through its members, to make serial demands for arbitration when it has previously failed to timely demand arbitration on the same issue. This would, practically speaking, nullify the deadlines set forth in the Collective Bargaining Agreement. If this Court were to adopt such a rule, it would abdicate its duty to give effect to all parts of a written contract. Ford Motor Co. v. John L. Frazier & Sons Co. (1964), 8 Ohio App.2d 158, 161. Therefore, this Court should deny jurisdiction and let the Ninth District's decision in this matter stand.

Appellant's Proposition of Law II:
The doctrine of *res judicata* cannot be applied to preliminary grievance meetings between an Employer and a Union arising from a collective bargaining agreement.

In the OPBA's second Proposition of Law, the OPBA again misconstrues the holding of the Ninth District. The OPBA claims that the Ninth District gave res judicata effect to the Mayor's "step 2" hearing of its December 27, 2005 grievance, and that it is inappropriate to do so, because such a hearing is before an adversary and no formalities of notice are required for the hearing. The OPBA misses the point entirely.

What the Ninth District gave *res judicata* effect to is the OPBA's failure to timely demand arbitration of the December 27, 2005 grievance, which would have provided the OPBA all of the things that it claims that it didn't have – a neutral fact-finder, formalities of notice, and evidentiary proceedings. By failing to timely demand

arbitration, the Mayor's decision on the grievance constituted a resolution of the claim. If the OPBA disagreed with that resolution, it was incumbent upon the OPBA to demand arbitration in a timely fashion.

In Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 382, this Court held that a final resolution of a prior proceeding bars "all claims which were or *might have been* litigated" in the first proceeding. (Emphasis added). Here, any of the issues concerning Officer Post's shift scheduling could have been litigated in the first grievance proceeding. The Mayor's decision would not have had res judicata effect upon the arbitrator, who would have been free to consider any evidence which the OPBA cared to offer. The OPBA did not pursue that opportunity, so successive grievances on the same issue are barred. The OPBA should not be permitted to file successive grievances over the same issue after abandoning a prior grievance.

Applying res judicata in this context is no more harsh than the application of the doctrine in other areas of litigation. As noted by this Court in Ameigh v. Baycliffs Corp. (1998), 81 Ohio St.3d 247, 256, "[j]udgments become preclusive in more ways than by litigation of all the issues." As a result, res judicata attaches when a party fails to file suit within the statute of limitations. LaBarbera v. Batsch (1967), 10 Ohio St.2d 106. Res judicata applies when a case is dismissed for failure to prosecute. State ex rel. SuperAmerica Group v. Licking Cty. Bd. of Elections, 80 Ohio St.3d 182, 1997-Ohio-347. Res judicata attaches when a party fails to timely appeal. Flanagan v. Flanagan, 174 Ohio App.3d 77, 2007-Ohio-6209, ¶9. In each of these contexts, res judicata did not apply due to a resolution of the case upon the merits, but instead it applied due to a party's failure to meet deadlines.

It should be no different for a contractually-imposed deadline. Here, the parties agreed to a Collective Bargaining Agreement which contained a ten day deadline for demanding arbitration. The consequences for missing that deadline were spelled out in the contract - the issue would be resolved according to the Mayor's decision. For that contract language to mean anything at all, it must mean that the grievance is resolved with finality. Otherwise, the language is meaningless, and the union would be free to grieve, re-grieve, and re-re-grieve the same issue in serial fashion any time it was dissatisfied. Such a bizarre result could not have been the intent of the contract. Contracts should not be construed so as to arrive at absurd results. Cincinnati v. Cameron (1878), 33 Ohio St. 336, 364. As such, the Ninth District was correct in its application of res judicata, and this Court should refrain from hearing this case.

VI. CONCLUSION

Based upon the foregoing law and argument, it is clear that the Ninth District reached the right result in this matter. Further, the matter is not one of general or widespread interest. As a result, this Court should DECLINE to exercise jurisdiction in this matter.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a copy of the foregoing was served on April 15, 2008 upon the following by regular, U.S. Mail:

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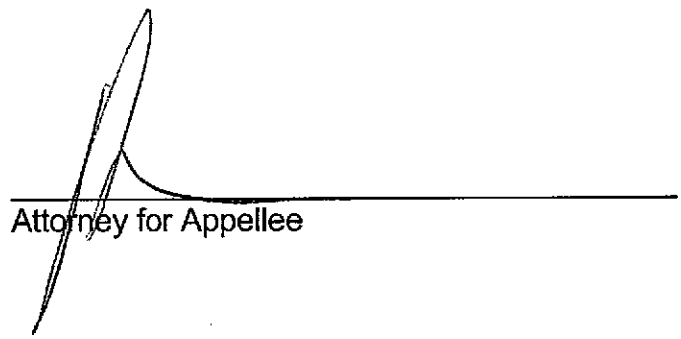

Attorney for Appellee

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