

IN THE SUPREME COURT OF OHIO

Mingo Junction Safety Forces Association :  
Local No. 1, et al., :

11-1363

Appellees, :

On appeal from the Jefferson County  
Court of Appeals, Seventh Appellate  
District

v. :

Mayor Dominic Chappano, et al., :

Court of Appeals  
Case No. 10-JE-20

Appellants. :

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS MAYOR DOMINIC CHAPPANO, ET AL.

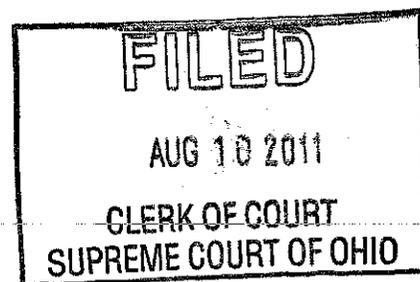
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LOCAL NO. 1

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EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents a critical issue concerning the ability of a court to deny constitutionally guaranteed due process rights to a defendant in a civil case where a plaintiff files a Motion for Permanent Injunction and a companion Complaint for Declaratory Judgment as one document, and where the court grants remedies requested by the Plaintiff in the Motion for Permanent Injunction that also dispositively rules on remedies requested by the Plaintiff in the Complaint for Declaratory Judgment before the Defendant has answered the Complaint and before the Defendant's time allowed by Rule to answer the Complaint has expired.

The decision of the court of appeal sets a precedent that would allow a trial court to deny due process to a defendant in a Complaint for Declaratory Judgment where a simultaneously filed Motion for Permanent Injunction is ruled on by the trial court and by its ruling effectively and dispositively rules on remedies requested in the form of a declaratory judgment.

STATEMENT OF THE CASE AND FACTS

This case arises from the efforts of the Appellees, the Mingo Junction Safety Forces Association, Local No. 1, to force the Appellants, the Village of Mingo Junction, Ohio, to comply with the terms of an expired collective bargaining agreement (hereinafter "CBA") that had formerly been in place between them. The Appellees failed to properly provide notice to the Appellant, as expressly stated in the CBA, of their intent to negotiate a successor CBA and consequently no negotiations were commenced. Subsequent to the expiration of the CBA the Appellant found it financially necessary to lay-off members of the Appellee organization. After

the expiration of the CBA and receipt of the notice of lay-offs the Appellee files two (2) grievances. The grievances concerned the noticed layoffs and the failure of the Appellant to negotiate a successor contract.

Appellees filed a Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Mandatory Injunction. At the same time the Appellees filed a companion Verified Complaint for Declaratory Judgment and Temporary and Permanent Injunction. A Temporary Restraining Order and Temporary Injunction was granted to the Appellees and in the Order the trial court directed the parties to submit to the court memorandums of law or briefs in support of their position regarding the permanent injunction within nine (9) days. Three (3) days after the briefs in support were submitted to the trial court the Appellees filed an Amended Motion for Permanent Mandatory Injunction. The following day the trial court issued a Final Appealable Order dissolving the previously issued Temporary Restraining Order and Preliminary Injunction; denied Appellees Motion for a Permanent Mandatory Injunction; and ordered the parties to engage in the grievance and arbitration procedures set forth in the CBA previously entered into between the parties for the purpose reaching a determination on Appellees claims that the CBA remains in effect and, whether it had been violated by the Appellants.

The court of appeals erred in ruling that due process was not denied to the Appellants. The court of appeals also erred in ruling that the trial court was correct to order the parties to submit to the grievance and arbitration procedures of the CBA notwithstanding Appellants' assertion that the CBA had expired.

In support of its position on these issues, the Appellants present the following argument.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: A defendant is denied due process of law in a Complaint for Declaratory Judgment when a trial court rules on remedies in a companion Motion for Permanent Injunction that effectively and dispositively resolve remedies in the Complaint for Declaratory Judgment before the defendant has answered the Complaint and before the time for the defendant to answer by Rule has expired.**

The guarantee of due process of law is found under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 16 of the Ohio Constitution. (*Ohio Valley Radiology Associates, Inc., et al. v. Ohio Valley Hospital Association, et al.* (1986), 28 Ohio St.3d 118). The United States Supreme Court has held that, “[t]he fundamental requisite of due process of law is the opportunity to be heard.” (*Id.* at p. 124 quoting *Grannis v. Ordean* (1914), 234 U.S. 385, 394). The United States Supreme Court has also held that, “An elementary and fundamental requirement of due process in any proceeding \*\*\* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections \*\*\*”. (*Id.* at p. 124-125 quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314. With regard to Section 16, Article I of the Ohio Constitution and its guarantee of due process, the Supreme Court of Ohio has described this guarantee as one of, “a reasonable opportunity to be heard after a reasonable notice of such hearing.” (*State ex rel. Allstate Ins. Co. v. Bowen* (1936), 130 Ohio St. 347). The Defendant-appellants were denied due process under both the Fourteenth Amendment to the United States Constitution and Section 16 of the Ohio Constitution.

In addition to their Complaint for Declaratory Judgment (hereinafter referred to as “Complaint”) the Appellees filed a companion Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Mandatory Injunction pursuant to R.C. § 2727.02 on

September 7, 2010 (hereinafter referred to as "Motion for Permanent Injunction"). On September 8, 2010 the trial court granted the Appellees a temporary restraining order and temporary injunction for a period of fourteen (14) days. As part of this Order the trial court ordered the parties, "to submit memorandums of law or briefs in support of their position regarding the permanent injunction on or before September 17, 2010, to enable the court to rule on the same on September 21, 2010, without an oral hearing." The Order was clear and unambiguous that the "memorandums of law or briefs in support" to be submitted to the court were to specifically address only the issue of the permanent injunction. At no point was it ever ordered or even indicated that the parties were to address any of the declaratory judgments demanded by the Appellees in their Complaint. Pursuant to the Order of the trial court the Appellants did submit a brief in support of their position however the Appellees did not.

On September 21, 2010 the trial court did indeed issue a decision entitled, "Entry Overruling Plaintiff's Motion for Permanent Mandatory Injunction and Ordering Grievance and Arbitration Proceedings" (hereinafter referred to as the "Order of September 21, 2010"). While the Order of September 21, 2010 denied the Appellees motion for a permanent injunction the final paragraph of the Order of September 21, 2010 stated, "The parties are hereby further **ORDERED** to engage in the grievance and arbitration procedures as the same are set forth in the collective bargaining agreement previously entered into between the parties." At the bottom of the final page just above Judge Henderson's signature the trial court wrote, "**THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.**" The Order Granting Temporary Restraining Order and Temporary Injunction did not direct the parties to address the issues of compliance with the collective bargaining agreement or the grievance and arbitration procedure.

As mentioned earlier the Appellees Complaint demanded that the court award the following:

(4) That the Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with the terms of the existing collective bargaining agreement until such time as a new agreement has been negotiated as required by Article 34, Section 10 of the Collective Bargaining Agreement.

(5) ... ordering the defendants to comply with the Collective Bargaining Agreement and ordering the Defendants to submit the resolution of its dispute with the Plaintiff to binding arbitration

The existence, content, and validity of a collective bargaining agreement between the parties is an issue of fact to be determined. In an action for declaratory judgment the parties have a right to have issues of fact tried and determined as in any other civil action pursuant to R.C. § 2721.10 which states,

When an action or proceeding in which declaratory relief is sought under this chapter involves the determination of an issue of fact, that issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the action or proceeding is pending.  
R.C. § 2721.10

The facts, as well as many, many others would have been at issue had the Appellants not been denied their right to answer the Complaint of the Appellees.

The result of Order of September 21, 2010 is that declaratory judgments # 4 and #5, demanded by the Appellees of their Complaint, as identified above, were effectively and dispositively ruled on by the trial court.

The court of appeals held that the Order of the trial court ruled only on "Appellees' claim for injunctive relief. Again, that claim stated:

(5) That the Plaintiffs are entitled to the remedies requested in the form of a Temporary Restraining Order, a Preliminary Restraining Order and a Permanent Mandatory injunction enjoining the Defendants from implementing layoffs in the Village of Mingo Junction Police department, requiring the Defendants and its representatives and agents, to enforce Mingo Junction ordinance 140.01, ordering

the defendant [sic] to comply with the collective bargaining agreement and ordering the Defendants to submit the resolution of its dispute with the Plaintiff to binding arbitration.

*Opinion of the Jefferson County Court of Appeals at p.7.*

The court of appeals determined that the trial court had not ruled on the Appellees' claims for declaratory judgment which it identified as the following:

(2) That Plaintiffs are entitled to a declaration that the Defendants are required to rescind the lay-off notice dated August 24, 2010.

(3) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with Mingo Junction ordinance 140.01 and 141.12(A) and the Collective Bargaining Agreement.

(4) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with the terms of the existing collective bargaining agreement until such time as a new agreement has been negotiated as required by Article 34, Section 10 of the Collective Bargaining Agreement.

*Opinion of the Jefferson County Court of Appeals at pp. 6-7.*

It is of particular note that in the request for injunctive relief ruled on by the trial court and the third and fourth requests for declaratory judgment that the court of appeals said the trial court did not rule on, all similarly requested an order requiring compliance with the CBA. The fifth request for injunctive relief states, "... ordering the defendant [sic] to comply with the collective bargaining agreement and ordering the Defendants to submit the resolution of its dispute with the Plaintiff to binding arbitration" *Id.* at pp. 6-7 (Emphasis added). The third request for declaratory judgment states, "Defendants and its representatives and agents, are required to comply with Mingo Junction ordinance 140.01 and 141.12(A) and the Collective Bargaining Agreement." *Id.* at p. 6 (Emphasis added). The fourth request for declaratory judgment states, "...Defendants and its representatives and agents, are required to comply with the terms of the existing collective bargaining agreement ..." *Id.* at p. 7 (Emphasis added).

For the trial court to order compliance with the grievance and arbitration procedure it is necessary for the CBA to be in effect because if the court (trial or court of appeals) determined that the CBA was terminated upon expiration the Appellees would have no appeal under the CBA and be limited to appeals found in civil service or statutory law. See *State of Ohio ex rel. Robert a Ciccolelli v. Dominic J. Medina et al.* (Oct. 5, 1992, Seventh App. Dist.), 1992 Ohio App. LEXIS 5221 (attached).

In *Ciccolelli* a city was a party to a collective bargaining agreement with a labor union and the collective bargaining agreement was to expire on December 31, 1989. The agreement required that either party desiring to modify the agreement shall give written notice to the other. No written notice was provided by either party. In January 1990 a bargaining unit member was terminated. In this case the bargaining unit member appealed to the city's civil service commission and the city argued that the bargaining unit member's appeal should be under the terms of the expired collective bargaining agreement (a successor agreement was subsequently negotiated and became effective in April 1990). The Seventh District court of appeals concluded that because neither party had provided the written notice of intent to modify as required by the agreement, the agreement expired on December 31, 1989 and was thus terminated. The Court further concluded that because the employee's termination occurred after the expiration and termination of the former agreement and before the start of the successor agreement, the employee had no appeal under the collective bargaining agreement. The court determined that at the time of his termination the employee's proper appeal was to the civil service commission.

The significance of *Ciccolelli* as it relates to the instant case is that despite the fact the lay-offs of the Mingo Junction police officers occurred after the expiration of the CBA the trial court ordered, through an injunctive relief remedy, that the Appellants must comply with the

grievance and arbitration procedure of the agreement. Logically the court must not consider the agreement terminated but rather in effect, valid, and the proper appeal venue for the Appellees.<sup>1</sup>

In discussing the trial court's order directing the parties to the grievance and arbitration procedure the court of appeals was obviously mistaken when they stated, "Notably, in so doing, the trial court did not determine whether or not the CBA had expired." Opinion of the Jefferson County court of appeals at p. 5. By its own precedent the court of appeals could not permit a trial court to order that the Appellees were entitled to appeal through the grievance and arbitration procedure if indeed the agreement had expired and was terminated. Further, by its own precedent the court of appeals could not permit a trial court to order compliance with the grievance and arbitration procedure of a collective bargaining agreement if the question of its legal existence were not determined. This is precisely one of the issues that would have been brought to the trial court's attention had the Appellants been permitted to answer the Complaint before the trial court directed the parties to the grievance and arbitration procedure.

Logically, if the parties can be ordered to comply with the CBA as to the grievance and arbitration procedure then the trial court and the court of appeals must accept the validity and legal existence of the CBA. Otherwise, how would it be possible for the trial court not to order compliance with the CBA as to Appellee's request for declaratory judgment #3 and #4? Ordering compliance with the collective bargaining agreement as a remedy effectively and dispositively orders compliance with all such requested remedies regardless of whether they are termed injunctive relief remedies or declaratory judgment remedies.

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<sup>1</sup>Much like *Ciccolelli*, the collective bargaining agreement between the parties in this case requires, in Article 2, that "if there is any intent to amend or modify this Agreement by either party, such party will give notice of their intent to the other party in writing no later than sixty (60) days prior to the expiration of this Agreement." The Appellees have correctly never claimed that any such written notice was provided by them to the Appellant within the required time frame and, they have maintained only that oral requests to bargain were made prior to the contractually required sixty (60) day period.

Specifically the following requests for declaratory judgment have been effectively and dispositively ruled on by the trial court and affirmed by the error of the court of appeals:

(3) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with Mingo Junction ordinance 140.01 and 141.12(A) and the Collective Bargaining Agreement.

(4) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with the terms of the existing collective bargaining agreement until such time as a new agreement has been negotiated as required by Article 34, Section 10 of the Collective Bargaining Agreement.

The court of appeals stated, “Appellants are correct that prior to ruling on a claim for declaratory relief, the trial court must follow the civil rules and allow the defendants time to answer.” *Opinion of the Jefferson County Court of Appeals* at p. 6. This must apply even in cases where the trial court may not have expressly ruled on claims for declaratory relief but in fact effectively has done so. Because these were granted before the Appellants time to answer the Complaint had expired the Appellants have been denied due process.

**Proposition of Law No. II: A party to a collective bargaining agreement is not obligated to engage in binding arbitration where the grievance did not arise under the collective bargaining agreement, more specifically when the grievance arises post-expiration of the collective bargaining agreement.**

Court of appeals *sua sponte* elected to address and affirm the decision of the trial court to order the parties to submit to the grievance and arbitration procedure of the CBA notwithstanding Appellants assertion that the CBA had expired. *Opinion of the Jefferson County Court of Appeals* at p. 9. The court of appeals stated that the trial court “... properly ordered the parties to submit to the grievance procedures in the CBA ...” *Id* at p. 9. The court of appeals erred in this judgment by relying on case law that had since been modified by the United States Supreme Court, and their judgment was contrary to their own existing case law precedent.

It is wholly against current case law to order parties to engage in a contractual grievance arbitration procedure post-contract expiration without first determining whether the subjects of the grievance are in fact subject to post-expiration arbitration. The court of appeals quotes *International Brotherhood of Teamsters, etc. Local Union 20 v. Toledo* (April 29, 1988, Sixth App. Dist.), 48 Ohio App.3d 11 citing *John Wiley & Sons, Inc. v. Livingston* (1964), 376 U.S. 543, 553 as stating, “[A] grievance which arises after the lapse of a collective bargaining agreement is arbitrable even though there is no longer any contract between the parties.” *Id* at p. 14. Neither of the cases to which the court of appeals cites stands for such a blanket statement as that quoted.

The court of appeals also cited to *Nolde Brothers, Inc. v. Local No 358, Bakery and Confectionary Workers Union, AFL-CIO* (1977), 430 U.S. 243 in support of this blanket statement approach. Subsequent to *Nolde Brothers* the United States Supreme Court questioned and clarified just such blanket statement thinking as that put forth by the court of appeals in the instant case. In *Litton Fin. Printing Div. v. NLRB* (1991), 501 U.S. 190 the United States Supreme Court, in considering *Nolde Brothers*, stated,

However, *Nolde Brothers* does not announce a broad rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable, but applies only where a dispute has its real source in the contract. Absent an explicit agreement that certain benefits continue past expiration, a postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arise before expiration, where a postexpiration action infringes a right that accrued or vested under the agreement, or where, under the normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. And, as *Nolde Brothers* found, structural provisions relating to remedies and dispute resolution -- e. g., an arbitration provision -- may in some cases survive in order to enforce duties under the contract. It is presumed as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the Agreement's expiration.

*Id.* paragraph (f) of the Syllabus.

\*\*\*\*\*

The object of an arbitration clause is to implement a contract, not to transcend it. *Nolde Brothers* does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. A rule of that sweep in fact would contradict the rationale of *Nolde Brothers*. The *Nolde Brothers* presumption is limited to disputes arising under the contract. A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Any other reading of *Nolde Brothers* seems to assume that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Any other reading of *Nolde Brothers* seems to assume that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied.

*Id.* at p. 205-206.

Interestingly in *Litton*, just like in the instant case, the issue concerned the arbitration of lay-offs that occurred after the expiration of the collective bargaining agreement. Even more interestingly, the decision of the court of appeals in *State of Ohio ex rel. Robert a Ciccolelli v. Dominic J. Medina et al.* (Oct. 5, 1992, Seventh App. Dist.), 1992 Ohio App. LEXIS 5221, (decided little more than one (1) year after *Litton*) was consistent with the decision of the United States Supreme Court in *Litton*. In both *Ciccolelli* and *Litton* the respective courts found that the grievances arose after the expiration of the collective bargaining agreements and were therefore not arbitrable.

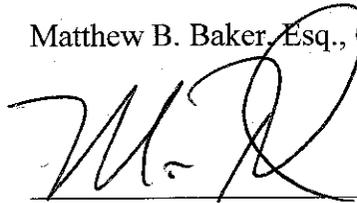
The court of appeals clearly erred in offering an affirmation of the trial court's direction ordering the parties to engage in the grievance and arbitration procedure when the lay-offs being grieved occurred after the expiration of the collective bargaining agreement

CONCLUSION

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

Respectfully submitted,

Matthew B. Baker, Esq., Counsel of Record

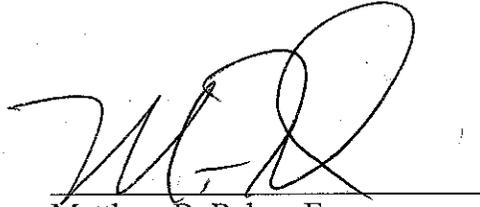


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Matthew B. Baker, Esq.  
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Mayor Dominic Chappano, et al.

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for Appellees, Michael Piotrowski, Esq., 2721 Manchester Road, Akron, Ohio 44319 on August 10<sup>th</sup>, 2011.

A handwritten signature in black ink, appearing to read 'M.B. Baker', written over a horizontal line.

Matthew B. Baker, Esq.  
Counsel for Appellants,  
Mayor Dominic Chappano, at al.

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

THE MINGO JUNCTION SAFETY )  
FORCES ASSOC. LOCAL 1, et al., )

PLAINTIFFS-APPELLEES, )

- VS - )

MAYOR DOMENIC CHAPPANO, et al., )

DEFENDANTS-APPELLANTS. )

CASE NO. 10 JE 20

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas  
Court, Case No. 10 CV 543.

JUDGMENT:

Affirmed.

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JUDGES:

Hon. Mary DeGenaro  
Hon. Cheryl Waite  
Hon. Joseph J. Vukovich

Dated: June 29, 2011

DeGenaro, J.

{¶1} Defendants-Appellants, The Village of Mingo Junction, and Mayor Dominic Chappano appeal the September 21, 2010 judgment of the Jefferson County Court of Common Pleas overruling a motion for a permanent mandatory injunction sought by Plaintiff-Appellees, Mingo Junction Safety Forces Association Local No. 1, et al., and ordering the parties to engage in the grievance and arbitration procedures set forth in a collective bargaining agreement previously entered into by the parties.

{¶2} Appellants argue that the trial court erred by entering a final judgment before they filed an answer. Further, they argue that their due process rights were violated when the trial court entered a final judgment before they received notice and an opportunity to be heard. These arguments are meritless. The trial court's September 21 judgment only ruled upon Appellees' claims for injunctive relief, and Appellants were afforded notice and an opportunity to be heard on those claims. Accordingly, the judgment of the trial court is affirmed.

#### Facts and Procedural History

{¶3} Appellee, Mingo Junction Safety Forces Association Local No. 1 is a labor organization that represents safety force employees employed by the Village of Mingo Junction.<sup>1</sup> Appellee, Joseph Sagun is the president of the Union. Appellant, Village and the Union entered into a collective bargaining agreement. Article 2, Section A of the CBA states that the agreement "shall run from August 20<sup>th</sup>, 2006 to August 15<sup>th</sup>, 2009." By agreement of the parties, this term had been extended to August 15, 2010.

{¶4} Article 34, Section 10 of the CBA states: "The current Collective bargaining Agreement shall continue until a new contract is agreed upon and signed, subject to the laws of the State of Ohio."

{¶5} Further, Article 35, Section A states:

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<sup>1</sup> As a village, which is a municipal corporation with a population of less than 5,000, see R.C. 703.01(A), Mingo Junction is not considered a "public employer" bound by Ohio's Public Employees' Collective Bargaining Act. See R.C. 4117.01(B).

{¶16} "The procedures contained in this article shall govern all negotiations for a new collective bargaining agreement between the parties. Within ninety days of the expiration of this collective bargaining agreement. [sic] The parties shall continue in full force and effect all terms and conditions of this existing agreement unless and until a new or modified agreement is agreed upon or established by operation of this Article. The parties shall conduct all negotiations in accordance with this Article in good faith."

{¶17} The CBA also states that the grievance procedure, the final step of which is binding arbitration, "shall be the exclusive method of resolving both contractual and disciplinary grievances." The CBA broadly defines a grievance as "a dispute between the Village and members of the bargaining unit over [sic] alleged violation, misinterpretation or misapplication of a specific article(s) or section(s) of this agreement."

{¶18} According to Appellees, beginning on June 8, 2010 the Union repeatedly attempted to schedule negotiations for a successor CBA. However, the meeting was not ultimately scheduled until August 17, 2010. During that meeting, the Village asserted that because the contract term had expired it was under no obligation to negotiate or follow the CBA.

{¶19} The Mayor issued layoff notices to seven members of the Union, stating that as of September 10, 2010, seven of the eight sworn members of the Mingo Junction Police Department (everyone except for the Police Chief) would be laid off from their positions.

{¶110} The Union filed two class action grievances. The first concerned the Village's refusal to enter into negotiations, negotiate in good faith, or maintain the current CBA until another agreement was put in place. The second concerned the layoffs. The Mayor responded to the grievances in a letter to the Union president in which he asserted that the CBA had expired as of August 15, 2010 and that therefore the terms and conditions of the CBA were no longer in effect and that the Village was under no obligation to address the grievances.

{¶111} On September 7, 2010, Appellees filed a verified complaint for declaratory judgment and temporary and permanent injunction, in which they requested the following

relief:

{¶12} "(1) That the Plaintiffs and Defendants have a real and justiciable controversy that must be expeditiously resolved.

{¶13} "(2) That Plaintiffs are entitled to a declaration that the Defendants are required to rescind the lay-off notice dated August 24, 2010.

{¶14} "(3) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with Mingo Junction ordinance 140.01 and 141.12(A) and the Collective Bargaining Agreement.

{¶15} "(4) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with the terms of the existing collective bargaining agreement until such time as a new agreement has been negotiated as required by Article 34, Section 10 of the Collective Bargaining Agreement.

{¶16} "(5) That the Plaintiffs are entitled to the remedies requested in the form of a Temporary Restraining Order, a Preliminary Restraining Order and a Permanent Mandatory injunction enjoining the Defendants from implementing layoffs in the Village of Mingo Junction Police department, requiring the Defendants and its representatives and agents, to enforce Mingo Junction ordinance 140.01, ordering the defendant [sic] to comply with the collective bargaining agreement and ordering the Defendants to submit the resolution of its dispute with the Plaintiff to binding arbitration.

{¶17} "(6) That all costs in this matter be assessed against the Defendants."  
(Verified Complaint.)

{¶18} Appellees also filed a motion for a restraining order, preliminary injunction and permanent mandatory injunction. Appellees requested that the court enjoin Appellants from instituting the layoffs, and order Appellants to comply with Mingo Junction Ordinance 141.01 and 141.12(A) and the CBA. These local ordinances, which are referenced in the CBA, concern personnel and scheduling requirements for the police department.

{¶19} The day the complaint was filed a hearing on the TRO was held and attended by counsel for both sides. As a result of this hearing the trial court granted the

TRO/preliminary injunction. The trial court's decision turned, at least in part, on its conclusion that the Mayor was not the appointing authority for Mingo Junction.

{¶20} Specifically, the court ruled:

{¶21} "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendants, its officers, employees, servants, agents and attorneys shall be and are hereby restrained as follows:

{¶22} "1. From enforcing the layoff notices as the layoff notices issued by the Mayor shall not be effective as they were not issued by the appropriate appointing authority.

{¶23} "2. From undermining the provisions contained in the ordinance requiring a minimum complement of safety forces in the Village of Mingo Junction (Ordinance No. 141.01), as the same is currently staffed.

{¶24} "3. Further, plaintiffs are hereby granted the requested Temporary Restraining Order and Preliminary Injunction for a fourteen (14) day period (through September 21, 2010).

{¶25} "4. The parties are to submit memorandums of law or briefs in support of their position regarding the permanent injunction on or before September 17, 2010, to enable the Court to rule on the same on September 21, 2010, without an oral hearing.

{¶26} "5. The parties are urged to engage in negotiations regarding the police department staffing and the Collective Bargaining Agreement within the fourteen (14) day period.

{¶27} "6. No bond shall be required of the plaintiffs."

{¶28} Both sides filed briefs in support of their respective positions. Among other things, Appellants argued that assuming arguendo the court found the CBA was still in effect, injunctive relief would be precluded since the CBA provided an adequate remedy at law, namely arbitration.

{¶29} On September 21, 2010, the trial court entered a judgment entry overruling Appellees' motion for a permanent mandatory injunction and ordering the parties to proceed with the grievances and arbitration. The trial court changed its earlier opinion

about the identity of the appointing authority for Mingo Junction, now finding that it was the Mayor. The court concluded that Appellees would not suffer irreparable harm absent the injunction and that they had an adequate remedy at law, i.e., the grievance and arbitration procedures in the CBA. Notably, in so doing, the trial court did not determine whether or not the CBA had expired. Rather, it found that the CBA provided a forum to litigate that very question, along with the issue of whether Appellants violated the CBA by issuing layoff notices. Specifically, the trial court stated:

{¶30} "Therefore, the claims of the plaintiff that the CBA continues to be in effect and that the CBA has been violated by the defendants shall be handled in accordance with said grievance and arbitration procedures as agreed to between the parties previously in said CBA, and a mandatory permanent injunction is not warranted."

{¶31} Finally, the trial court did not address Appellees' claims for declaratory relief in the September 21 entry. And at the end of the entry the trial court included the Civ.R. 54(B) "no just cause for delay" language.

{¶32} Appellants filed a motion for additional time to answer or respond to Plaintiff's complaint, along with a request for hearing. Before the trial court could rule on that motion, Appellants filed a timely of appeal with this court.

{¶33} Appellants filed a motion for stay of execution of judgment pending appeal pursuant to Civ.R. 62 with the trial court which was overruled. Appellants then filed a stay motion with this court, which was granted on December 14, 2010. Specifically, this Court concluded that the Village was entitled to a stay as a matter of right pursuant to Civ.R. 62(C), and consequently stayed the portion of the court's September 21, 2010 order compelling Appellants "to engage in the grievance and arbitration procedures" from the previously entered CBA.

#### **Trial Court Ruling before Answer was Filed**

{¶34} In their first of two assignments of error, Appellants assert:

{¶35} "The trial court erred in issuing a final appealable order on a complaint for declaratory judgment filed by the Plaintiff-Appellees before the Defendant-Appellants had submitted an answer to the complaint and before the time to answer the complaint as

prescribed by Ohio Civil Rule 12(A)(1) expired."

{¶36} Appellants are correct that prior to ruling on a claims for declaratory relief, the trial court must follow the civil rules and allow the defendants time to answer. See Civ.R. 7(A) and Civ.R. 12(A)(1). "The procedure for obtaining a declaratory judgment must be in accordance with the civil rules." *Galloway v. Horkulic*, 7th Dist. No. 02JE52, 2003-Ohio-5145, at ¶21, citing Civ.R. 57. See, also, *Hartley v. Clearview Equine Veterinary Servs.*, 6th Dist. No. L-04-1163, 2005-Ohio-799.

{¶37} Civ.R. 7(A) provides: "Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

{¶38} Civ.R. 12(A)(1) provides: "The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication."

{¶39} Thus, it would be error for a trial court to rule on a declaratory judgment complaint before the defendant has been afforded time to answer pursuant to Civ.R. 12(A)(1) and assuming no Civ.R. 12(B) motion had been filed. Here, Appellants had until October 7, 2010 to answer the declaratory judgment action which is clearly after the trial court's September 21, 2010 judgment.

{¶40} However, as indicated above, the trial court did not rule on Appellees' claims for declaratory relief in the September 21 judgment. Again, those claims were as follows:

~~{¶41} "(2) That Plaintiffs are entitled to a declaration that the Defendants are required to rescind the lay-off notice dated August 24, 2010.~~

{¶42} "(3) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with Mingo Junction ordinance 140.01 and 141.12(A) and the Collective Bargaining Agreement.

{¶43} "(4) That Plaintiffs are entitled to a declaration that the Defendants and its representatives and agents, are required to comply with the terms of the existing collective bargaining agreement until such time as a new agreement has been negotiated as required by Article 34, Section 10 of the Collective Bargaining Agreement."

{¶44} The September 21 entry did not address those claims. The trial court did not declare that Appellants must rescind the layoff notices, or that Appellants must comply with Mingo Junction Ordinance 140.01 and 141.12(A) and all the terms and conditions in the CBA. Further, the court did not declare that Appellants are required to comply with the terms of the CBA until such time as a new agreement has been negotiated. Importantly, the trial court included the Civ.R. 54(B) language in the September 21 entry, making it immediately appealable, even if all the claims had not been disposed of. See, e.g., *Ankrom v. Hageman*, 10th Dist. No. 06AP-735, 2007-Ohio-5092, at ¶13 (concluding that denial of permanent injunction was final order, but where other claims remained, the Civ.R. 54(B) language was required to make it immediately appealable).

{¶45} Rather, the September 21, 2010 judgment entry only ruled on Appellees' claim for injunctive relief. Again, that claim stated:

{¶46} "(5) That the Plaintiffs are entitled to the remedies requested in the form of a Temporary Restraining Order, a Preliminary Restraining Order and a Permanent Mandatory injunction enjoining the Defendants from implementing layoffs in the Village of Mingo Junction Police department, requiring the Defendants and its representatives and agents, to enforce Mingo Junction ordinance 140.01, ordering the defendant [sic] to comply with the collective bargaining agreement and ordering the Defendants to submit the resolution of its dispute with the Plaintiff to binding arbitration."

{¶47} The trial court overruled Appellees' request for a permanent injunction because the CBA provided a remedy for the parties' disputes in the form of grievance procedures that culminate in binding arbitration. The trial court followed the proper procedure regarding Appellants' request for injunctive relief. See Civ.R. 65. Appellants received notice of the complaint, the motion for TRO, preliminary and permanent

injunction, and counsel for both sides appeared for a hearing on the TRO. *Id.* The trial court handled the TRO and preliminary injunction request together, which is proper where, as here, both parties had notice of, were present at, and participated in the hearing. See *Turoff v. Stefanec* (1984), 16 Ohio App.3d 227, 228, 475 N.E.2d 189. The trial court then granted the TRO/preliminary injunction and instructed the parties to brief the issue of whether a permanent mandatory injunction should issue, which both sides then did.

{¶48} The trial court ultimately overruled Appellees' motion for a permanent injunction, and dissolved the TRO/preliminary injunction since the parties had an adequate remedy at law to resolve their disputes, the grievance and binding arbitration procedures contained in the CBA. Thus, the court ordered the parties to engage in the grievance and binding arbitration procedures found in the CBA. It is this portion of the judgment that caused Appellants to appeal.

{¶49} One argument advanced by Appellees is that any error by the trial court in compelling the parties to engage in the grievance and arbitration procedures in the CBA was invited by Appellants, since one of their reasons for opposing the injunction was that the CBA provided an adequate remedy at law.

{¶50} Under the invited-error doctrine, "a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. Beaver v. Konteh* (1998), 83 Ohio St.3d 519, 521, 700 N.E.2d 1256. "Invited error is a branch of the waiver doctrine that estops a party from seeking to profit from an error that the party invited or induced." *Koch v. Rist* (2000), 89 Ohio St.3d 250, 256, 730 N.E.2d 963.

{¶51} In their memorandum contra to Appellees' motion for permanent injunction, Appellants argued: "assuming *arguendo* only, that Plaintiffs' assertions are true that the CBA remains in effect, the grievance procedure found therein constitutes an adequate remedy at law. Because the Plaintiffs have an adequate remedy at law there can be no entitlement to injunctive relief." (emphasis in original)

{¶52} Since Appellants couched the above argument as one made *arguendo*, at

first blush it appears to be unfair to conclude that this constitutes invited error. However, Appellant did advance this argument to prevent the trial court from issuing the injunction. Thus, it is somewhat disingenuous to now complain on appeal that the trial court erroneously used that same reasoning to order the parties engage in the grievance and arbitration process. In effect, Appellants are attempting to use this argument as both a shield and a sword.

{¶53} Regardless, the court properly ordered the parties submit to the grievance and arbitration procedures in the CBA notwithstanding Appellants' assertion that the CBA had expired. "[A] grievance which arises after the lapse of a collective bargaining agreement is arbitrable even though there is no longer any contract between the parties." *Internatl. Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 20 v. Toledo*, 48 Ohio App.3d 11, 14, 548 N.E.2d 257, citing *John Wiley & Sons, Inc. v. Livingston* (1964), 376 U.S. 543, 553, 84 S.Ct. 909, 11 L.Ed.2d 898; and *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO* (1977), 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300.

{¶54} Further, the CBA states that the grievance procedure, the final step of which is binding arbitration, "shall be the exclusive method of resolving both contractual and disciplinary grievances." Further, it broadly defines a grievance as "a dispute between the Village and members of the bargaining unit over [sic] alleged violation, misinterpretation or misapplication of a specific article(s) or section(s) of this agreement." The parties' disputes, whether the CBA remains in effect and whether Appellants violated it by issuing the layoff notices, are disputes that fall under the CBA's definition of grievance. Accordingly, the trial court properly ordered the parties to submit to the grievance procedures in the CBA but otherwise denied Appellees' request for injunctive relief.

{¶55} The trial court did not err by ruling on the claims for injunctive relief before Appellants filed an answer to the claims for declaratory relief. Accordingly, Appellants' first assignment of error is meritless.

### Due Process

{¶156} In their second and final assignment of error, Appellants assert:

{¶157} "The trial court erred by denying the Defendant-Appellants due process of law when it issued a final appealable order granting declaratory judgment on a complaint for declaratory judgment filed by the Plaintiff-Appellees without providing the Defendant-Appellees [sic] notice and opportunity to be heard on the complaint."

{¶158} This assignment of error also presupposes that the trial court granted declaratory relief in the September 21, 2010 entry. However, as discussed above, the entry did not rule upon the requests for declaratory relief, but rather overruled Appellees' request for injunctive relief and ordered the parties to submit their disputes to binding arbitration.

{¶159} Appellants received notice of Appellees' Verified Complaint and motion for injunctive relief. Appellants attended a hearing on the TRO/preliminary injunction, and pursuant to the trial court's request, they submitted a brief regarding the permanent injunction. Thus, Appellants received notice and had an opportunity to be heard regarding Appellees' request for injunctive relief. Accordingly, Appellants' second assignment of error is meritless.

{¶160} In conclusion, both of Appellants' assignments of error are meritless. Both presuppose that the September 21, 2010 judgment ruled on Appellees' claims for declaratory relief. However, the judgment only ruled upon Appellees' claims for injunctive relief. Appellants were afforded notice and an opportunity to be heard on those claims. Accordingly, the judgment of the trial court is affirmed.

Waite, P.J. , concurs.

Vukovich, J. , concurs.

APPROVED:

  
\_\_\_\_\_  
JUDGE MARY DEGENARO

# Court of Appeals of Ohio

## JUDGES

GENE DONOFRIO  
JOSEPH J. VUKOVICH  
CHERYL L. WAITE  
MARY DEGENARO



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COURT ADMINISTRATOR  
ROBERT BUDINSKY, ESQ.

## Seventh Appellate District

(330) 740-2180  
FAX (330) 740-2182

June 28, 2011

John Corrigan, Clerk of Courts  
Jefferson County Courthouse  
P.O. Box 1326  
Steubenville, OH 43952

Re: **THE MINGO JUNCTION SAFETY FORCES ASSOC., LOCAL 1, et al.,  
PLAINTIFFS-APPELLEES, VS. MAYOR DOMENIC CHAPPANO, et al.,  
DEFENDANTS-APPELLANTS, CASE NO. 10 JE 20.**

TO THE CLERK:

By direction of the court you are hereby authorized to enter on the docket (not journal) of the Courts of appeals the decision of this court in the above-captioned case as evidenced by the following entry:

**"JUNE 29, 2011. FOR THE REASONS STATED IN THE OPINION RENDERED HEREIN, APPELLANTS' ASSIGNMENTS OF ERROR ARE MERITLESS. IT IS THE FINAL JUDGMENT AND ORDER OF THIS COURT THAT THE JUDGMENT OF THE COMMON PLEAS COURT, JEFFERSON COUNTY, OHIO, IS AFFIRMED. COSTS TAXED AGAINST APPELLANTS. SEE OPINION AND JUDGMENT ENTRY.**

You are hereby authorized to and please will file and spread upon the journal of this court the enclosed judgment entry in the above-captioned case.

Very truly yours,

*Bobbie J. Knickerbocker*

Bobbie J. Knickerbocker,  
Secretary

cc: Judge Henderson  
Attorney Piotrowski  
Attorney Haught  
Attorney Baker

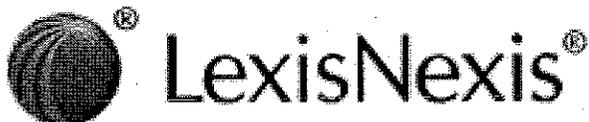
STATE OF OHIO ) IN THE COURT OF APPEALS OF OHIO  
JEFFERSON COUNTY ) SS: SEVENTH DISTRICT

THE MINGO JUNCTION SAFETY )  
FORCES ASSOC., LOCAL 1, et al., ) CASE NO. 10 JE 20  
PLAINTIFFS-APPELLEES, )  
- VS - ) JUDGMENT ENTRY  
MAYOR DOMENIC CHAPPANO, et al., )  
DEFENDANTS-APPELLANTS. )

For the reasons stated in the opinion rendered herein, Appellants' assignments of error are meritless. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Jefferson County, Ohio, is affirmed. Costs taxed against Appellants.

*Mary DeSmaro*  
*Joseph W. White*  
*John White*

JUDGES.



1 of 5 DOCUMENTS

STATE OF OHIO, ex rel. ROBERT A. CICCOLELLI, RELATOR, v. DOMINIC J. MEDINA, Mayor of Campbell and Individually, et al, RESPONDENTS.

CASE NO. 90 C.A. 39

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHONING COUNTY

1992 Ohio App. LEXIS 5221

October 5, 1992, Decided

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDINGS: Original Action (Mandamus)

**DISPOSITION:** JUDGMENT: Relator's Motion for Summary Judgment is sustained.

**COUNSEL:** For Relator: Paul J. Gains, 204 Stambaugh Building, Youngstown, Ohio 44503.

For Respondents: John B. Juhasz, 7330 Market Street, Youngstown, Ohio 44512.

**JUDGES:** Hon. Joseph Donofrio, Hon. Edward A. Cox, Hon. Joseph E. O'Neill

**OPINION BY:** PER CURIAM

**OPINION**

*OPINION and JOURNAL ENTRY*

Per Curiam.

On December 23, 1991, this court filed a judgment entry granting the relator until December 27, 1991 to file a motion for summary judgment and further granting the respondents leave until January 6, 1992 to respond, or file their own motion for summary judgment. A copy of said order was placed in the mailbox of the former counsel for

respondents, who was still listed as counsel of record. The mailbox in the assignment commissioner's office is for the private law offices of the former counsel, and not the Law Director's Office of the City of Campbell. On December 30, 1991, the relator filed and served his motion for summary judgment in related Case No. 90 C.A. 162. Respondents' counsel acknowledges receipt of this motion. This court sua sponte transferred the [\*2] motion for summary judgment to this case by entry dated January 14, 1992. Unaware of the transfer order, respondents moved, on March 5, 1992, in Case No. 90 C.A. 162 for additional time to respond to the motion for summary judgment. While said motion was pending, on March 16, 1992, summary judgment was granted by this court in Case No. 90 C.A. 39 for the relator.

On June 11, 1992, respondents filed a motion to vacate summary judgment, which was granted by this court. Respondents then filed a motion in opposition to relator's motion for summary judgment. This court now responds to the relator's motion for summary judgment and respondents' motion in opposition to relator's motion.

The facts are as follows:

On November 16, 1989, the relator was appointed to a position of operator in the water plant for the City of Campbell, Ohio. The appointment was provisional. At the time of the appointment, there was in force and effect a collective bargaining agreement which provided that

provisional appointments should be for a probationary period of six (6) months. On January 12, 1990, the relator received a letter from the mayor of the City of Campbell which stated:

"This is [\*3] to notify you that you have been terminated from the position of Operator in the Water Plant, City of Campbell, Ohio, effective January 12, 1990." (Relator's Ex. B.).

No reason for the dismissal was set forth in the foregoing letter.

At the time of relator's dismissal, *R.C. 124.27* provided, in pertinent part, as follows:

"If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period *after completion of sixty days or one-half* of his probationary period, whichever is greater. If the appointing authority's decision is to remove the appointee, his communication to the director shall *indicate the reason* for such decision. Dismissal or reduction may be made under provisions of *section 124.34 of the Revised Code* during the first sixty days or first half of the probationary period, whichever is greater." (Emphasis added.)

*R.C. 124.34* sets forth the requirements of this dismissal which occurred during the first half of the relator's probationary period. That statute recites, in pertinent part, as follows:

"In any case of reduction, suspension of more than three working days, or removal, the [\*4] appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall *state the reasons* therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate." (Emphasis added.)

The letter of termination, issued on January 12, 1990, did not set forth the reason for the relator's termination, nor did it reflect that a copy of that letter had been filed with the Campbell Civil Service Commission.

On January 16, 1990, in compliance with *R.C. 124.34*, the relator filed an appeal of his termination with the Campbell Civil Service Commission. A hearing was conducted relative to this appeal on January 31, 1990.

The respondents, by way of admission in their answer filed April 5, 1990, admitted that, during the hearing before the Campbell Civil Service Commission, the Campbell City Law Director, Attorney Michael P. Rich, advised the civil service commission members that the action taken by the respondent mayor was in violation of *R.C. 124.27* (Para. 15 of Answer).

On February 7, 1990, relator received a notice from the Campbell Civil [\*5] Service Commission that the termination by the mayor had been affirmed.

On February 17, 1990, the relator received a second letter from the mayor of the City of Campbell, which letter stated as follows:

"I am hereby giving you notice of the termination of your services with the City of Campbell.

"This notice is given pursuant to Article 28 of the contract existing between the City of Campbell and the Campbell Organization of Public Employees Local 4200.

"This notice is further given pursuant to the fact that you are in the second half of your probationary period with the City of Campbell."

A copy of this letter was delivered to the finance director, the city administrator, the law director and the civil service commission of the City of Campbell.

Calendarwise, this second termination was made during the second half of the relator's probationary period. However, the letter failed to meet a requirement of *R.C. 124.27* which specifically states:

"\* \* \* If the appointing authority's decision is to remove the appointee, his communication to the director shall indicate the reason for such decision."

Neither the first notice of termination nor the second notice [\*6] of termination indicated any reason for termination and, thus, neither complied with the provisions of *R.C. 124.27* or *R.C. 124.34*.

Additionally, as a part of this motion for summary judgment, the relator has attached to his motion for summary judgment a communication from the Civil Service Commission of the City of Campbell under date of August 6, 1990. This letter reads as follows:

"The Campbell Civil Service Commission met to

discuss its pending law suit filed by Robert Ciccolelli, concerning his termination as operator in the Campbell Water Plant.

"After discussion of the matter, the Commission unanimously decided to reinstate Robert Ciccolelli to his position as operator in the Campbell Water Plant with all back pay, seniority, and fringe benefits.

"A vote of the members was taken with Theodore Perantinides and David Skelley voting to reinstate Robert Ciccolelli and James Ciccolelli abstained his vote.

"Therefore, please be advised that effective immediately Robert Ciccolelli is hereby reinstated with full back pay and all other emoluments of office."

Attached to the motion was an affidavit of Theodore Perantinides and an affidavit of David Skelley, members [\*7] of the Campbell Civil Service Commission. In each affidavit, these members explain their intent by their decision under date of August 6, 1990, as follows:

"The intent of the commission was that Mr. Ciccolelli be reemployed as if he had never been terminated from his position as operator in the Campbell Water Plant, and that he was to be awarded all back pay, seniority and fringe benefits as if he had never been terminated."

No appeal of the August 6, 1990 civil service commission was taken by respondents, nor did respondents request any clarification or reconsideration of the order.

Respondent alleges that, at the time that relator was appointed, there was in full force and effect a collective bargaining agreement which provided that provisional appointments should be for a probationary period of six months.

Respondent argues that a collective bargaining agreement, allowing for a binding grievance procedure, was in force. Although respondent admits that the collective bargaining agreement expired December 31, 1989 and a new agreement was not entered into until April 1990, after relator had been terminated, the ongoing negotiations treated the agreement as being extended [\*8] beyond the original expiration date.

The agreement itself requires written notification to modify the agreement. No written notice to commence

negotiations was given. In the absence of a contract, the applicable statutes control. Secondly, the collective bargaining agreement does not mention the subject of probationary employee termination at all. The testimony of the vice president of the union, offered at a hearing before the civil service commission, confirmed that there was nothing the union could do for Mr. Ciccolelli prior to expiration of his probationary period.

Article XXIX, of the Collective Bargaining Agreement (Respondent Ex. A), captioned, "Terminations and Renegotiations" states:

"This agreement shall be effective as of the 1st day of 1989 and shall remain in full force and effect until the 1st day of December, 1989, unless either party shall notify the other, *in writing*, that they desire to modify this agreement. If such notice is given, negotiations shall commence promptly and this agreement shall remain in full force and effect until an amended agreement is agreed." (Emphasis added).

Clearly, negotiations do not commence in the agreement until either [\*9] party notifies the other in writing of the desire to modify the agreement.

Neither respondent mayor's affidavit nor Richard DeLuca's affidavit indicates that either party wrote the other wishing to modify the agreement. The mayor states only that the contract "\* \* \* had expired by its terms on December 31, 1989," and that a successor agreement was not negotiated and entered into until April 1990, long after he terminated relator.

The logical conclusion is that neither party extended the contract in writing until April 1990 when negotiations commenced. Therefore, the agreement terminated on December 31, 1989. Because the agreement had terminated and was not renegotiated until April 1990, there was no agreement in effect during the time of relator's dismissals.

*R.C. 4117.10* states, in pertinent part:

"Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws pertaining to the wages, hours, and terms and conditions of employment for public employees."

Because there was no agreement in effect at the time of relator's termination, the parties were bound [\*10] by civil service statutes. *State ex rel. Internatl. Union of Operating Engineers v. Cleveland* (1992), 62 Ohio St. 3d 537.

Even if the contract may have been in effect, the parties were still bound by civil service statutes regarding probationary employees. Article XVIII of the collective bargaining agreement, titled "Probationary Period" of respondent's Exhibit A states:

"Section 1. Effective January 1, 1989, all original and promotional appointments, including provisional appointments shall be for a period of six months. Service as a provisional employee in the same or similar classification shall be included in the probationary period."

The above section only delineates the duration and effective dates of the probationary period. The contract does not mention the subject of probationary employee termination at all.

The Ohio Supreme Court has ruled, where a collective bargaining agreement does not specifically mention the subject of probationary employee termination, state and local laws govern such termination. See *Bashford v. Portsmouth* (1990), 52 Ohio St.3d 195, *State ex rel. Clark v. Greater Cleveland Regional Transit Auth.* (1990), 48 Ohio St.3d 19, [\*11] *State ex rel. Casper v. Dayton* (1990), 53 Ohio St.3d 16, *Reeves v. Union Twp. Bd. of Trustees* (1989), 55 Ohio App.3d 148. Consequently, even if there exists a question of fact regarding the termination of the collective bargaining agreement, there is absolutely no question that the collective bargaining agreement has no application in the case *sub judice*, and civil service law now applies.

Thus, concerning allegations that the contract was in effect at the time of the firing, there is no evidence which was in existence at the time of the firing to substantiate the contract's existence.

It is thus our opinion that the union contract was not in effect at the time of the firing. But even if it was found to be in effect, there was no clause concerning the firing of probationary employees, hence the Ohio Revised Code controls and the civil service laws are in effect and controlling.

Respondent also argues that relator was terminated in the second half of his probationary period, because the relator was subsequently compensated for back pay and other emoluments of office from January 12, 1990 through February 17, 1990. (Respondent submits a photocopy of the check tendered, [\*12] but not the endorsed check, as it remains in the hands of relator's counsel, was not cashed, nor accepted as payment.)

Respondent cites *Walton v. Welfare Dept.* (1982), 69 Ohio St. 2d 58, at 62-63:

"\* \* \* construction of R.C. 124.21 so as to provide an appeal from second half probationary removals would result in absurd consequences clearly sought to be avoided by the General Assembly."

Clearly, in using such cite, respondent presumes dismissal in the second half of the probationary period.

Finally, respondent argues that any communication to the director as to reason for discharge is just that, a communication to the director, and not that one be provided to the employee. Respondent argues that there is nothing in the record to indicate whether the February 17, 1990 termination letter was the only document provided by the civil service commission.

Relator responds by citing to *State, ex rel. Clements v. Babb* (1948), 150 Ohio St. 359, for the proposition that the communication to the commission must disclose substantial and not merely frivolous conclusions as to the employee's unsatisfactory performance. Relator attaches affidavits of the civil service commission [\*13] members attesting that none of them received any notice of unsatisfactory performance of the relator. Additionally, relator points to the mayor's testimony at the civil service hearing that relator had not been reprimanded.

Although we must recognize the right of a city to fire an employee within the probationary period, it is also evident that said rights must comply with all the statutory requirements of the State of Ohio.

The Supreme Court, in considering matters relating to dismissal of civil service employees, including provisional employees, has held that it is mandatory that there be a complete compliance with the requirements of R.C. 124.34. *State, ex rel. Bay v. Witter* (1924), 110 Ohio St. 216, 221. See also *State, ex rel. Alford v. Willoughby Hills* (1979), 58 Ohio St.2d 221, 225.

No one is attempting to take away the city's rights to its hiring and firing practice, but if they are going to exercise those rights, they must do them either under the auspices of the union agreement, (which here are not available or if they were available were not covering) or per the Ohio Revised Code requirements as set out by our state legislature, and comply exactly with those [\*14] requirements so as not to infringe on the "due process" rights of these probationary employees.

The city has no one to blame for the ensuing results of not complying with the termination steps and conditions, since they were known, or readily available, to the city, prior to the precipitous steps taken to terminate Mr. Ciccolelli.

Thus, in summarizing:

Obviously the first firing of Mr. Ciccolelli, on January 12, 1990, was in violation of the Ohio Revised Code since the union agreement was not in effect at the time of firing of relator, and the firing was within the first one-half of the probationary period and not done with "cause," as required in *R.C. 124.34*.

Concerning the second firing of relator, on February 17, 1990, it also is in violation of *R.C. 124.27*, since no "reason" was communicated to the civil service commission in violation of the Ohio Revised Code section.

We note that the Campbell Civil Service Commission originally upheld the January 12, 1990 firing of relator, but also note that said commission reconsidered its decision on August 6, 1990 and reinstated relator "with all seniority" back to his original dismissal date. Said commission has the authority [\*15] and "power of civil service body on its own motion and without notice of hearing to reconsider, modify, vacate, or set aside order relating to dismissal of employee." See *16 ALR 2d 1126*.

Even without the civil service commission reinstatement of relator, it seems obvious that the relator was wrongfully terminated.

It is possible that there were proper reasons to terminate relator, but we will never know since they were not stated in either termination of relator.

The motion of the relator for summary judgment is

sustained. The respondent, Mayor of the City of Campbell, is ordered to forthwith reinstate the relator to his position as operator in the Campbell Water Department with all seniority and fringe benefits. It is further ordered that the relator be reimbursed for all wages lost and that the employer/respondent make a PERS contribution in the full amount of lost contributions.

Costs to be taxed against respondent mayor.

APPROVED:

Edward A. Cox

Joseph E. O'Neill

JUDGES.

DISSENT BY: JOSEPH DONOFRIO

DISSENT

DONOFRIO, P. J., DISSSENTING

I respectfully dissent to the decision of the majority for the following reasons.

The majority approach this case as if the relator [\*16] was a tenured employee with civil service status. The relator was in the second half of his probationary period of employment. The majority's order for reinstating the relator pivots on the fact that a termination notice did not give reasons for termination and, therefore, did not comply with the provisions of *R.C. 124.27*. In addition, they rely on a letter from the Civil Service Commission indicating that they have met in a meeting and discussed the pending lawsuit and decided to reinstate the relator. There is nothing in the record that indicates that there was an appeal to the Civil Service Commission. There is no record of any proceedings by the Civil Service Commission. There is no record of any holding or decree or a discussion of evidence before it, in relation to a proper appeal before the Civil Service Commission. In construing *R.C. 124.27*, the section the majority relies upon for their decision, the Ohio Supreme Court stated in the case of *Walton v. Welfare Dept. (1982), 69 Ohio St.2d 58, at 62-63*, as follows:

"Secondly, construction of *R.C. 124.27* so as to provide an appeal from second-half probationary removals would result in absurd consequences clearly [\*17] sought to be

avoided by the General Assembly."

In light of this holding, it is difficult to see how the Civil Service Commission had jurisdiction in regards to the letter that it had written reinstating the relator. The fact that two members of the Civil Service Commission supplied an affidavit on behalf of the relator as to their intent to reemploy the relator as if he had never been terminated from his position, does nothing to support relator's position. These affidavits simply lack any indicia of jurisdiction. In the case of *Taylor v. Middletown* (1989), 58 Ohio App.3d 88, that court stated in the syllabus:

"3 Removal of or reduction of a probationary employee who has completed sixty days or one half of the probationary period, whichever is greater, may not be appealed to the civil service commission.

"4. Probationary civil service employment does not confer a legitimate claim of entitlement to continued employment to be accorded procedural due process under the Fourteenth Amendment."

Further, in the case of *Vonderau v. Parma Civil Service Comm.* (1983), 15 Ohio App.3d 44, at 45, the court, citing *Hill v. Gatz* (1979), 63 Ohio App.2d 170, paragraph one [\*18] of the syllabus, stated:

"The continued employment of a probationary civil servant is at the discretion of the appointing authority after completion of sixty days or after the first half of the

probationary period, whichever is greater. The decision of the appointing authority made during such period to terminate a probationary civil servant's employment is final and not subject to administrative or judicial review."

I would determine the standard to be used for the issuance of writ of mandamus from the Ohio Supreme Court case of *State ex rel. Westchester Estates Inc., v. Bacon* (1980), 61 Ohio St.2d 42, at paragraph one of the syllabus, which states:

"In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law."

I would, therefore, find that the respondent is not under a clear legal duty to perform the act ordered by the majority, nor has the relator established a clear legal right. Mandamus is not appropriate. At the most, I would find that there are genuine issues [\*19] of material facts to be resolved and relator is not entitled to summary judgment as a matter of law.

APPROVED:

Joseph Donofrio

Presiding Judge