

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellees,

vs.

Mayor Dominic Chappano, et al.,

Appellants.

Case No: 11-1363

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

Court of Appeals
Case No. 10-JE-20

**APPELLEE'S MEMORANDUM IN RESPONSE
TO APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

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FILED
SEP 09 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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**EXPLANATION AS TO WHY THIS CASE IS NOT OF GREAT
PUBLIC OR GENERAL INTEREST NOR DOES IT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Appellants urge this Court to accept jurisdiction in this case because the Appellants were denied due process when the Jefferson County Court of Common Pleas “effectively and dispositively” ruled on portions of an unanswered Complaint for Declaratory Judgment in its order to proceed with the contractual arbitration procedure to order to determine if the obligation to arbitrate was still in effect. The Appellant’s assertion fails because neither the Trial Court nor the Court of Appeals ruled upon the continued effectiveness of the contract in this matter. The Trial Court merely accepted the Appellant’s argument that the contract required that the matter be subjected to arbitration, and that therefore, the Appellee had an adequate remedy at law. Once the Trial Court found that the Appellee had an adequate remedy at law it instructed the parties, including the Village of Mingo Junction to engage in that remedy. No finding on the merits of the dispute between the parties was ever reached by any court in this matter, the holding of the Trial Court, supported by the Court of Appeals was that the parties were required to resolve their dispute through the arbitration procedure established in the Contract.

This dispute, which pertains to a contract entered into by the Village of Mingo Junction and an association of local employees, was not required by any state law (i.e. R.C. 4117) as village employees are not subject to the provisions of that statute. Therefore, what the Village insists is a “collective bargaining agreement” is actually a simple written contract under which the parties have agreed to resolve their disputes through binding arbitration. The Village seems to desire any venue other than the one

they contractually obligated themselves to litigate in, so they are taking all possible steps to avoid arbitration. The results of this matter may be of great local interest to the employees and citizens of Mingo Junction, but this dispute is not in any way of significant public interest. The number of Villages who have voluntarily entered into agreements similar to the one in place here is extremely limited and the question of whether or not a contract provision should be enforced to require arbitration offers no unique or compelling question of law.

The second argument put forth by the Village relates to the alleged right of a party to an agreement to arbitrate to avoid that arbitration by claiming that the provisions of the agreement related to duration prevent the arbitration. The Village argument is that they are no longer obligated under the agreement to arbitrate this dispute because they never received a "written" notice to negotiate, they have not claimed that they did not schedule negotiations, or that they were not engaging in the negotiation process, because they had and were, they are merely stating that although they received timely notice, in person during a public meeting of the Village Council, and scheduled multiple meetings to renegotiate the agreement, they are now permitted to assert that the failure to provide the notice in writing prevents them from having any obligation to follow the contract, which by its own terms remains in effect until a new contract is signed. They now make this argument, even though they argued last September, well after they now claim the contract had expired, that the Association had an adequate remedy at law in the grievance and arbitration process contained in that agreement.

While arguing in the alternative has a long and storied history in the annals of the law, the reality is that if one argument is diametrically opposed to another, both cannot be

made with any likelihood of success. In this case the Court of Appeals found that the Trial Court had simply accepted the Village's argument and denied the Permanent Injunction because the Association had a remedy at law in the arbitration procedure. (Opinion of the Court of Appeals p. 5) Now the Village wants to claim that this constitutes a decision on the merits as to whether or not the Contract was still in effect. The Trial Court and the Court of Appeals both agreed that no decision was reached on the continued effectiveness of the contract, the decision was that the parties had agreed to arbitrate these types of disputes, and that the Village had even used the continued viability of that agreement to arbitrate to avoid a preliminary injunction. The Village's arguments go beyond self-serving and enter the realm of disingenuous. They should not be allowed to use this type of hyper-litigiousness in an attempt to break the counter-party to an agreement to arbitrate, and no public or constitutional interest is served by permitting them to do so.

The Appellant's claims all ask this Court to substitute its judgment on the facts or the meaning of the contract for those of the Arbitrator selected by the parties to resolve all disputes under the Contract. Moreover they ask that this Court instruct all lower courts to regularly involve themselves in the minutiae of private arbitration agreements. This Court has traditionally been very reluctant to interfere in such agreements and should not now start down a path of interpreting agreements that are subject to broad arbitration provisions, this case offers no reason to modify that position.

STATEMENT OF THE CASE AND FACTS

On September 7, 2010 the Appellee filed a verified Complaint for Declaratory Judgment and Temporary and Permanent Injunction in the Jefferson County Court of Common Pleas. That complaint requested that the trial court issue a preliminary injunction and a permanent injunction as well as a declaratory judgment. Accompanying the Complaint was a Motion for a Temporary Restraining Order, Preliminary Injunction and Permanent Mandatory Injunction. The issues contained within the complaint related to the announced lay-off of the entire staff of the Mingo Junction Village Police Department and the refusal of the Village to answer grievances that had been filed under the contract between the Village of Mingo Junction and the Mingo Junction Safety Forces Association. When the Motion for a Temporary Restraining Order was presented to Judge Henderson of the Jefferson County Court of Common Pleas Christopher Haught, the Director of Law for the Village of Mingo Junction was informed and attended a meeting with Judge Henderson where the TRO was discussed. Before the close of that meeting the parties knew that Judge Henderson would be issuing a Temporary Restraining Order and that a decision as to a preliminary and permanent injunction would be issued by September 21, 2010.

Prior to starting a court session to issue the TRO the parties discussed the process whereby a decision on the Preliminary and Permanent injunction could be argued. The Parties agreed that there were no facts in dispute and that legal arguments relating to the matter could be submitted to the court via simultaneous written briefs. The Court requested that those briefs be submitted by September 17, 2010 so that the trial court

could consider them over the weekend of the 18th and 19th of September. The undersigned requested permission to file the brief in question via fax, and the Court granted the request with the instruction that the fax should go to the probation department fax number. The parties mutually agreed to these terms.

Shortly after the end of the in chambers meeting with Judge Henderson a short hearing was held in which Judge Henderson issued the TRO and instructed the parties as to the filing of simultaneous briefs. The instructions were exactly what had been discussed in Judge Henderson's Chambers.

Later that day the Village had Village Administrator Karen O'leary reissue lay-off notices to the staff of the Police Department. These notices were identical to the prior notices issued by the Mayor of Mingo Junction except for their effective date. This was to address that part of the Plaintiff's argument that asserted that the Mayor is not the appointing authority in Mingo Junction.

On September 17, 2010 the parties filed their briefs regarding the permanent injunction. Included with the Plaintiff-Appellee's brief was an amended motion that removed the references to a "temporary restraining order" and added references to the newly reissued lay-off notices. Plaintiff-Appellees argued that the contract between the Plaintiffs and the Defendants was still in effect and that the lay-off provisions and manning provisions in the collective bargaining agreement remained in effect.

The Village argued that the lay-offs were permitted under Ohio Law (Defendant's Memo Contra). The Village ended its statement of the facts with a description of the Order issued by Judge Henderson with the TRO. According to the Village, "The order further

required the parties to submit briefs regarding their positions on the issuance of a permanent injunction.” (Defendant’s Memo Contra p. 3)

Among several other arguments the Village’s brief in opposition argued that no permanent injunction should be issued because the Plaintiff’s had an “adequate remedy at law” (Id at 14) this remedy consisted of the grievance and arbitration procedure provided in the CBA between the Village and the Plaintiffs. (Id. at 16-17) The Village was quite assertive on this issue, writing ”Because the Plaintiffs have an adequate remedy at law there can be no entitlement to injunctive relief.” (Id. at 17, **emphasis contained in the original**). The village went on to argue that the grant of a permanent injunction preventing the lay-offs would require a finding that the collective bargaining agreement was no longer in effect and would deny both the Plaintiffs and the Defendants due process of law(Id.) . The Village’s primary argument against the issuance of a permanent injunction boiled down to an assertion that the matter should be resolved through the negotiated arbitration procedure.

On September 21, 2010 Judge Henderson found for the Village and denied the requested permanent injunction forestalling the lay-offs. However, he did issue an order that the parties submit the matter to arbitration citing the fact that the existence of the arbitration procedure provided an adequate remedy at law, the exact claim asserted by the Village. The Plaintiff’s immediately began the process of selecting an arbitrator, but the Village’s labor consultant refused to cooperate. Approximately one month later the Village filed an appeal to the Seventh district Court of Appeals.

The Court of Appeals found the Appellant’s assignments of error to be “meritless” and affirmed the judgment of the trial court (*Opinion of the Jefferson County*

Court of Appeals, June 29, 2011 at p. 14) . The Court of Appeals rejected the Appellant's assertions that the Trial court had ruled on the declaratory judgment motion and found that the appellant's arguments failed without that assertion. (*Id.*)

APPELLEE'S POSITION ON APPELLANT'S PROPOSITIONS OF LAW

Appellants 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 the 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 Appellate Court Did Not Err by Finding that the September 21st Order of the Trial Court is Not a Declaratory Judgment in Favor of the Plaintiffs

The Appellants continue to assume that the Entry by the trial court was a declaratory judgment establishing that the collective bargaining agreement was in effect, but offer no support for why that assumption is true. The order did not establish that the collective bargaining agreement was still in effect, it determined that the parties had to resolve the dispute about the status of the collective bargaining agreement through the grievance and arbitration process. There is a significant difference between a declaration that the contract remains in effect and an order that the parties resolve the question through the agreed upon arbitration process. To mischaracterize an order referring a matter to binding arbitration as a declaratory judgment on the underlying dispute is ridiculous. In fact, as the

Village pointed out in its brief in opposition, “[b]y statute, arbitration awards can be appealed to the court for the purpose of confirming the award, modifying the award, or vacating the award.” (Memorandum Contra p. 17) If the Village has a legitimate claim under the contract that they are no longer bound by that contract, they can argue it to the Arbitrator as they agreed to do when they agreed to the contract to begin with. If the Arbitrator fails to look to the contract to answer that question then they can petition the courts for redress. Since the contract contains a broad grievance clause that covers any “alleged violation, misinterpretation or misapplication of a specific article(s) or section(s) of this agreement.” and a grievance process that ends in binding arbitration, it is clear that the effect of the articles being argued about is a question legally left to the binding arbitration process. . Under the September 21 Entry the Village is receiving all of the process that is due.

In finding the arguments of the Village without merit, the Appellate Court clearly held that the Order of the Trial court was not a decision on the merits of the matter or the continued validity of the contract. The Court stated “. . . the trial court did not rule on Appellees’ claims for declaratory relief in the September 21 Judgment, . . .” (Opinion of the Appellate Court p. 6) If there has been no ruling on the declaratory judgment then the Village has not been denied anything other than a chance to argue in direct contradiction to the position that they took in their Memorandum Contra.

Appellants Proposition of Law No. 2 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.

Under the applicable case law this matter is one that is properly placed before an arbitrator as the contract in question is not expired and the facts and circumstances surrounding the dispute arose when there was no question that the contract was still operable

The Village's argument presupposes that the contract in this case is expired, something that the trial court and Court of Appeals clearly had questions about. The contract in question has provisions that extend it until a new contract has been negotiated. The Village's argument is that those provisions are not effective because the Appellee failed to provide a written notice of their intent to negotiate a new agreement. The Appellee disagrees. Both the position of the Appellant and the position of the Appellee rely upon language contained in the agreement and facts that arose prior to the expiration of the agreement.

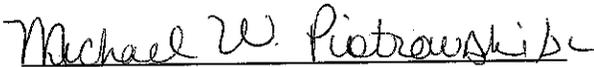
The case relied upon by the Village to convince this court that the Court of Appeals is wrong is *Litton Fin. Printing Div. v. NLRB*(1991), 501 U.S. 190. The *Litton* Court held that “. . . a postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arise before expiration, where a post expiration 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 the expiration of the remainder of the agreement.” *Id.* paragraph (f) of the syllabus. In the instant case there is a valid argument that the contract in question has not expired. In addition, the facts and circumstances giving rise to the grievance, i.e. that the Village failed to negotiate in good faith as required by the Contract and refused to resolve

the dispute according to the alternative dispute resolution process contained in the contract, all occurred before the date that the Village now claims that the Contract expired (August 15, 2010). It is clear that under the *Litton* analysis this dispute is subject to the contractual agreement to arbitrate.

CONCLUSION

The Appellant's arguments in support of this Court's accepting jurisdiction are lacking in any compelling justification to dedicate resources to this case. There is no matter of significant public interest or constitutional question.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Memorandum in Response was sent by regular U.S. mail this 9th day of September, 2011 to Mathew Baker, Attorney-at-Law, 913 Elcliff Drive, Westerville, OH 43081.

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