

Case No. 15-____

IN THE
SUPREME COURT OF OHIO

GEORGIA B. COX,

Plaintiff-Appellee,

v.

DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendant-Appellant.

Appeal from the Second District Court of Appeals,
Montgomery County, Ohio,
Appellate Case No. 26382

MEMORANDUM OF DEFENDANT-APPELLANT
DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION
IN SUPPORT OF JURISDICTION

Beverly A. Meyer (0063807) - *Counsel of Record*
COOPER, GENTILE, WASHINGTON & MEYER CO., L.P.A.
118 West First Street
Talbott Tower - Suite 850
Dayton, Ohio 45402
Tel: (937) 224.5300 / Fax: (937) 224.5301
E-mail: bameyer@cgwlaw.com
Counsel for Defendant-Appellant Dayton Public Schools Board of Education

Georgia B. Cox
4191 Mapleleaf Drive
Dayton, Ohio 45416
Plaintiff-Appellee, pro se

TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	5
ARGUMENT IN SUPPORT OF DEFENDANT-APPELLANT’S PROPOSITIONS OF LAW	9
<u>Proposition of Law No. 1:</u> Rights a public employee may otherwise have under the law are superseded by the obligations, rights, and remedies contained in R.C. Chapter 4117.	9
<u>Proposition of Law No. 2:</u> An employee does not have standing to petition a court to vacate or modify an arbitration award pursuant to R.C. Chapter 2711 unless the collective bargaining agreement under which the award was issued expressly gives the employee an independent right to submit disputes to arbitration.	9
<u>Proposition of Law No. 3:</u> R.C. 3319.16 does not confer standing on a teacher to petition a court to vacate or modify an arbitration award issued under the collective bargaining agreement negotiated by her bargaining representative and her employer unless the agreement expressly makes the teacher a party to the arbitration.	9
<u>Proposition of Law No. 4:</u> The question of whether an employee clearly and unmistakably waived individual statutory rights is not a proper consideration in determining whether an arbitration award issued under a collective bargaining agreement should be vacated or modified pursuant to R.C. Chapter 2711.	11
<u>Proposition of Law No. 5:</u> A court reviewing a motion to vacate or modify an arbitration award pursuant to R. C. Chapter 2711 must base its decision solely upon the record of the arbitration proceeding.	11
<u>Proposition of Law No. 6:</u> A petitioner’s compliance with each provision of Civ.R. 5 is necessary to vest a court with jurisdiction to hear a motion to vacate or modify an arbitration award pursuant to R.C. Chapter 2711.	13
<u>Proposition of Law No. 7:</u> Notice of a petition seeking the vacation or modification of an arbitration award pursuant to R.C. Chapter 2711 must be received by the adverse party or its attorney within the statutory three month period contained in R.C. 2711.13.	13

Proposition of Law No. 8: The three month period set forth in R.C. 2711.13 commences upon the issuance of the arbitration award. 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDIX 17

Appendix Page

Opinion and Final Entry of the Second District Court of Appeals, Montgomery County, Ohio, CA 26382, journalized on February 20, 2015 (2015-Ohio-620)..... 1

Decision, Order and Entry of the Montgomery County Court of Common Pleas journalized on August 12, 2014 17

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

This cause presents the court the opportunity to address and settle Ohio law in two important areas: 1) the conflict between collectively-bargained rights and individual statutory rights in the arbitration context; and 2) the procedures that must be followed in asking a court to vacate or modify an arbitration award under R.C. Chapter 2711. The Ohio Supreme Court has not addressed the issue of an individual union employee's standing to seek review of an arbitration decision under R.C. Chapter 2711 since 2003. The court has not specifically addressed R.C. 2711.13's jurisdictional prerequisites since 1995 and has never clarified the steps necessary to perfecting service of a motion to vacate or modify an arbitration award within the statute's three month period.

In this case, the court of appeals found that a terminated school teacher had standing to petition a court to vacate or modify the arbitration award issued under the arbitration provisions of the collective bargaining agreement covering the terms and conditions of her employment even though the contract did not expressly give the employee an independent right to submit disputes to arbitration. The appellate court's construction of the agreement ignores the plain language in Articles 3 and 46 of the agreement and disregards the operation of that language as practiced by its parties – the union and the board of education. The appellate court imposed its own interpretation of the agreement onto the union and the employer, thereby denying them the benefit of their bargain. In doing so, the court of appeals elevated the individual and statutory rights of the teacher above the bargaining rights of the union and employer and all of the other employees covered by the collective bargaining agreement, contradicting this court's holding and reasoning in *Leon v. Boardman Twp.*, 100 Ohio St.3d 335, 2003-Ohio-6466, 800 N.E.2d 12. The appellate court's decision

forces a union and an employer to cede control of the interpretation of their collectively-bargained agreement to any dissatisfied bargaining unit employee, who can then attempt to obtain an interpretation of the agreement that advances her personal interests to the detriment of the other employees' interests arising under that same agreement.

After finding that the teacher had standing to petition for vacation of the arbitration award, the court of appeals remanded the matter to the trial court with instructions to determine not only whether the arbitrator's award was contrary to law, arbitrary, or capricious but also whether the teacher had clearly waived her statutory rights under R.C. 3319.16. On its own volition, the court of appeals authorized the trial court's vacation of the arbitration award -- and the teacher's contract termination -- if it found that the employee did not clearly waive those rights. The question of whether the teacher had waived her rights under R.C. 3319.16 was never at issue in the underlying arbitration between the union and the employer and should not be at issue now. By requiring the trial court to determine whether the employee's individual rights were clearly and unmistakably waived, the court of appeals has set a precedent impermissibly broadening the judiciary's limited and narrow review of arbitration awards. Its decision requires the trial court to make factual and legal determinations that depend on circumstances that were not before the court and were never before the arbitrator, all in the context of a R.C. Chapter 2711 proceeding. The court's decision further burdens the arbitral process and effectively mandates that evidence and argument concerning the issue of whether an employee clearly and unmistakably waived her individual rights be presented for an arbitrator's determination in any labor arbitration for fear that the arbitrator's award will be vacated without it.

The court of appeals' decision upsets the delicate balance of labor relations throughout the State of Ohio. Employers and unions have discussions and make concessions throughout the bargaining process, and those discussions and concessions enable them to reach agreement on the specific terms placed in their labor contracts. Employers and unions need to be sure that they can enforce *their* interpretation of an agreement based upon *their* mutual understanding and not upon a court's mistaken impression of what their language means to them. Likewise, an individual employee should not be permitted to assert her unique interpretation of a collective bargaining agreement in an arbitral context unless the employer and the union and the other bargaining unit employees who ratify the agreement explicitly give that employee permission to do so through the contract's terms. Industrial peace depends on it. The Supreme Court's review of this issue is urgently needed to ensure the stability and continued vitality of the collective bargaining process under R.C. Chapter 4117 and to protect the integrity of agreements negotiated by unions and employers throughout the State. An individual employee's interests should not supersede or interfere with collectively-bargained rights of others. The Supreme Court's review of this issue is also needed to determine which, if any, individual employee rights prevail over the obligations, rights, and remedies contained in R.C. Chapter 4117, the Public Employees' Collective Bargaining Act.

The court of appeals in this matter also found that the employee's motion to vacate or modify the arbitration award was timely filed and served under R.C. 2711.13 even though she did not comply with the requirements of Civ.R. 5. The court of appeals deemed Civ.R. 5(D) inapplicable to the issue of service for purposes of meeting the statutory deadline set forth in R.C. 2711.13. The appellate court also disregarded authority from other appellate

districts holding that notice of a motion to vacate or modify an award must be received by the adverse party within three months of the award's delivery to the parties in interest for a court to have jurisdiction over it. Finally, the court of appeals opined that the trial court should have addressed whether the three month deadline began to run on the date the arbitration award was sent to the parties *or* the date that the decision was adopted by the employer and the termination became effective, in direct contravention of the statute's language providing that the notice must be served "within three months after the award is *delivered* to the parties in interest." R.C. 2711.13 (Emphasis added). The court of appeals' decision ignores the express language of R.C. 2711.13 and Civ.R. 5. It also discards consistent authority relied upon by litigants and courts, leaving unanswered the important question of what is required for a party to comply with the mandates of R.C. 2711.13.

The Supreme Court last directly addressed the jurisdictional requirements of R.C. 2711.13 through its decision in *City of Galion v. Am. Fedn. of State, Cty., & Mun. Empls., Local No. 2243*, 71 Ohio St.3d 620, 1995-Ohio-197, 646 N.E.2d 813 (1995). Since that time, Ohio's appellate courts have been interpreting the Supreme Court's statement that "the language of R.C. 2711.13 is clear, unmistakable and, above all, mandatory" in a variety of ways. 71 Ohio St.3d at 622. For example, the Eighth and Ninth Appellate Districts have held that R.C. 2711.13's language confers jurisdiction on a court to hear a motion to vacate or modify an arbitration award only if the adverse party or the adverse party's attorney actually receives notice of the motion within the statutory three month period. *See, e.g., Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1020, ¶¶ 21-24 (8th Dist.); *City of Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, ¶ 17; *City of Cuyahoga Falls v. Fraternal Order of*

Police, 9th Dist. Summit No. 23870, 2007-Ohio-7060, ¶¶ 8-10. According to these courts, notice timely postmarked but not timely received will not suffice. *Id.* The Second District Court of Appeals, however, has now decided that a clerk of courts' mere placement of a filed motion in the mail to the adverse party within the three month period satisfies the requirements of R.C. 2711.13, even where the motion to vacate lacks the proof of service required by Civ.R. 5(B)(3) and the petitioner, herself, has not mailed the motion to the adverse party or its attorney within the three month period. Under the conditions approved by the Second Appellate District, neither the adverse party nor its attorney will have notice of the filing within the three month period set forth in R.C. 2711.13. Although the Supreme Court has unreservedly characterized R.C. 2711.13's terms as "clear," "unmistakable," and "mandatory," Ohio's lower courts clearly do not agree on what that language actually means. The Supreme Court's intervention on this issue is necessary to provide arbitrating parties clear direction as to the jurisdictional requirements set forth in R.C. 2711.13. The ever-expanding role of arbitration in labor relations, employment relationships, and commercial dealings further emphasizes the need for clarity on the issue of how a party provides notice and perfects service of a motion to vacate an arbitration award within the statutory three month period.

STATEMENT OF THE CASE AND FACTS

This case arises from Plaintiff-Appellee Georgia Cox's reported assault of a multi-handicapped student in Dayton Public Schools' Meadowdale High School. On October 10, 2012, a special education teacher at the high school witnessed Intervention Specialist (special education teacher) Georgia Cox forcefully strike a student confined to a wheelchair. The teacher reported Ms. Cox's conduct to the building principal, who, in turn, involved the

School District's human resources director. An investigation into Ms. Cox's conduct ensued, which resulted in her placement on administrative leave, an opportunity for a pre-disciplinary hearing, and the provision of notice to Ms. Cox that the Dayton Public Schools Board of Education was considering termination of her continuing teaching contract.

The Board of Education and Ms. Cox's bargaining representative, the Dayton Education Association ("DEA"), were parties to a collective bargaining agreement that provided for the pre-disciplinary processes Ms. Cox received. Under Article 46 of the negotiated agreement, Ms. Cox had ten days in which to decide whether she wanted to avail herself of the statutory hearing processes available to her as a teacher with a continuing contract under R.C. 3319.16 *or* have the matter of her intended termination decided by an arbitrator pursuant to Section 3.07.2 D, the collective bargaining agreement's arbitration provision. She selected arbitration. The DEA then provided the Board of Education notice of the DEA's intent to submit the matter to arbitration in accordance with the provisions of Articles 3.07.2 D and 46.01.1 Ms. Cox had also filed two grievances concerning the processes accorded her under Article 48 of the collective bargaining agreement. The DEA submitted those grievances to arbitration as well, and all three matters were combined and heard by a single arbitrator in September 2013. The Arbitrator issued his opinion and award on December 10, 2013 and emailed it to counsel for the Board and counsel for the DEA that same day. The Arbitrator found that the Board had good and just cause to terminate Ms. Cox's employment and denied the two grievances.

On March 10, 2014, Georgia Cox filed a motion to vacate or modify the arbitration award in the Montgomery County Court of Common Pleas. Her motion did not contain proof of service. Rather, the clerk of courts issued service of her motion to the Board of Education

by mailing Ms. Cox's motion to the Board on March 10, 2014. Ms. Cox personally mailed a copy of her motion, postmarked March 11, 2014, to counsel for the Board of Education the next day. The Board of Education received its copy from the clerk of courts on March 12, 2014, and counsel for the Board received her copy on March 13, 2014 – both more than three months after the arbitrator's December 10th issuance of the award.

The Board filed a motion to dismiss Ms. Cox's motion pursuant to Civ.R. 12(B)(1) and (6), arguing that her motion was untimely and that she had no standing to dispute the award because she was not a party to the arbitration. The trial court agreed that Ms. Cox was not a party to the arbitration according to the terms of the collective bargaining agreement under which the award was issued and dismissed Ms. Cox's motion to vacate. The trial court stated that its determination on the question of Ms. Cox's standing divested it of jurisdiction over the matter, but it discussed Ms. Cox's apparent failure to comply with the requirements in R.C. 2711.13, regardless.

Georgia Cox appealed the trial court's dismissal of her motion to the Second District Court of Appeals, contesting the trial court's determination that she lacked standing and asserting that the Board of Education had engaged in "invited error" that salvaged her presumed failure to comply with R.C. 2711.13. In a unanimous decision, the court of appeals reversed the trial court and remanded the matter with specific instructions for its subsequent review of the arbitration award.

The appellate court determined that Ms. Cox complied with the filing requirements of R.C. 2711.13. In reaching this conclusion, the court of appeals erred by ignoring the motion's lack of a certificate of service and by ruling that Ms. Cox complied with Civ.R. 5 when the clerk of courts issued service of her motion to the Board of Education on March 10, 2014.

The court also erred in determining that R.C. 2711.13 does not require actual delivery or receipt of the motion by the adverse party or its attorney prior to the filing deadline. The appeals court recognized the Eighth District Court of Appeals' differing treatment of circumstances substantially similar to those in this matter but concluded that the Cuyahoga County Court of Appeals focused on the language of Civ.R. 5(D), which this court of appeals erroneously deemed inapplicable to the completion of service under R.C. 2711.13. The court of appeals further erred when it stated that the trial court should have addressed whether the operative date for commencement of R.C. 2711.13's three month period was the date the arbitration decision was sent to the parties or the later date on which Ms. Cox's termination became effective.

The appellate court also determined that Ms. Cox has standing to pursue judicial review of her termination. In reaching this conclusion, the court of appeals erred by ignoring the plain language of the collective bargaining agreement, which fails to expressly provide Ms. Cox an independent right to submit disputes to arbitration under the agreement. The court erroneously constructed an interpretation of the DEA and Board of Education's negotiated agreement that is antithetical to their agreement's express language and long-standing operation and the parties' intent. The appeals court then erred by using its construction to conclude "that the teacher is a party to any action involving the teacher's termination," effectually providing Ms. Cox a private right of action based on rights provided to teachers under R.C. 3319.16. It is significant to this matter that the court of appeals did not characterize its decision as according Ms. Cox the right to pursue judicial review of the *arbitrator's award*. Rather, it erroneously determined that she has standing to pursue a judicial review *of her termination*. The court of appeals further erred by directing the trial

court to determine on remand whether Ms. Cox clearly and unmistakably waived her R.C. 3319.16 rights and then authorizing the court to vacate that portion of the arbitrator's award under R.C. 2711.10(D) if she did not. The appellate court erred by expanding the discretion and role of the judiciary when reviewing arbitration awards under R.C. Chapter 2711 beyond its established limited, narrow scope.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Rights a public employee may otherwise have under the law are superseded by the obligations, rights, and remedies contained in R.C. Chapter 4117.

Proposition of Law No. 2: An employee does not have standing to petition a court to vacate or modify an arbitration award pursuant to R.C. Chapter 2711 unless the collective bargaining agreement under which the award was issued expressly gives the employee an independent right to submit disputes to arbitration.

Proposition of Law No. 3: R.C. 3319.16 does not confer standing on a teacher to petition a court to vacate or modify an arbitration award issued under the collective bargaining agreement negotiated by her bargaining representative and her employer unless the agreement expressly makes the teacher a party to the arbitration.

R.C. 4117.09 requires that parties to a collective bargaining agreement reduce their agreement to writing and execute it. R.C. 4117.09(A). The bargaining unit employees covered by that agreement are not parties to it; they are merely beneficiaries. *Pulizzi v. City of Sandusky*, 6th Dist. Erie No. E03002, 03-LW-4372, 2003-Ohio-5853, ¶ 8. The bargaining unit employees cannot individually act to enforce the terms of the agreement -- only a party to the agreement can. R.C. 4117.09(B) provides: "A party to the agreement may bring suits for violation of agreements or for the enforcement of an award by an arbitrator in the court of common pleas..." R.C. 4117.09(B)(1) (Emphasis added).

Where collective bargaining has occurred, R.C. Chapter 4117 prevails over nearly any and all other conflicting laws. R.C. 4117.10(A); *Consolo v. City of Cleveland*, 103 Ohio St.3d

362, 2004-Ohio-5389, 815 N.E.2d 1114, ¶ 21, *reconsideration denied*, 104 Ohio St.3d 1428, 2004-Ohio-6585, 819 N.E.2d 710 (Citations omitted). Individual rights an employee may have under the law are thus superseded by the obligations, rights, and remedies contained in R.C. Chapter 4117. *Pulizzi* at ¶ 9 (citing *Provens v. Stark Cty. Bd. of Mental Retardation and Dev. Disabilities*, 64 Ohio St.3d 252, 258, 1992-Ohio-35, 594 N.E.2d 959 (1992)). The terms of a collective bargaining agreement generally prevail over an employee's individual statutory rights where the agreement addresses a matter. R.C. 4117.10(A). Individual rights accorded a teacher by R.C. Chapter 3319 do not prevail over the terms of a collective bargaining agreement. R.C. 4117.10(A); see *State ex rel. Rollins v. Bd. of Edn. Cleveland Hts.-University Hts. City School Dist.*, 40 Ohio St.3d 123, 125, 532 N.E.2d 1289 (1988), *reh'g denied*, 41 Ohio St.3d 717, 535 N.E.2d 314 (1989); *State ex rel. Williams v. Belpre City School Dist. Bd. of Edn.*, 41 Ohio App.3d 1, 6, 534 N.E.2d 96 (4th Dist.1987).

The establishment of a union as the exclusive collective bargaining representative of a group of employees necessarily subordinates the interests of an individual employee to the collective interests of all employees covered by a labor agreement. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976) (citing *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)). The only individual rights that survive the contract's operation are those that are explicitly carved out by its terms. Ohio's strong public policy favors private settlement of grievance disputes arising from collective bargaining agreements. *Goodyear Tire & Rubber Co. v. Local Union No. 200*, 42 Ohio St.2d 516, 520, 330 N.E.2d 703, *cert. denied*, 423 U.S. 986 (1975). As a result, the finality of labor arbitrations should be enforced and not left to the individual pursuits of dissatisfied employees. When an employee's discharge or grievance is arbitrated between her union and her employer under the terms of a collective bargaining agreement,

she does not have standing to petition for the vacation or modification of that award unless the collective bargaining agreement expressly gives her an independent right to submit disputes to arbitration. *Leon*, 100 Ohio St.3d 335, 2003-Ohio-6466, 800 N.E.2d 12, syllabus; *Koehring v. Ohio State Dept. of Rehab. and Corr.*, 10th Dist. Franklin No. 06AP-396, 2007-Ohio-2652, ¶ 54. The statutory provisions relating to teachers under Ohio law do not provide them standing to individually sue for vacation of an arbitrator's award issued under a collective bargaining agreement. *See Kathy W. Coleman v. East Cleveland City School Dist. Bd. of Edn.*, 8th Dist. Cuyahoga No. 86975, 2006-Ohio-4885; *Coleman v. Cleveland School Dist.*, 142 Ohio App.3d 690, 756 N.E.2d 759 (8th Dist.2001); *Cotton v. Cleveland Mun. School Dist.*, Case No. 1:08CV1079, 2009 U.S. Dist. LEXIS 49569, *22 (N.D. Ohio 2009).

The court of appeals improperly found that the employee had standing to move to vacate the arbitration award in this matter even though the collective bargaining agreement does not expressly provide her the independent right to submit disputes to arbitration or make her a party to the arbitration. The appeals court's decision not only undermines the integrity of the agreement and the parties' relationship but improperly makes the agreement subservient to the individual statutory rights of the employee, contrary to R.C. Chapter 4117, the agreement, and the negotiating parties' intent.

Proposition of Law No. 4: The question of whether an employee clearly and unmistakably waived individual statutory rights is not a proper consideration in determining whether an arbitration award issued under a collective bargaining agreement should be vacated or modified pursuant to R.C. Chapter 2711.

Proposition of Law No. 5: A court reviewing a motion to vacate or modify an arbitration award pursuant to R. C. Chapter 2711 must base its decision solely upon the record of the arbitration proceeding.

Judicial review of arbitration awards is narrowly circumscribed by R.C. 2711.10 and 2711.11. A common pleas court reviewing an arbitration award is limited to ascertaining

whether fraud, corruption, misconduct, arbitration impropriety, or evident mistake made the award unjust or unconscionable. R.C. 2711.10 and 2711.11; *Russo v. Chittick*, 48 Ohio App.3d 101, 548 N.E.2d 314 (8th Dist.1988), paragraph one of the syllabus. The court's jurisdiction is narrow and limited. *Warren Edn. Assn. v. Warren Bd. of Edn.*, 18 Ohio St.3d 170, 172, 480 N.E.2d 456 (1985). In ruling on a motion to vacate, the court must base its decision solely upon the evidentiary record from the arbitration proceeding. *Chester Twp. v. Fraternal Order of Police*, 102 Ohio App.3d 404, 408, 657 N.E.2d 348 (11th Dist.1995), *discretionary appeal not allowed*, 73 Ohio St.3d 1453, 654 N.E.2d 989 (1995). Information that was not before the arbitrator cannot be considered by the court. *Id.*

The question of whether an individual employee waived her statutory rights is not one of the conditions set forth in R.C. 2711.10 or 2711.11. Notably, the Supreme Court did not discuss the issue of waiver in *Meyer v. UPS*, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106, when it held that a discharged employee's arbitration barred him from pursuing an action for age discrimination under R.C. 4112.14(C). *Meyer* at ¶ 51. The question of an individual's assent to arbitration is, instead, a matter for the arbitrator. *CACV of Colorado, LLC v. Kogler*, 2d Dist. Montgomery Case No. 021329, 2006-Ohio-5124, ¶ 12.

The court of appeals' instruction requiring the trial court to determine whether the employee clearly and unmistakably waived her individual statutory rights improperly modifies the express, limited statutory conditions for which an arbitration award may be vacated or modified and impermissibly broadens the court's narrow standard of review. The appellate court's decision also improperly requires the trial court to determine an issue that was never before the arbitrator and for which evidence was, therefore, not introduced.

Proposition of Law No. 6: A petitioner's compliance with each provision of Civ.R. 5 is necessary to vest a court with jurisdiction to hear a motion to vacate or modify an arbitration award pursuant to R.C. Chapter 2711.

Proposition of Law No. 7: Notice of a petition seeking the vacation or modification of an arbitration award pursuant to R.C. Chapter 2711 must be received by the adverse party or its attorney within the statutory three month period contained in R.C. 2711.13.

Proposition of Law No. 8: The three month period set forth in R.C. 2711.13 commences upon the issuance of the arbitration award.

After any arbitration award is made, a party to the arbitration may file a motion in common pleas court seeking to vacate, modify, or correct the award as prescribed in R.C. 2711.10 and 2711.11. R.C. 2711.13. The statute provides, "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, *as prescribed by law for service of a motion in an action.*" *Id.* (Emphasis added); *see also* R.C. 2711.05 (application to the court shall be made and heard in the manner provided by law for the making of motions). This three month period is mandatory and jurisdictional. *City of Galion*, 71 Ohio St.3d at 622, 646 N.E.2d at 815.

Ohio Civ.R. 5 sets forth the requirements for service of a motion. Its provisions differ significantly from the prescribed procedures for process of a complaint under Civ.R. 4 and 4.1. Civ.R. 4 requires the clerk to issue a summons for service upon each defendant upon the filing of a complaint. Civ.R. 4 and 4.1. The clerk of courts' service by mail is appropriate under Civ.R. 4.1. Civ.R.4.1 (A)(1)(a). Civ.R. 5(B) lists the various methods by which service of a motion may be perfected upon an adverse party or their attorney. Civ.R. 5(B)(1) and (2). Civ.R. 5(B) does not provide for service of a motion via mailing by the clerk of courts. Civ.R. 5(B)(2); *see City of Cuyahoga Falls*, 2007-Ohio-7060, at ¶ 9. Unlike a complaint, a

motion filed under Section 2711.13 does not require that the clerk of courts issue summons and perfect service. *Mun. Constr. Equip. Operators' Labor Council*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, at ¶ 21. Rather, a petitioner should perfect service through compliance with all parts of Civil Rule 5.

Ohio Civ.R. 5(B)(3) requires that the served document be accompanied by a completed proof of service stating the date and manner of service under Civ.R. 5(B)(2) and that the document be signed in accordance with Civ.R. 11. Civ.R. 5(B)(3); *see also CACV of Colorado, LLC*, 2006-Ohio-5124, at ¶ 9 (applying former version of Civil Rule 5 requiring proof of service). Civ.R. 5(D) requires that a motion be filed with the court within three days after its service on a party. The provisions of Civ.R. 5 cumulatively dictate that a court will only have jurisdiction to hear a motion to vacate or modify if the adverse party or its attorney actually receives notice of the motion within the statutory three-month period. *Mun. Constr. Equip. Operators' Labor Council*, at ¶¶ 21-24; *City of Cleveland*, 2009-Ohio-6313, at ¶ 17 (Citation omitted); *City of Cuyahoga Falls*, at ¶¶ 8-10. Notice that is timely postmarked but not timely received by the adverse party or its attorney will not suffice. *Id.*

The three month period begins to run when the arbitrator delivers his award to the parties. R.C. 2711.13. Since this time limitation is jurisdictional, courts use the postmark date of the award and not the date it was actually received in determining when the three month period commences. *Citibank South Dakota, N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576, ¶ 26 (2d Dist.). Nothing in the statute delays the commencement of this period until the date upon which the employer acts on the award. *See* R.C. 2711.13. Any contrary holding ignores the plain language of the statute.

The court of appeals in this matter improperly concluded that the clerk of courts' mailing of the petitioner's motion to the adverse party in the manner for process of a complaint satisfies the requirements of Civ.R. 5. The petitioner failed to include proof of service in her motion and failed to serve the motion herself within the statutory period. The court of appeals' decision does not find fault in these omissions. The appellate court also improperly deemed the provisions of Civ.R. 5(D) inapplicable to the service of actions filed pursuant to R.C. Chapter 2711. The appellate court's decision effectively rewrites Civ. R. 5 and R.C. 2711.13. The various provisions of Civ.R. 5 collectively require that the adverse party or its attorney actually receive notification of the motion within the three month period set forth in R.C. 2711.13. Finally, under the express terms of R.C. 2711.13, the statutory time period must commence when the arbitrator issues his award to the parties and not at a later date.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The scope and impact of the issues presented by the court of appeals' decision affect labor and employee relations in both the public and private sectors and every type of arbitration award. Appellant Dayton Public Schools Board of Education respectfully requests that the court accept jurisdiction in this case so that the important issues it presents will be reviewed on the merits.

Respectfully submitted,

/s Beverly A. Meyer

Beverly A. Meyer (0063807) - *Counsel of Record*
COOPER, GENTILE, WASHINGTON & MEYER CO., L.P.A.
Counsel for Defendant-Appellant
Dayton Public Schools Board of Education

CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of Defendant-Appellant's ***Memorandum in Support of Jurisdiction*** was sent to Georgia B. Cox, Plaintiff-Appellee, 4191 Mapleleaf Drive, Dayton, Ohio 45416 by regular U.S. mail, postage prepaid, this 26th day of March, 2015.

/s Beverly A. Meyer _____

Beverly A. Meyer (0063807)

COOPER, GENTILE, WASHINGTON & MEYER CO., L.P.A

Counsel for Defendant-Appellant

Dayton Public Schools Board of Education

APPENDIX

**Opinion and Final Entry of the Second District Court of Appeals,
Montgomery County, Ohio, CA 26382, journalized on February 20, 2015
(2015-Ohio-620)**

**Decision, Order and Entry of the Montgomery County Court of Common
Pleas journalized on August 12, 2014**



FILED
COURT OF APPEALS

2015 FEB 20 AM 8:43

GREGORY A. SCUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
36

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GEORGIA B. COX

Plaintiff-Appellant

v.

DAYTON PUBLIC SCHOOLS
BOARD OF EDUCATION

Defendant-Appellee

:
: Appellate Case No. 26382
:
: Trial Court Case No. 2014-CV-1422
:
: (Civil Appeal from
: Common Pleas Court)
:
:
:

.....
OPINION

Rendered on the 20th day of February, 2015.
.....

GEORGIA B. COX, 4191 Mapleleaf Drive, Dayton, Ohio 45416
Plaintiff-Appellant, *pro se*

BEVERLY A. MEYER, Atty. Reg. No. 0063807, Cooper, Gentile, Washington & Meyer
Co., 118 West First Street, Suite 850, Dayton, Ohio 45402
Attorney for Defendant-Appellee
.....

FAIN, J.

{¶ 1} Plaintiff-appellant Georgia Cox appeals from a judgment of the Montgomery County Common Pleas Court dismissing her motion to vacate, modify or correct an arbitration decision that confirmed the termination of her employment with defendant-appellee Dayton Public Schools Board of Education. She contends that the court erred in finding no jurisdiction to consider the motion based on an untimely filing and her lack of standing.

{¶ 2} We conclude that the court erred by finding that the motion was untimely, because it was filed and served in compliance with R.C. 2711.13 and Civ. Rule 5. We also conclude that the court erred in finding that Cox lacked standing to invoke her statutory rights to pursue a court review of her termination.

{¶ 3} Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings, consistent with this opinion.

I. The Course of the Proceedings

{¶ 4} This is the second appeal initiated by Cox regarding the consequences of an event that occurred on October 10, 2012 in connection with her employment as a teacher at Meadowdale High School. The first appeal, *State v. Cox*, 2014-Ohio-2201, 12 N.E.3d 446 (2d Dist.), affirmed a felony conviction for assault of a functionally impaired student. We concluded that "the evidence in the record permitted the jury reasonably to find that Cox hit the victim's upper right chest, in the area of his shoulder, and the jury could reasonably infer that she intended to cause the victim physical harm in the form of pain." Cox at ¶ 2.

{¶ 5} All of the actions taken by the parties in response to the event that occurred

on October 10, 2012, are governed by a collective bargaining agreement, referred to as a "Master Contract" between the teacher's union and the school board. Cox was immediately placed on paid administrative leave pending an investigation of the incident. On October 16, 2012, criminal charges were initiated against Cox in Vandalia Municipal Court. On October 16, 2012 the Director of Human Resources prepared a "Notice of Charges and Specifications," and set it for hearing on October 30, 2012. Based on advice of counsel, Cox attempted to have the hearing continued until after the completion of the criminal case.

{¶ 6} On November 6, 2012, Cox was notified that her paid leave status would change to unpaid leave as of November 12, 2012. The union representing Cox, the Dayton Education Association (DEA), filed a grievance over the untimeliness of the Notice of Charges, alleging that the collective bargaining agreement required the notice to be issued within 24 hours of a suspension. In response, the October 16th Notice of Charges was rescinded and reissued with a statement that the hearing would be reset "on a yet to be determined date and pending the criminal charges arising out of the same."

{¶ 7} When the hearing was set for December 19, 2012, Cox's attorney requested a continuance, stating that Cox would not participate in the hearing until after the completion of the criminal case. In response, the Notice of Charges was again reissued with a new hearing date of January 9, 2013. On January 8, 2013, Cox again requested a continuance because the criminal charges were still pending. Notwithstanding the request for a continuance, the hearing was conducted on January 9, 2013; Cox did not appear.

{¶ 8} Shortly before the hearing, the DEA filed two grievances, contesting the decision to convert Cox to unpaid leave and the failure to continue the hearing until after

the criminal case was complete. After the hearing, Cox was served with a Notice of Intent to Terminate. The DEA elected to submit the matter to arbitration. The arbitrator made a finding that three matters were properly before him: the two grievances filed by the DEA; and the termination of Cox's employment.

{¶ 9} The arbitrator conducted a hearing on September 17-19, 2013. Cox appeared, represented by counsel. A representative of the DEA also participated in the hearing. The arbitrator issued a decision on December 10, 2013, finding that the District had good and just cause to terminate Cox and that the two grievances should be denied. The arbitrator's decision does not contain a certificate of service to identify the date or method of service of the decision, does not state that it is a final and binding order, and contains no statement regarding any post-arbitration remedies to seek judicial review of the decision. The parties have acknowledged that the decision was emailed to all parties on December 10, 2013. The record also contains a resolution of the Board, dated December 18, 2013, adopting the decision of the arbitrator, and directing that a copy of its order be served on Cox by certified mail.

{¶ 10} On March 10, 2014, Cox, pro se, filed her motion to vacate, modify or correct the arbitration decision with the common pleas court. The motion did not contain a certificate of service, but at the time of filing Cox separately filed a praecipe for service of the motion to the appellee, Dayton Public Schools Board of Education. The docket reflects that the Clerk of Courts did issue service of the motion to the Board on March 10, 2014. The certified mail receipt reflects that the Board received the motion on March 12, 2014. The Board filed a motion to dismiss, upon the grounds that Cox's motion was untimely filed and that she lacked standing to seek judicial review of the arbitrator's decision. The

trial court granted the motion to dismiss, finding that the court lacked jurisdiction because Cox failed to comply with the filing requirements of R.C. 2711.13, and because only the DEA had standing to pursue a review of the arbitration decision. From the judgment dismissing her motion to vacate the arbitration award, Cox appeals, pro se.

II. The Standard of Review

{¶ 11} The Board moved to dismiss the motion to vacate pursuant to Civ.R. 12(B)(1) and 12(B)(6). Subsequent to the trial court's dismissal entry, and this appeal, the Supreme Court of Ohio has clarified that a motion to dismiss based on standing is not a jurisdictional issue, and should therefore be raised under Civ.R. 12(B)(6). *U.S. Bank Natl. Assn. v. Perdeau*, 6th Dist. Lucas No. L-13-1226, 2014-Ohio-5818, ¶ 10, citing *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 23.

{¶ 12} A complaint may be dismissed pursuant to Civ.R. 12(B)(6) as failing to comply with the applicable statute of limitations when the complaint shows conclusively on its face that the action is time-barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11. Therefore, both grounds for the Board's motion to dismiss are considered under Civ.R. 12(B)(6).

{¶ 13} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted under Civ.R. 12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to recovery. *Thompson v. Stealth Investigations, Inc.*, 2d Dist. Clark No. 2009 CA 86, 2010-Ohio-2844, ¶¶ 4-6.

{¶ 14} The standard of review for a Civ.R. 12(B)(6) motion to dismiss, which raises questions of law, is de novo. *Id.* at ¶ 4. De novo review requires an "independent

6

review of the trial court's decision without any deference to the trial court's determination." *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, 863 N.E.2d 189, ¶ 17 (2d Dist.), quoting *State ex rel. AFSCME v. Taft*, 156 Ohio App.3d 37, 2004-Ohio-493, 804 N.E.2d 88, at ¶ 27.

III. Cox Complied with the Filing Requirements of R.C. 2711.13

¶ 15 Pursuant to R.C. 2711.13, any party to an arbitration may initiate judicial review of an arbitration decision by filing a motion in the court of common pleas to vacate, modify or correct the arbitration. The statute specifically provides, "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action." The Board concedes that the motion was filed within the mandatory three-month deadline, but asserts that compliance with the statute failed when a copy of the motion was not delivered to them until three days after it was filed. We have held that service of a motion filed pursuant to R.C. 2711.13 to initiate judicial review of an arbitration decision is governed by Civ.R. 5. *CACV of Colorado, L.L.C. v. Kogler*, 2d Dist. Montgomery No. 21329, 2006-Ohio-5124. Civ. R. 5 (B)(2) specifically addresses when service is completed as follows:

(2) Service in general. A document is served under this rule by:

(a) handing it to the person;

(b) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) If the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(c) mailing it to the person's last known address by United States mail, in **which event service is complete upon mailing;**

(d) delivering it to a commercial carrier service for delivery to the person's last known address within three calendar days, **in which event service is complete upon delivery to the carrier;**

(e) leaving it with the clerk of court if the person has no known address; or

(f) sending it by electronic means to a facsimile number or e-mail address provided in accordance with Civ.R. 11 by the attorney or party to be served, **in which event service is complete upon transmission,** but is not effective if the serving party learns that it did not reach the person served.

(Emphasis added.)

(¶ 16) The record supports that Cox complied with R.C. 2711.13 by filing the motion to vacate within three months of the issuance of the arbitrator's decision. The Board asserts that compliance with the statute was not complete until it actually received a copy of the motion, which did not occur until three days after the three-month filing deadline. We find that Cox complied with Civ.R. 5 when the motion was filed timely and when the clerk of courts issued service of the motion on the day of filing. Civ.R. 5 unequivocally provides that "service" is complete upon mailing or upon delivery to the carrier. Neither Civ.R. 5, nor R.C. 2711.13 require actual delivery of the motion or receipt of the motion by the adverse party prior to the filing deadline in order for service to be

complete.

{¶ 17} We recognize that the Eighth District has held that a movant's failure to assure that an adverse party has actually received the notice of a motion to vacate, filed pursuant to R.C. 2711.13, before the expiration of the three-month statutory period will deprive the trial court of jurisdiction, even when the moving party timely filed the motion with the court and requested service by the clerk of courts. *Cleveland v. Laborers Intern. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313. However, the *Cleveland* court failed to address the specific language of R.C. 2711.13, which requires the motion to be "served" in accordance with rules for "service" of a motion, and the provision of Civ.R. 5(B)(2), which specifically states that "service" is complete when the pleading to be served is mailed or delivered to the carrier for service. Instead, the *Cleveland* court focused on the language of Civ.R. 5(D), which states that "[a]ll documents, after the original complaint, required to be served upon a party shall be filed with the court within three days after service." Civ.R. 5(D) does not prohibit any pleading to be filed first, then served on the parties after the filing date. Whether the filing date comports with a statutory deadline requiring "service" by a set date depends on when service is complete, which is defined by Civ.R. 5(B).

{¶ 18} We provided an analysis of Civ.R. 5(D) in *McGlinn v. Zander*, 2d Dist. Montgomery No. 7208, 1981 WL 2547 (Sept. 25, 1981), in which we held that the Rule does not preclude the filing of a motion prior to service of the motion on the opposing party, and does not apply to the question of when service is made for the purpose of meeting a deadline.

{¶ 19} We conclude that the provisions of Civ.R. 5(D) are inapplicable to the issue

of when service is complete for the purposes of meeting the statutory deadline set forth in R.C. 2711.13, which is specifically addressed in Civ.R. 5(B)(2). Thus, we conclude that the trial court erred when it found that it lacked jurisdiction to consider Cox's motion, based on the timeliness of the filing, which did comply with R.C. 2711.13 and Civ.R. 5(B)(2). Furthermore, the court should have addressed whether the three-month statutory deadline began to run from the date the arbitration decision was sent to the parties, December 10, 2013, or the date that the arbitration decision was adopted by the Board, and the termination became effective, on December 18, 2013. Although the arbitration decision does not state that it is a final and binding order, the Master Contract does provide in Section 3.07.2(D)(5) that "[u]nless contrary to law, the decision of the arbitrator shall be final and binding upon the Board, the Association and any Professional Staff Member involved in the matter."

IV. Cox Does Have Standing to Pursue a Judicial Review of her Termination

{¶ 20} The trial court found that Cox lacked standing to pursue a motion to vacate the arbitration decision because she was not a party to the arbitration proceeding. The court relied on Section 3.07.2(D)(1) of the Master Contract, which states that only the DEA shall have the right to appeal any grievance to arbitration. This section of the collective bargaining agreement is applicable to the two grievances that were reviewed by the arbitrator. However, different sections of the Master Contract apply to the termination. The trial court did not review or consider Article 46 or Article 48 of the Master Contract, which are directed to the procedures that must be followed for termination

actions. Section 46.01.1 of the Master Contract provides in pertinent part:

The procedures the Board must follow in terminating a contract of a Professional Staff Member are outlined in Ohio Revised Code, Section 3319.16 and Article Forty-Eight. Any employee who has received a notice of intention to terminate his/her contract by the Board shall have the right, within 10 days of the receipt of the notice, to proceed with a case under Section 3319.16, Revised Code; or to have his/her case decided by an arbitrator pursuant to Article 3.07.2D

(Arbitration).

Section 46.01.2 of the Master Contract further provides that: "[a]ny Professional Staff Member who has been notified of intent to dismiss under this section must be informed of his/her right to counsel or Association assistance and representation, if desired."

Article 48 of the Master Contract establishes a "due process procedure" for the disciplinary and termination process, which includes specific notices directed to the teacher and the Association, and the opportunity to be heard at a prompt hearing.

{¶ 21} Therefore, Articles 46 and 48 of the Master Contract specifically provide individual rights to a teacher to be notified of the intent to terminate, to attend an immediate hearing, to retain a personal attorney and to make a personal decision whether to arbitrate the termination action or whether to exercise her statutory rights instead of her contractual rights. Construing the intent of these sections of the Master Contract, *in pari materia*, with the arbitration provisions of the contract leads to the conclusion that the teacher is a party to any action involving the teacher's termination. This is consistent with the content of the arbitrator's action, which treated the termination as a separate

issue from the two grievances, and allowed Cox to participate in the arbitration with counsel. The arbitrator, however, does not state whether Cox was given any personal choice over the decision whether to proceed to arbitration or to pursue a review of the termination under her statutory rights. The arbitration decision does include a statement that the choice to proceed with arbitration was made by the DEA.

{¶ 22} R.C. 3319.16 provides a specific statutory procedure for termination of any teacher contract by a Board of Education. The statute requires the Board to furnish the teacher with a written notice of its intention to terminate the teacher's contract, and allows the teacher to demand a hearing. The statute allows the Board to refer the hearing to a referee, but makes no reference to arbitration. After the hearing is conducted, the Board must take action to adopt or reject the recommendation for action and its order must be reflected in its minutes, and notice of the order must be served on the teacher. R.C. 3319.16 provides for judicial review of the Board's order as follows:

Any teacher affected by an order of termination of contract may appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of such order. The appeal shall be an original action in the court and shall be commenced by the filing of a complaint against the Board, in which complaint the facts shall be alleged upon which the teacher relies for a reversal or modification of such order of termination of contract.

{¶ 23} There is no question that a teacher has standing to appeal her termination to the common pleas court, if she chooses the statutory procedure rather than the arbitration procedure. No provision in the Master Contract provides that the teacher is

specifically choosing to forfeit her statutory right to judicial review when she chooses to have the hearing conducted by an arbitrator instead of a member of the Board or a referee. In fact, the language of Article 46 of the Master Contract acknowledges that termination procedures are governed by both the Master Contract and R.C. 3319.16, and that the teacher has the right to choose how to proceed with her case. This choice gives the teacher standing in the termination process.

{¶ 24} The trial court's reliance on *Leon v. Boardman Twp.*, 100 Ohio St. 3d 335, 2003-Ohio-6466, 800 N.E.2d 12, for its finding that only the union had standing to appeal the arbitration decision ignores the restrictive clause in the holding of the case which makes an exception for collective bargaining agreements where the employee is given the right to choose arbitration. In the *Leon* case, which involved the termination of a patrolman, the court held, "when an employee's discharge or grievance is arbitrated between an employer and a union under the terms of the collective bargaining agreement, the aggrieved employee does not have standing to petition a court to vacate the award pursuant to R.C. 2711.10 unless the collective bargaining agreement expressly provides the employee an independent right to submit disputes to arbitration." *Id.* at ¶18. (Emphasis added.) In the present case, the court erred by failing to acknowledge that Section 46.01.1 of the Master Contract does specifically give the teacher the independent right to submit her termination to arbitration.

{¶ 25} The effect of holding that the teacher has no standing to pursue a judicial review of her termination is a waiver of her statutory rights. The U.S. Supreme Court has recognized that an arbitration clause in a collective bargaining agreement can waive the members' rights to judicial review of statutory claims if the waiver is "clear and

unmistakable." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998). Ohio courts have recognized that in some cases, a party's statutory rights can differ from contractual rights she may have under a collective bargaining agreement, in which case an incident that raises multiple issues can result in having a grievance reviewed by arbitration, while the statutory claim can proceed for court review. *Haynes v. Ohio Turnpike Comm.*, 177 Ohio App.3d 1, 2008-Ohio-133, 893 N.E.2d 850, ¶ 18 (8th Dist.). See also, *Chenevey v. Greater Cleveland Regional Transit Auth.*, 2013-Ohio-1902, 992 N.E.2d 461, ¶ 17 (8th Dist.)

{¶ 26} The record is not clear whether Cox's waiver of her statutory rights was clear and unmistakable. Even though the Master Contract gives Cox the right to choose the statutory process or arbitration for a review of her termination, it is not clear whether she affirmatively assigned that right to her union, DEA, or made the choice to arbitrate with the knowledge that her choice to do so would materially affect her post-hearing review rights. In addition to different filing deadlines under R.C. 3319.16 and 2711.13, the standard of review for the common pleas court to review a teacher termination under R.C. 3319.16 and the standard of review for the common pleas court to consider a motion to vacate an arbitration award pursuant to R.C. 2711.13 are materially different. R.C. 3319.16 provides that the judicial review of a teacher termination is a "special proceeding," commenced by the filing of a complaint. R.C. 3319.16 provides that the common pleas court may conduct hearings and take additional evidence, whereas the review process dictated by R.C. 2711.13 limits the common pleas court to a review of the arbitrator's decision to determine if it is "unlawful, arbitrary or capricious". *Martins Ferry City School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emps.*, 7th Dist. Belmont No.12

BE 15, 2013-Ohio-2954, ¶ 18.

{¶ 27} Therefore, based on her statutory and contractual rights, Cox does have standing to pursue judicial review of her termination. On remand, the court must review the merits of Cox's motion to vacate, modify or correct the arbitrator's award by determining if it is contrary to law, arbitrary or capricious, which should include, but is not limited to, whether Cox's waiver of her statutory rights was clear and unmistakable. If Cox did not clearly waive her statutory rights, the court is authorized by R.C. 2711.10(D) to vacate that part of the award terminating her contract, and remand the matter to the Board for proceedings consistent with law.

V. Conclusion

{¶ 28} Upon our de novo review, the judgment of the trial court is Reversed, and this matter is Remanded for further proceedings consistent with this opinion.

.....

DONOVAN and WELBAUM, JJ., concur.

Copies mailed to:

- Georgia B. Cox
- Beverly A. Meyer
- Hon. Michael Tucker



FILED
COURT OF APPEALS

2015 FEB 20 AM 8:43

GREGORY A. TRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
36

Handwritten mark

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GEORGIA B. COX	:	Appellate Case No. 26382
Plaintiff-Appellant	:	Trial Court Case No. 2014-CV-1422
v.	:	(Civil Appeal from
DAYTON PUBLIC SCHOOLS	:	Common Pleas Court)
BOARD OF EDUCATION	:	FINAL ENTRY
Defendant-Appellee	:	

.....

Pursuant to the opinion of this court rendered on the 20th day
of February, 2015, the judgment of the trial court is **Reversed**, and
this matter is **Remanded** for further proceedings consistent with the opinion.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the
Montgomery County Court of Appeals shall immediately serve notice of this judgment
upon all parties and make a note in the docket of the mailing.

Mike Fain

MIKE FAIN, Judge


MARY E. DONOVAN, Judge


JEFFREY M. WELBAUM, Judge

Copies mailed to:

Georgia B. Cox
4191 Mapleleaf Drive
Dayton, OH 45416

Beverly A. Meyer
Cooper, Gentile, Washington & Meyer Co.
118 W. First Street, Suite 850
Dayton, OH 45402

Hon. Michael Tucker
Montgomery County Common Pleas Court
401 N. Perry Street
Dayton, OH 45422

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

GEORGIA B. COX,	:	CASE NO. 2014 CV 01422
	:	
Plaintiff,	:	JUDGE MICHAEL L. TUCKER
v.	:	
	:	DECISION, ORDER AND ENTRY
DAYTON PUBLIC SCHOOLS BOARD OF	:	OVERRULING PLAINTIFF'S MOTION
EDUCATION,	:	TO VACATE OR MODIFY AND
	:	SUSTAINING DEFENDANT'S MOTION
Defendant.	:	TO DISMISS

On March 10, 2014, Plaintiff, Georgia B. Cox, filed a motion to vacate, modify or correct an arbitration award pursuant to R.C. 2711.13 with respect to an arbitration proceeding between the Dayton Education Association and Defendant, the Dayton Public Schools Board of Education (the "Board"). The Board responded by filing a motion to dismiss or strike Ms. Cox's motion to vacate or modify on April 8th. On the following day, the court entered an order requiring any memoranda or evidence in opposition to the Board's motion be filed on or before April 22, 2014 and that any replies in support be filed on or before April 29, 2014.

Ms. Cox filed a motion for leave on April 23, 2014 requesting leave instanter to file a memorandum in opposition out of time to the Board's motion to dismiss, along with an attached memorandum in opposition. The Board submitted a reply in support of its motion on April 25th, and Ms. Cox, without seeking leave, subsequently filed two additional memoranda. Given that the applicable briefing deadlines have passed, Ms. Cox's motion to vacate or modify and the Board's motion to dismiss or strike are ready for decision.

FACTS

Ms. Cox, a licensed intervention specialist, began her employment with the Board as a student teacher during the 2007-2008 school year. (Def.'s Mot. to Dismiss or Strike 14.)¹ The arbitrator noted that Ms. Cox holds "master's degrees in management and education" and described her as "a highly qualified teacher." *Id.* She taught at Colonel White High School and Thurgood Marshall High School after beginning her employment with the Board, and on August 13, 2012, Ms. Cox began teaching at Meadowdale High School. *Id.*

For the 2012-2013 school year, she was assigned eight multihandicapped students, assisted by two paraprofessionals. *Id.* at 15. Multihandicapped students typically ate breakfast in the school's cafeteria each morning during the students' first period from 8:00 a.m. to 8:50 a.m. *Id.* According to the lesson plan, Ms. Cox was to teach life skills during first period, which included instruction on topics such as "communication skills, socialization skills, and basic functional skills." *Id.* On the morning of October 12, 2012, owing to the absence of one of her two usual paraprofessional assistants, Ms. Cox chose to conduct her class at "a table in the front of the cafeteria," rather than the area she would normally have chosen. *Id.*

To make room for a student who used a particularly large wheelchair, Ms. Cox needed to move another student who also used a wheelchair. *Id.* As she moved the latter student, she "stood immediately in front of him," and "all witnesses agree, said something to the effect of 'if you hit me, I'll hit you back.'" *Id.* The arbitrator indicated in his decision that "the parties' versions of events diverge significantly" from that point. *Id.* at 16.

The Dayton Education Association (the "Association") maintained at arbitration that the student "used his left hand to grab onto [Ms. Cox's] left forearm." *Id.* Ms. Cox testified that she interpreted this as the student demonstrating his wish to be acknowledged, but seeing the student

¹ Citations to the Board's motion to dismiss or strike rely on the continuous pagination generated when using Adobe software to view the PDF copy of the motion as it appears on Montgomery County PRO, including exhibits.

then raise his right arm, she said: “Don’t hit me, don’t hit me, if you hit, I’ll hit you back.” *Id.* She described her statement as having the “pedagogical purpose of linking actions and consequences.” *Id.*

As Ms. Cox describes the incident, the student struck her with his raised right arm, and she attempted to break his left-hand grip on her left arm “by using her right balled fist to give [the student’s] still-raised right arm a ‘soft’ ‘noogie.’” *Id.* She indicates that this failed to break his grip, so “she raised her right arm again and struck her own left arm in an attempt to break it loose.” *Id.*

For the Board, a paraprofessional testified that she heard Ms. Cox make the foregoing remark about hitting the student back “and then heard a smacking sound.” *Id.* The paraprofessional did not see Ms. Cox strike the student. *Id.* An intervention specialist who was facing Ms. Cox, however, testified she saw Ms. Cox hit the student twice, forcefully. *Id.* The intervention specialist reported the incident to the principal of Meadowdale High School, who “began an investigation that culminated in Ms. Cox’s discharge and [the] grievance” that lead to the arbitration at issue here. *Id.*

The parties’ accounts afterward reconverge. *Id.* Having reviewed a video recording of the incident, the school’s principal removed Ms. Cox from the classroom and had the student brought to the nurse’s office. *Id.* at 17. The nurse testified before the arbitrator that she found no sign of any injury associated with the incident, although she acknowledged that the absence of such indications did not mean that the student had not been injured. *Id.*

Following the nurse’s examination of the student, the principal reviewed the video recording of the incident again, in Ms. Cox’s presence. *Id.* The school’s Director of Safety and Security escorted Ms. Cox out of the building shortly thereafter, and later that day (October 12, 2012), the Board’s Executive Director of Human Resources wrote Ms. Cox a letter informing her that she had been placed on paid administrative leave during the pendency of an investigation into the incident. *Id.*

Felony criminal charges were filed against Ms. Cox as the result of the incident, and the Board issued a “Notice of Charges and Specifications” on October 16, 2012 setting a hearing on the matter for October 30th. *Id.* The president of the Association indicated to the Board that it would not allow Ms. Cox to speak during any such disciplinary hearing so long as the criminal charges against her remained pending. *Id.* As a result, the hearing did not take place, and on November 6th, the Board informed Ms. Cox by letter that her paid administrative leave would be converted to unpaid leave effective November 12th. *Id.*

On November 12th, the Association filed Grievance 12-15 in which it offered objections to the Notice of Charges and Specifications. *Id.* The Association contended that the Board violated § 48.03.2 of the Master Contract Between the Dayton Education Association and the Dayton City School District (the “Master Contract”) by failing to provide Ms. Cox with written notice of the allegations against her within 24 hours of her suspension. *Id.* In the grievance, the Association asked the Board to withdraw the Notice of Charges and Specifications and “commit in writing to provide charges and specifications in a timely manner as specified under Article 48” of the Master Contract. *Id.*

The Board rescinded the Notice of Charges and Specifications on the same date—November 12th—and then immediately reissued it. *Id.* On December 18, 2012, with the rescheduled disciplinary hearing set for the following day, the Association sent a letter to the Board requesting a continuance. *Id.* at 18. The Association stated again that Ms. Cox would not participate in such a hearing with the criminal charges against her still unresolved. *Id.* Ms. Cox submitted a substantively similar memorandum on her own behalf. *Id.*

On December 19th, the Board once again reissued the Notice of Charges and Specifications, rescheduling the disciplinary hearing for January 9, 2013. *Id.* Likewise, the Association again requested a continuance and took the position that Ms. Cox would not appear in advance of the

resolution of her pending criminal charges. *Id.* Ms. Cox, as well, submitted another memorandum, dated January 9th, taking a substantively similar position. *Id.*

The Board held the hearing anyway on January 9, 2013, with the Association's president; the Board's Executive Director of Human Resources; and the principal of Meadowdale High School in attendance. *Id.* During the hearing, the Board presented the video recording of the incident, and the Association read Ms. Cox's memorandum of January 9th into the record. *Id.* At the conclusion of the hearing, the hearing officer found that Ms. Cox had twice struck a student on October 10, 2012 and recommended that Ms. Cox's employment be terminated. *Id.*

The matter proceeded to arbitration on September 17-19, 2013. *Id.* at 13. In a decision dated Tuesday, December 10, 2013, the arbitrator found "that the [Board] had good and just cause to terminate the employment of Ms. Cox" and that the Association's corresponding grievance "should be denied." *Id.* at 22. The arbitrator transmitted copies of the decision to the Board and to the Association by email on the same date. *Id.* at 12. Ms. Cox, too, appears to have received a copy of the decision by email on or about December 10th, albeit from an unidentified source; in her opposition to the Board's motion to dismiss or strike, she states that "she became aware a[] [decision] had been [issued]" but "was not able to access the attachment of the e-mail [sic] prompting [sic] of the decision" until Friday, December 13, 2013. (Pl.'s First Opp'n to Def.'s Mot. to Dismiss 3.)

On March 10, 2014, Ms. Cox filed her instant motion to vacate or modify with this court. After the Board filed its motion to dismiss or strike in response, Ms. Cox filed no fewer than three memoranda in opposition. She filed a motion on April 23, 2014 seeking leave instanter to file the first of these out of time—the applicable deadline having passed on April 22nd. Although the court did not enter an order at the time sustaining the motion, it has accepted the memorandum. After the Board filed its reply, Ms. Cox subsequently filed two additional, untimely memoranda. The court

will not, as a result, consider the latter two documents.

STANDARD OF REVIEW

Under R.C. 2711.13, after “an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas [in the corresponding county] for an order vacating, modifying, or correcting the award as prescribed in [R.C. 2711.10 and 2711.11].” R.C. 2711.10 states that a “court of common pleas shall make an order vacating [an arbitration] award upon the application of any party to the arbitration” if the award “was procured by corruption, fraud or undue means”; in the event of “evident partiality or corruption on the part of the arbitrators”; if the arbitrators “were guilty of [certain] misconduct” or “any other misbehavior by which the rights of any party [were] prejudiced”; or, if the “arbitrators exceeded their powers.” Similarly, R.C. 2711.11 directs “the court of common pleas in the county [in which] an award was made in an arbitration proceeding” to enter “an order modifying or correcting the award upon the application of any party to the arbitration” if the award results from “an evident material miscalculation of figures” or certain other “material mistake[s]”; if the “arbitrators have awarded upon a matter not submitted to them,” unless that matter was not material; or if “the award is imperfect in matter of form not affecting the merits of the controversy.”

Notice “of a motion to vacate, modify, or correct an [arbitration] award must be served upon the adverse party or [the adverse party’s] attorney within three months after the award is delivered to the parties in interest,” in accordance with the procedures “prescribed by law for service of notice of a motion in an [ordinary civil] action.” R.C. 2711.13; *City of Galion v. Am. Fed’n of State, County & Mun. Employees, Local No. 2243*, 71 Ohio St. 3d 620, 621-622, 1995-Ohio-197, 646 N.E.2d 813; *City of Cleveland v. Laborers Int’l Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, ¶¶ 17-20 (citing *City of Cuyahoga Falls v. Fraternal Order of Police*, 9th Dist. Summit No. 23870, 2007-Ohio-7060, ¶¶ 9-10). The “three-month deadline set forth in R.C.

2711.13 for filing and serving a motion to vacate [or modify] an arbitration award is mandatory and jurisdictional.” *Mun. Constr. Equip. Operators’ Labor Council v. City of Cleveland*, 197 Ohio App. 3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 28 (8th Dist.) (citing *City of Galion*, 71 Ohio St. 3d at 622).

Subject matter jurisdiction “is the power conferred upon a court, either by constitutional provisions or by statute, to decide a particular matter or issue on its merits.” *In re B.P.*, 11th Dist. Trumbull No. 2011-T-0032, 2011-Ohio-2334, ¶ 30 (citing *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 75, 1998-Ohio-275, 701 N.E.2d 1002). Because “subject matter jurisdiction defines the competency of a court to render a valid judgment, it cannot be waived.” *Id.* at ¶ 31 (citing *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St. 3d 229, 1996-Ohio-224, 661 N.E.2d 1097 (1996)). A “motion to dismiss for lack of subject matter jurisdiction is made pursuant to Civ.R. 12(B)(1), and “[t]he standard of review for [such] a dismissal * * * is whether any cause of action cognizable by the forum has been raised in the complaint.” *Id.* at ¶ 30 (quoting *State ex rel. Bush v. Spurlock*, 42 Ohio St. 3d 77, 80, 537 N.E.2d 641 (1989)); accord *Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 764, 2009-Ohio-1769, 910 N.E.2d 1088, ¶ 26 (2d Dist.) (citing *Crestmont Cleveland P’ship v. Ohio Dept. of Health*, 139 Ohio App. 3d 928, 936, 746 N.E.2d 222 (10th Dist. 2000)); *Lawson Steel Slitting, Inc. v. Cleveland Elec. Illuminating Co.*, 8th Dist. Cuyahoga No. 96845, 2012-Ohio-83, ¶ 17 (citing *Pro Se Commercial Props. v. Illuminating Co.*, 8th Dist. Cuyahoga No. 92961, 2010-Ohio-516, ¶ 7).

LAW AND ANALYSIS

Ms. Cox lacks standing to pursue her motion to vacate or modify because she was not a party to the arbitration proceeding at issue. As a result, the court has no jurisdiction over this matter. Therefore, the court overrules Ms. Cox’s motion to vacate or modify and sustains the Board’s motion to dismiss under Civ.R. 12(B)(1).

Independently, Ms. Cox's apparent failure to comply with the service requirements set forth in R.C. 2711.13 indicates that the court would not have had jurisdiction to adjudicate her motion, regardless of the question of standing. The dismissal of this action moots the Board's motion to strike.

A. Ms. Cox lacks standing.

Moving under Civ.R. 12(B)(1) for the court to dismiss this case, the Board argues that Ms. Cox lacks standing" to pursue her motion to vacate or modify the arbitrator's decision because she was not a party to the arbitration itself. (Def.'s Mot. to Dismiss or Strike 1, 5-7.) Ms. Cox maintains that she was a party to the arbitration and that she therefore has a "right to point [out] that there were flaws with the [underlying grievance and arbitration process], and hence the outcome of the process." (Pl.'s First Opp'n to Def.'s Mot. to Dismiss 5.) Finding that Ms. Cox has no standing to invoke the provisions of R.C. 2711.10, 2711.11 or 2711.13, the court sustains the Board's motion to dismiss.

R.C. 2711.13 states that following the entry of "an award in an arbitration proceeding * * *, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in [R.C.] 2711.10 and 2711.11." (Emphasis added.) The latter two sections alike refer to "the application of any party to the arbitration" for such relief. (Emphasis added.) Thus, Ms. Cox would have to have been a party to the arbitration proceeding in order to have standing now to move the court under R.C. 2711.13 to vacate or modify the arbitrator's decision.

When "an employee's discharge or grievance is arbitrated between an employer and a union under the terms of a collective bargaining agreement, the aggrieved employee does not have standing to petition a court to vacate the award pursuant to R.C. 2711.10, unless the collective bargaining agreement expressly gives the employee an independent right to submit disputes to

arbitration.” *Leon v. Boardman Twp.*, 100 Ohio St. 3d 335, 2003-Ohio-6466, 800 N.E.2d 12, ¶ 18; see also e.g. *State ex rel. Hudak v. State Employment Relations Bd.*, 5th Dist. Stark No. 2013 CA 00007, 2013-Ohio-2679, ¶ 35 (citing *Leon*, 100 Ohio St. 3d 335); *Rush v. United Parcel Serv.*, 9th Dist. Medina No. 07 CA 0069-M, 2008-Ohio-1646, ¶¶ 10-12 (citing *Leon*, 100 Ohio St. 3d 335, syllabus). The nearly identical language of R.C. 2711.11 suggests that the same would be true of a motion to modify.

In this case, § 3.07.2(D)(1) of the Master Contract states that “[o]nly the Association shall have the right to appeal any grievance * * * to arbitration.” (Def.’s Mot. to Dismiss or Strike 42.) (Emphasis added.) Far from “expressly giv[ing] [Ms. Cox] an independent right to submit disputes to arbitration,” the Master Contract expressly restricts that right to the Association.² Ms. Cox, then, did not have the right to seek arbitration of her grievance against the Board, and as a consequence, she lacks standing to move to have the arbitrator’s decision vacated or modified. *Leon*, 2003-Ohio-6466, ¶ 18.

According to Ms. Cox, she does have standing because she is “the party directly subject to the adverse effect of the arbitration, and the exclusive party for whom there [was] ‘something to lose.’” (Pl.’s First Opp’n to Def.’s Mot. to Dismiss 1.) The *Leon* decision expressly contradicts this contention, however. Nothing “in the national or state labor policy * * * precludes a collective bargaining agreement from giving the arbitral right to [an] aggrieved employee, rather than to [her] union,” but even so, “an aggrieved worker whose employment is governed by a collective bargaining agreement that provides for binding arbitration will generally be deemed to have relinquished [her] right to act independently of the union in all matters related to or arising from the contract, except to the limited extent that the agreement explicitly provides to the contrary.” *Leon*,

² In § 3.07.2(D)(3), the Master Contract also states that “[n]either party will be permitted to assert in any arbitration proceeding any ground or to rely on any evidence not previously * * * disclosed to the other party.” (Def.’s Mot. to Dismiss or Strike 42.) (Emphasis added.) This further indicates that the Master Contract contemplates only two parties to the arbitration of grievances: the Association and the Board.

2003-Ohio-6466, ¶ 17 (citing *Vaca v. Sipes*, 386 U.S. 171, 184, 87 S. Ct. 903 (1967); *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc.*, 341 F.2d 715, 720-721 (6th Cir. 1965)).

Standing “is a ‘jurisdictional requirement’” that “is required to invoke the jurisdiction of [a] common pleas court” and must “be determined as of the commencement” of an action. *Fed. Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶¶ 22, 24 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S. Ct. 2130 (1992); *State ex rel. Dallman v. Franklin County Court of Common Pleas*, 35 Ohio St. 2d 176, 179, 298 N.E.2d 515 (1973)). Ms. Cox does not have standing to pursue her motion to vacate or modify because she was not a party to the arbitration. Given that Ms. Cox lacks standing, this court lacks jurisdiction to adjudicate her motion. The court sustains the Board’s motion to dismiss on this basis.

B. The court likely lacks subject matter jurisdiction to adjudicate Ms. Cox’s motion regardless of whether she has standing.

In support of its motion to dismiss, the Board also argues that Ms. Cox’s “failure to abide by the express [service] requirements of [R.C.] 2711.13, * * *, divests [the] [c]ourt of [subject matter] jurisdiction.” (Def.’s Mot. to Dismiss or Strike 4-5.) The record includes insufficient evidence to permit a definitive conclusion on this question, but the evidence available suggests that the court indeed lacks jurisdiction for purposes of Ms. Cox’s motion to vacate or modify.

The provisions of R.C. 2711.13 mandate that “[n]otice of a motion to vacate, modify, or correct an [arbitration] award * * * be served upon the adverse party or [the adverse party’s] attorney within three months after the award is delivered to the parties in interest.” Although the statute expressly bestows upon the court the “authority to decide” a motion such as Ms. Cox’s instant motion to vacate, the “three-month deadline set forth in R.C. 2711.13 for filing and [service] is mandatory and jurisdictional.” *Mun. Constr. Equip. Operators’ Labor Council v. City of*

Cleveland, 197 Ohio App. 3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 28 (8th Dist.) (citing *City of Galion v. Am. Fed'n of State, County & Mun. Employees, Local No. 2243*, 71 Ohio St. 3d 620, 622, 1995-Ohio-197, 646 N.E.2d 813); *In re B.P.*, 11th Dist. Trumbull No. 2011-T-0032, 2011-Ohio-2334, ¶ 30 (citing *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 75, 1998-Ohio-275, 701 N.E.2d 1002). In other words, the authority of a court to adjudicate a motion to vacate or modify depends upon timely service of notice “upon the adverse party or [the adverse party’s] attorney.” R.C. 2711.13; see also *City of Cuyahoga Falls v. Fraternal Order of Police*, 9th Dist. Summit No. 23870, 2007-Ohio-7060, ¶ 10. A court will have jurisdiction to hear a motion to vacate or modify only if “the adverse party or [the adverse party’s] attorney” actually receives notice of the motion within the statutory three-month period; notice timely postmarked but not timely received will not suffice. *Mun. Constr. Equip. Operators’ Labor Council*, 2011-Ohio-5834, ¶¶ 21-24; *City of Cleveland v. Laborers Int’l Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, ¶ 17 (citation omitted); *Fraternal Order of Police*, 2007-Ohio-7060, ¶¶ 8-10.

Ms. Cox filed her notice and motion on March 10, 2014, but she did not include a certificate of service. (See generally Pl.’s Mot. to Vacate, Modify or Correct.) The absence of a certificate violates Civ.R. 5(B)(3), which requires that any “served document * * * be accompanied by a completed proof of service.” Ms. Cox’s failure to include a certificate of service—of itself—might have been sufficient to divest the court of jurisdiction over this case because R.C. 2711.13 requires that a motion to vacate or modify be served as if it were a “notice of a motion in an [ordinary civil] action,” or put differently, the statute requires that a motion to vacate or modify be served in compliance with Civ.R. 5. See also *Laborers Int’l Union Local 1099*, 2009-Ohio-6313, ¶¶ 18-20 (quoting *Fraternal Order of Police*, 2007-Ohio-7060, ¶¶ 9-10) (discussing applicability of Civ.R. 5 to motions under R.C. 2711.13).

In addition, the docket reflects that Ms. Cox filed instructions for service, along with her

motion, directing the clerk to serve notice on the Board by certified mail. Yet, “unlike a complaint, [a] motion filed under R.C. 2711.13 does not require that the clerk of courts issue summons and perfect service.” *Mun. Constr. Equip. Operators’ Labor Council*, 2011-Ohio-5834, ¶ 21. Service “must be perfected,” instead, “by service on the attorneys for the respective parties prior to [the] filing [of] the [motion], as explained by Civ.R. 5(D),” which states that “[a]ll documents, after [an] original complaint, required to be served upon a party shall be filed with the court within three days after service.” Civ.R. 5(D) (emphasis added); *Laborers Int’l Union Local 1099*, 2009-Ohio-6313, ¶ 18 (emphasis added). The instructions for service accordingly do not satisfy the service requirement set forth in R.C. 2711.13.

Even had the foregoing attempts at service otherwise satisfied the service requirement, however, the Board’s actual receipt of service appears to be late with respect to the delivery date of the arbitrator’s decision. Since “July 1, 2005, pursuant to Rule 36 and Rule 37 of the [American Arbitration Association’s] Labor Arbitration Rules, an award is rendered when it is transmitted via email to the parties.” *Mun. Constr. Equip. Operators’ Labor Council*, 2011-Ohio-5834, ¶ 22. Were the same version of the Labor Arbitration Rules applicable to the case at hand, then, the three-month period during which Ms. Cox would have had to effect service of her motion on the Board began on December 10, 2013—the date on which the arbitrator emailed copies of his decision to the Board and the Association. (Def.’s Mot. to Dismiss or Strike 12.)

R.C. 1.45 states that if “a number of months is to be computed by counting the months from a particular day, [then] the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not [as] many days in the concluding month [as in the beginning month], in which case the period ends on the last day of [the concluding] month.” Here, assuming that the arbitrator effectively delivered his decision on December 10, 2013, the three-month service period specified by R.C. 2711.13 ended on March 10,

2013, given that December and March are months consisting of 31 days. *See also Laborers Int'l Union Local 1099*, 2009-Ohio-6313, ¶ 16 (citing *Girard v. AFSCME Ohio Council 8, Local Union 3356*, 11th Dist. Trumbull No. 2003-T-0098, 2004-Ohio-7230) (noting that Civ.R. 6(E) does not apply to motions under R.C. 2711.13).

The record of this case demonstrates conclusively that the Board did not actually receive service of Ms. Cox's motion before March 11, 2013. Though Ms. Cox mailed a copy of her motion to the Board, the envelope bore a postmark of March 11th, and the docket reflects that the Board received the copy served by the clerk on March 12th. (Def.'s Mot. to Dismiss or Strike 167.) Furthermore, Ms. Cox's non-compliance with Civ.R. 5 means that she "did not invoke [the] rule." *Laborers Int'l Union Local 1099*, 2009-Ohio-6313, ¶ 26. Consequently, even though she mailed a copy of her motion to the Board's attorney in an envelope bearing a postmark of March 11, 2014, Ms. Cox could not avail herself of the provisions of Civ.R. 5(B)(2)(c), an example of the so-called "mailbox rule," regardless of whether she actually deposited the envelope in the mail on March 10th.³ *Id.*; Def.'s Mot. to Dismiss or Strike 167.

Under R.C. 2711.13, the court's jurisdiction to adjudicate a motion to vacate or modify requires service of notice "upon the adverse party or [the adverse party's] attorney." *See also Mun. Constr. Equip. Operators' Labor Council*, 2011-Ohio-5834, ¶ 28; *In re B.P.*, 2011-Ohio-2334, ¶ 30. Ms. Cox would not seem to have satisfied this requirement, which would prevent the court from exercising subject matter jurisdiction over her motion. The court nevertheless makes no finding on this question because the Master Contract does not indicate which version of the American Arbitration Association rules applied to the arbitration proceeding at issue, and the balance of the record includes insufficient evidence to resolve the uncertainty.

³ Civ.R. 5(B)(2)(c) states that a "document is served under [Civ.R. 5] by * * * mailing it to [a] person's last known address by United States mail, in which event service is complete upon mailing."

C. The dismissal of this case under Civ.R. 12(B)(1) obviates the need for consideration of the Board's motion to strike.

In the alternative to its request for dismissal of this matter under Civ.R. 12(B)(1), the Board moved to strike Ms. Cox's motion to vacate or modify. (Def.'s Mot. to Dismiss or Strike 1.) The court has determined that it has no jurisdiction to enter a final decision on Ms. Cox's motion because she lacks standing. As such, the Board's alternative motion to strike is moot.

CONCLUSION

Ms. Cox was not a party to the underlying arbitration proceeding and thus lacks standing to move under R.C. 2711.10, 2711.11 or 2711.13 to have the arbitrator's decision vacated or modified. Therefore, the court sustains the Board's motion to dismiss pursuant to Civ.R. 12(B)(1).

Regardless of Ms. Cox's standing, the court would probably have lacked jurisdiction over this case based upon the apparent untimeliness of Ms. Cox's service of her motion on the Board. The Board's motion in the alternative to strike Ms. Cox's motion to vacate or modify has been rendered moot by the dismissal of this action.

THIS IS A FINAL APPEALABLE ORDER UNDER CIV.R. 58, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV.R. 54. PURSUANT TO APP.R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED

s/MICHAEL L. TUCKER, JUDGE

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "notifications" tab of the following case participants:

BEVERLY A. MEYER
(937) 224-5300
Attorney for Defendant

Copies of this document were sent to all parties listed below by ordinary mail:

GEORGIA B. COX
4191 MAPLELEAF DRIVE
DAYTON, OH 45416
Plaintiff

ANN M. SCOTT, Bailiff
(937) 225-4448



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision
Case Number: 2014 CV 01422
Case Title: GEORGIA B COX vs DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION

So Ordered

Michael L. Tucker

Electronically signed by mtucker on 2014-08-12 16:00:24 page 16 of 16