Supreme Court of Ohio Clerk of Court - Filed December 09, 2015 - Case No. 2015-0494

Case No. 2015-0494

IN THE

SUPREME COURT OF OHIO

GEORGIA B. COX,

Plaintiff-Appellee,

v.

DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendant-Appellant.

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

MERIT BRIEF OF DEFENDANT-APPELLANT DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION

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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. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 1, Award, pp. 2-4.) The teacher reported Ms. Cox's conduct to the building principal, who, in turn, began an investigation that culminated in Ms. Cox's discharge and the filing of grievances under the collective bargaining agreement covering the terms and conditions of her employment. (*Id.*)

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. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 1 and Exhibit 2.) The agreement also afforded Ms. Cox the opportunity to decide whether she wished 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. (*Id.*, Exhibit 2, Article 46, Section 46.01.1.) Ms. Cox chose arbitration, and the DEA submitted three matters – two procedural grievances and the termination of Ms. Cox's employment – to arbitration to determine whether the Board of Education violated the

parties' collective bargaining agreement and to decide whether there was "good and just cause" to terminate Georgia Cox's employment. (*Id.,* Exhibit 1, Award, p. 6.) The parties combined all three issues into a single arbitration hearing held on September 17, 18 and 19, 2013. (*Id.*, Exhibit 1, Award, p. 1.) 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. (*Id.*, Exhibit 1.) The arbitrator found that the Board had good and just cause to terminate Ms. Cox's employment and denied the two grievances. (*Id.,* Exhibit 1, Award, p. 10.)

On March 10, 2014, Georgia Cox filed a motion to vacate or modify the arbitration award in the Montgomery County Court of Common Pleas. (*Plaintiff's Motion to Vacate, Modify or Correct Arbitration Award*, March 10, 2014.) Her motion did not contain proof of service. (*Id.*) Rather, the clerk of courts requested and issued service of Ms. Cox's motion to the Board of Education by placing Ms. Cox's motion in the mail on March 10, 2014. (*Instructions for Service on a New Case Via Certified Mail*, March 10, 2014.) Ms. Cox personally mailed a copy of her motion, postmarked March 11, 2014, to counsel for the Board of Education. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 3, Affidavit of Beverly A. Meyer, ¶ 4.) 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. (*Successful Service Notice*, March 17, 2014; *Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 3, Affidavit of Beverly A. Meyer, ¶ 4.)

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 under R.C. 2711.13 and that she had no standing to dispute the award because she was not a party to the arbitration. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014.) 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. (Appendix D, *Montgomery County Court of Common Pleas' Decision, Order and Entry Overruling Plaintiff's Motion to Vacate or Modify and Sustaining Defendant's Motion to Dismiss*, August 12, 2014.) Although the trial court stated that its determination on the question of Ms. Cox's standing divested it of jurisdiction over the matter, it discussed Ms. Cox's apparent failure to comply with the requirements of R.C. 2711.13. (*Id.*)

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. (*Plaintiff's Notice of Appeal to the Second District Court of Appeals*, September 10, 2014; *Brief of Appellant Georgia B. Cox*, October 28, 2014.) 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. (Appendix C, *Opinion of the Second District Court of Appeals*, February 20, 2015.) The appellate court determined that Ms. Cox has standing to pursue judicial review of her termination and that she complied with the filing requirements of R.C. 2711.13. (*Id.*, pp. 6-9, 14.) In reaching its conclusion, the court found that Ms. Cox complied with Civ.R. 5 when

the clerk of courts issued service of her motion to the Board of Education within the three month statutory period on March 10, 2014. (*Id.*, p. 7.) The appellate court also determined that R.C. 2711.13 does not require actual delivery or receipt of the motion by the adverse party or its attorney within the statutory period where service occurs as defined by Civ.R. 5(B)(2). (*Id.*, pp. 8, 9.)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. VII

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.

Ohio's Arbitration Statute Protects the Sanctity of Arbitration Awards

Ohio's public policy favors the private settlement of grievances through arbitration. *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). Consistent with that policy, the General Assembly provided a special statutory procedure for the limited and narrow judicial review of arbitration awards by enacting R.C. Chapter 2711. *City of Galion v. Am. Fedn. of State, Cty., & Mun. Emps., Local No. 2243*, 71 Ohio St.3d 620, 623, 646 N.E.2d 813 (1995). R.C. 2711.13 is part of that statutory scheme, and it provides arbitrating parties a mechanism for seeking the vacation, modification, or correction of arbitration awards in specified circumstances. Under R.C. 2711.13, "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 sections 2711.10 and 2711.11 of the Revised Code." The legislature's instructions to a party moving for vacation or revision of an award are seemingly straightforward: "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." R.C . 2711.13. The statute concludes, stating: "For the purposes of the motion, any judge who might make an order to stay proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award." *Id.* R.C. 2711.05, which reinforces the distinct motion practice requirements imposed on a party seeking to vacate or modify an arbitration award, provides that "[a]ny application to the court of common pleas under sections 2711.01 to 2711.15, inclusive, of the Revised Code, shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise expressly provided in such sections." R.C. 2711.05; *see also Corrado v. Lowe,* 11th Dist. Geauga No. 2014-G-3239, 2015-Ohio-1993, ¶ 24, quoting *MBNA Am. Bank, M.A. v. Anthony,* 5th Dist. Tuscarawas No. 05AP090059, 2006-Ohio-2032, ¶ 13, *discretionary appeal not allowed*, 111 Ohio St.3d 1411, 2006-Ohio-5083, 854 N.E.2d 1091, and *Licking Hts. Local Sch. Dist Bd. Of Edn. v. Reynoldsburg City Sch. Dist. Bd. Of Edn.*, 10th Dist. Franklin No. 11AP-173, 2011-Ohio-5063, ¶ 15, *motion denied,* 130 Ohio St.3d 1482, 2011-Ohio-6228, 957 N.E.2d 1172, and *discretionary appeal not allowed*, 131 Ohio St.3d 1457, 2012 Ohio 648, 961 N.E.2d 1136 (which stated that "the applicable civil rule provisions are those pertaining to motions, rather than those pertaining to commencement of an action."); *Licking Hts. Local Sch. Dist Bd. Of Edn. v. Reynoldsburg City Sch. Dist. Bd. Of Edn.*, 10th Dist. Franklin No. 12AP-579, 2013-Ohio-3211, ¶ 20, quoting *Licking Hts. Local Sch. Dist Bd. Of Edn. v. Reynoldsburg City Sch. Dist. Bd. Of Edn.*, 10th Dist. Franklin No. 11AP-173, 2011-Ohio-5063 (which applied the Ohio Rules of Civil Procedure pertaining to motions to a motion to vacate or modify rather than those pertaining to the commencement of an action).

This court last addressed the requirements of R.C. 2711.13 in its 1995 decision *City of Galion v. Am. Fedn. of State, Cty., & Mun. Emps., Local No. 2243*, 71 Ohio St.3d 620, 646 N.E.2d 813. The Supreme Court deemed the language of R.C. 2711.13 "clear, unmistakable, and above all, mandatory" and determined that compliance with the statute's provisions is necessary to accord a trial court jurisdiction. 71 Ohio St.3d at 622, 646 N.E.2d 813. In answering the certified issue, the court held that the statute "provides a three-month period *within which* a party must file a motion to vacate, modify, or correct an arbitration award under R.C. 2711.10 or 2711.11." *Id.* (Emphasis added.) R.C. Chapter 2711 is the exclusive means by which a party may attempt to alter a result obtained through arbitration. *Id.* at paragraph two of the syllabus. That fact, coupled with the truth that public policy favors arbitration as a means of resolving disputes, requires an application of R.C. 2711.13 and each of its provisions that protects the integrity of issued arbitral awards.

R.C. 2711.13 Requires Timely Receipt of a Motion to Vacate, Modify or Correct an Arbitration Award

The evaluation of two phrases in R.C. 2711.13 are necessary to answering the question of whether notice of a petition seeking the vacation or modification of an arbitration award must be received by the adverse party or its attorney within the statutory three month period. The first is the General Assembly's edict that "notice * * * must be served upon the adverse party or his attorney within three months" and the second is that such service must occur "as prescribed by law for service of notice of a motion in an action." R.C. 2711.13.

A court's paramount concern when construing a statute is the legislative intent in enacting the statute. *Steele v. Morrisey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21, citing *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-

Ohio-1630, 786 N.E.2d 39, ¶ 12. It is presumed that every word in a statute is designed to have legal effect. R.C. 1.47. As a result, a statute should be interpreted to give some effect to every part of it.

The legislature's use of the word "notice" in R.C. 2711.13 is important, for implicit in the concept of notice is actual receipt. The General Assembly could have simply required that the motion to alter an arbitration award be served within three months, but it did not. Its use of the word "notice," and its concomitant use of the word "upon," is tactical and intentional and requires that a party be made aware of a motion to vacate or revise an arbitration award within the three month period.

This analysis is similar to that undertaken by the Supreme Court in *Welsh Dev. Co. v. Warren Cty. Reg'l Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, *reconsideration denied*, 128 Ohio St.3d 1517, 2011-Ohio-2686, 948 N.E.2d 452, where the court reviewed the steps necessary to perfecting an administrative appeal. Ohio law specifies that an "appeal is perfected when a written *notice of appeal* is filed * * * in the case of an administrative-related appeal, *with* the administrative officer, agency, board, department, tribunal, or other instrumentality involved." R.C. 2505.04 (Emphasis added.) In that regard, the court explained, "The concepts of service and filing both relate to notice, which is the crucial point. A person or entity is served when actual delivery is made to the intended target, usually a party to a lawsuit." *Welsh Dev. Co.* at ¶ 38. The court continued, "Filing is accomplished when actual and timely delivery is made to the correct tribunal." *Id.* The court noted that nothing in the appellate rule prevents a clerk of courts from being requested by praecipe to transmit a complaint and notice of appeal to an administrative agency. *Id.* However, the court determined that an administrative appeal is not perfected

unless there is actual *receipt by the agency* within the time prescribed for filing an administrative appeal under Chapter 2505. *Id.* at ¶¶ 39, 40. Absent timely delivery, a trial court has no jurisdiction over such an appeal. *Id.* at ¶ 40.

R.C. 2711.13 requires the same result here. Under R.C. 2711.13, however, the "tribunal" or "agency" which must be made aware is the adverse party or its attorney. Absent timely receipt by an adverse party or its attorney of notice that a motion exists under R.C. 2711.13, the trial court has no jurisdiction over the matter.

R.C. 2711.13 also requires that service occur the same as service of notice of a motion in an action. The method of service prescribed by R.C. 2711.13 is intentionally restrictive and supports the argument that timely receipt of notice is required for a court to entertain a motion to vacate an arbitration award.

The provisions of Civ.R. 5 differ significantly from the prescribed procedures for process of a complaint under Civ.R. 4 and 4.1, and this is a distinction with a difference in the present matter. Civ.R. 4 requires the clerk of courts 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). This is the civil rule applicable to a R.C. 2711.13 motion. *Licking Hts. Local Sch. Dist Bd. Of Edn.*, 10th Dist. Franklin No. 11AP-173, 2011-Ohio-5063, ¶ 15. Acceptable methods include handing a document to a person, leaving it at the person's office or dwelling, mailing it to the person's last known address, delivering it to a commercial carrier service, leaving it with the clerk of court if the person has no known address, or sending it by electronic means to a facsimile number or email address.

Civ.R. 5(B)(2). Notably, Civ.R. 5(B) does not provide for service of a motion via mailing by the clerk of courts. The only involvement of a clerk of court contemplated by Civ.R. 5 involves a party leaving a document with it when the person to whom the document is directed has no known address. Civ.R. 5(B)(2)(e). Unlike a complaint, a motion filed under R.C. 2711.13 does not require that the clerk of court issue summons and perfect service. *Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 21 (8th Dist.). Rather, a petitioner should perfect service through compliance with *all* parts of Civ.R. 5.

Even if this court considers service through the clerk of courts acceptable, it should address the mandates of Ohio Civ.R. 5(B)(4), which require that every served document be accompanied by a completed proof of service stating the date and manner of service under Civ.R. 5(B)(2) and signed in accordance with Civ.R. 11, as that rule relates to R.C. 2711.13. *See* Civ.R. 5(B)(4)*; see also CACV of Colorado, LLC v. Kogler,* 2d Dist. Montgomery Case No. 021329, 2006-Ohio-5124, ¶ 9 (applying former version of Civ.R. 5 requiring proof of service). This requirement applies regardless of whether a party appears through counsel or pro se. Civ.R. 5(B)(4) and Civ.R. 11.[1]

The General Assembly Has Not Chosen to Revise R.C. 2711.13 Despite Appellate Courts' Interpretations Requiring that an Adverse Party Receive Actual Notice Within the Statutory Three Month Period.

This court has repeatedly recognized that legislative inaction in the face of knowledge of the courts' longstanding interpretation of a statute may suggest a legislative intent to retain existing law. *Ohio Neighborhood Finance, Inc. D.B.A. Cashland v. Scott*, 139

[1] Civ.R. 5(B)(4) further forbids a court from considering any document filed with the court unless proof of service accompanies it. Finally, Civ.R. 5(D) requires that a motion be filed with the court within three days after its service on a party.

Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 37; *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, ¶ 26; *State v. Cichon*, 61 Ohio St.2d 181, 183-84, 399 N.E.2d 1259 (1980) (Citations omitted.) Four appellate districts in Ohio have addressed the issue of whether actual receipt of a R.C. 2711.13 motion is required within the three month period. The Second District Court of Appeals, which recently issued the decision placing Proposition of Law VII before this court, determined that the clerk of courts' placement of a motion to vacate in the mail within the three month period satisfied the jurisdictional requirements of R.C. 2711.13, even when neither the adverse party nor its attorney received notice of the motion within the three month period following the award's initial delivery to the parties. (Appendix C, *Opinion of the Second District Court of Appeals*, February 20, 2015, pp. 8, 9.) Its decision is contrary to past conclusions reached by other appellate districts.

The Tenth District Court of Appeals, which examined R.C. 2711.13's jurisdictional requirements in 1998, found no error in a trial court's determination that an employer's failure to provide service "upon" the union within the three month period deprived the court of jurisdiction. *Thomas v. Franklin Cty. Sheriff's Office*, 130 Ohio App.3d 153, 719 N.E.2d 977 (10th Dist. 1998). The employer had argued that its motion was filed within the three month period and that there was no showing that the union was prejudiced by its failure to receive timely service, which occurred several days after the statutory period expired. *Id.* at 155-156, 719 N.E.2d 977. Regardless, the court required strict compliance with R.C. 2711.13's service mandates. In doing so, it relied on an earlier decision, *Teamsters Local Union 293 v. Mannesmann Demag Corp.*, 8th Dist. Cuyahoga No. 44914, 85-LW-2044, 1985 Ohio App. LEXIS 9399 (November 21, 1985), in which the Eighth Appellate

District determined that R.C. 2711.13 required an employee and his union to both file a notice to vacate an arbitration award and notify the employer of its filing within three months. *Id.* at 156, quoting *Teamsters Local Union 293, supra* (which cites *Warren Edn. Assn. v. Warren City Bd. Of Edn.*, 18 Ohio St.3d 170, 173, 480 N.E.2d 456 (1985)). However, the Tenth Appellate District Court of Appeals left the specific question of whether notice must be received by an adverse party within the three month period open to interpretation.

The Eighth and Ninth District Courts of Appeals, conversely, have clearly determined that a trial court has no jurisdiction to entertain a motion to vacate when timely notice is not received by the adverse party or its attorney. The General Assembly has not amended R.C. 2711.13 as a result of their decisions.[2] The Ninth District Court of Appeals examined what process R.C. 2711.13 requires to vest a court with jurisdiction in *City of Cuyahoga Falls v. Fraternal Order of Police*, 9th Dist. Summit No. 23870, 2007-Ohio-7060. In that matter, the city filed an application to vacate an arbitration award dated September 22, 2006 with the court on December 15, 2006. *City of Cuyahoga Falls* at ¶ 3. It provided the clerk instructions for service of the application that same day, but summons did not issue until December 27, 2006. *Id.* The application was not actually served on the union and its member, however, until December 30, 2006 and January 3, 2007. *Id.* The city contended that it satisfied R.C. 2711.13's service requirements when it filed the application with the court on December 15th and included instructions for its service by the clerk. *Id.* at ¶ 8. The city alternatively argued that service was complete – and, therefore, timely - on December 27th, when the clerk issued summons to the adverse parties. *Id.* The

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[2] R.C. 2711.13 was last revised in 1976.

court disagreed, focusing its inquiries on the requirements of Civ.R. 5 and the date on which the union and the employee actually had notice of the application. *Id.* at ¶¶ 8, 9. The Summit County Court of Appeals applied principles originally espoused by the Second Appellate District in concluding that the trial court lacked jurisdiction to hear the matter. It explained that an application filed under R.C. 2711.13 requires that service occur "as prescribed by law for service *of a motion* in an action." *Id.* at ¶ 9 (Emphasis in original.) The court rejected the notion that R.C. 2711.13 requires service via the clerk's office and instead opined that service must be perfected on the attorneys for the respective parties prior to the filing of the application. *Id.*, citing *CitiBank S. Dakota, N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576, ¶¶ 8, 9 (2d Dist.) and *CACV of Colorado, L.L.C. v. Kogler*, 2d Dist. No. 021329, 2006-Ohio-5124, ¶¶ 8, 9. The court determined, "The emphasis of the service requirement of R.C. 2711.13, when read in pari materia with Civ.R. 5, is *notice* to the party who prevailed at arbitration" and pointed to the fact that neither the union nor the employee received service – rather, notice – until several days beyond the expiration of the three-month requirement contained in the statute. *Id.* (Emphasis added.) The city's failure to abide by the statute's service requirements within the three month period precluded consideration of its motion by the court. *Id.* at ¶ 10.

In *City of Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, the Eighth Appellate District reviewed circumstances in which an arbitration award was issued on February 29, 2008, and the City of Cleveland filed a motion to vacate the award on May 28, 2008. *City of Cleveland* at ¶¶ 3, 4. The city did not include a proof of service on its motion - similar to Plaintiff-Appellee's omission in the present matter – but instructed the clerk of courts to serve the document on the union. *Id.*

at ¶ 4. The union received the document on June 5, 2008, several days past the three month period that commenced on February 29th. *Id.* The union moved to strike the city's motion as improperly served and untimely received under R.C. 2711.13. *Id.* at ¶ 5. The city, in response, argued that its motion was timely served and that service was complete on May 28th, when the clerk of courts mailed the document to the union. *Id.* The appellate court focused its analysis on the operation of Civ.R. 5 under R.C. 2711.13 and concluded that the city failed to serve the motion to vacate in the manner prescribed for service of a motion. The court noted that the city did not include a proof of service in its motion or file it within three days of service, which are both elements required by Civ.R. 5. *Id.* at ¶ 22. Relying on the Ninth District Court of Appeals' decision in *City of Cuyahoga Falls, supra*, the court found that the city could not use the clerk of courts' mailing of the document to satisfy the service requirement of Civ.R. 5 because it did not include a proof of service in its motion and did not serve the union under the requirements of that rule. *Id.* at ¶ 26. The appellate court embraced the principles outlined in prior cases decided by the Eleventh, Second, and Eighth Appellate Districts[3] to state that "the Civil Rules cannot be applied to extend the statutory and jurisdictional limitations set forth in R.C. 2711.13, which specifically states that notice of the motion to vacate must be 'served upon the adverse party or his attorney within three months[.]'" *Id.* In the end, the lack of timely notice to the union proved fatal to the city's motion and divested the trial court of jurisdiction over the city's motion. The court again relied on the Ninth District's pronouncements in *City of*

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[3] Specifically, *Girard v. AFSCME Ohio Council 8, Local Union 3356*, 11th Dist. Trumbull No. 2003-T-0098, 2004-Ohio-7230; *Citibank South Dakota, N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576; and *Teamsters Local Union 293 v. Mannesmann Demag Corp.*, 8th Dist. Cuyahoga No. 49914, 1985 Ohio App. LEXIS 9399.

Cuyahoga Falls, supra, declaring, "[a]t [the] most basic level, however, neither the [union] nor [the officer] had *notice* of the application as of * * * the latest possible three-month mark in this case." *Id.*, quoting *City of Cuyahoga Falls, supra*, (Emphasis added.)

In *Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, the Eighth District Court of Appeals again applied the requirements of R.C. 2711.13, this time to a matter in which a union initially filed a complaint which sought an order vacating an arbitration award within the three month period and subsequently filed a "Notice of Filing of Motion and Memorandum to Vacate and Modify the Arbitration Award" one day past the statutory deadline. *Mun. Constr. Equip. Operators' Labor Council* at ¶¶ 9, 10. The clerk of courts served the complaint within the statutory period but not on the city's counsel. *Id.* The union apparently served its notice of filing of motion and memorandum to vacate the award two days past the statutory period. *Id.* The appellate court determined: "[U]nlike a complaint, the motion filed under R.C. 2711.13 does not require that the clerk of courts issue summons and perfect service. Instead, service must be perfected by service on the attorneys for the respective parties prior to filing the application." *Id.* at ¶ 21, citing *City of Cleveland v. Laborers Interntl. Union Local 1099, supra*. The court concluded that, because the union failed to file and serve its notice within the three-month time period, the trial court properly granted the city's motion to strike the union's motion to vacate. *Id.* at ¶ 24; accord *Gonda & Assocs. v. Flynn*, 8th Dist. Cuyahoga No. 93566, 2010-Ohio-679, ¶ 13, citing *Mun. Constr. Equip. Operators' Labor Council, supra,* for the tenet that a party's failure to serve an adverse party with notice of a motion to vacate within 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. Once again, a court found that a party's compliance with the jurisdictional requirements of R.C. 2711.13 hinged on timely notice to the adverse party or its attorney.

Both of these cases in the Eighth Appellate District were, of course, preceded by that court's decision in *Teamsters Local Union 293.* There, the appellate court took both the language of R.C. 2711.13 and the Ohio Supreme Court's 1985 decision, *Warren Edn. Assn. v. Warren City Bd. of Edn.,* 18 Ohio St.3d 170, 480 N.E.2d 456, and interpreted that language at face value. *Teamsters Local Union 293*, 8th Dist No. 49914, 85-LW-2044 ("Thus, R.C. 2711.13 required this employee and his union to file the present action and to notify the employer of its filing within three months.")

The legislature's inaction in the face of these decisions manifests its approval of these courts' interpretation of R.C. 2711.13's operation and effect. The mandate to be drawn from the courts' decisions and their analyses of not only the express terms of R.C. 2711.13 but the statute's interaction with the provisions of Civ.R. 5 is 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. Notice that is timely postmarked but not timely received by the adverse party or its attorney will not suffice.

It is Undisputed that Neither Defendant-Appellant nor Its Attorney Received Notice of Plaintiff-Appellee's Petition to Vacate or Modify the Arbitrator's Award Within R.C. 2711.13's Statutory Period.

The arbitrator issued the opinion and award underlying this matter on December 10, 2013. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 1.) R.C.

2711.13 required that notice of the Motion to Vacate, Modify, or Correct Arbitration Award be received by Defendant-Appellant Board of Education or its attorney on or before Monday, March 10, 2013. It was not timely received.

Although Plaintiff-Appellee Cox filed her Motion to Vacate, Modify or Correct Arbitration Award in the Montgomery County Court of Common Pleas on March 10, 2014, the Board of Education did not receive notice of it until March 12, 2014, when the Board actually received service from the common pleas court's clerk of courts. (*Plaintiff's Motion to Vacate, Modify or Correct Arbitration Award*, March 10, 2014; *Instructions for Service on a New Case Via Certified Mail*, March 10, 2014; *Successful Service Notice*, March 17, 2014.) Ms. Cox personally mailed a copy of her motion, postmarked March 11, 2014, to counsel for the Board of Education. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 3, Affidavit of Beverly A. Meyer, ¶ 4.) However, counsel for the Board did not receive that copy until March 13, 2014 – again, more than three months after the arbitrator's issuance of his award. (*Id.*) Ms. Cox failed to comply with the requirements set forth in R.C. 2711.13 in a timely manner. As a result, the courts lacked jurisdiction to entertain her motion.

CONCLUSION

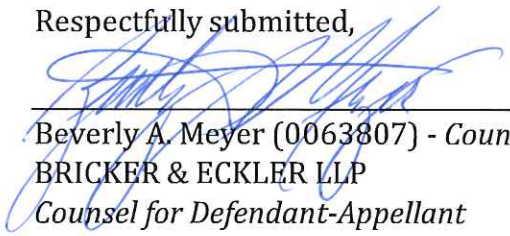
This court has long recognized that the enactment of R.C. 2711.10, 2711.11, and 2711.13 restricts the jurisdiction of the courts to review arbitration awards and that any resulting review is both narrow and limited. *Warren Edn. Assn.*, 18 Ohio St.3d at 173, 480 N.E.2d 456. This court should not allow parties to use the Rules of Civil Procedure to extend the statutory and jurisdictional limitations set forth in R.C. 2711.13 and, thereby,

provide an opposing party notice of their petition to vacate an arbitration award outside the stated three month period.

The express terms of R.C. 2711.13 are clear and unmistakable, and they require that notice of a petition seeking the vacation or modification of an arbitration award pursuant to R.C. Chapter 2711 be received by the adverse party or its attorney within three months after the issuance of the arbitration award at issue. Only strict compliance with the requirements of R.C. Chapter 2711, and specifically R.C. 2711.13, will protect the contractual arbitral process and the awards obtained through it. It is only fair that a party know at the earliest moment that an award it presumes to be valid and fully enforceable is actually under attack.

The decision below must be reversed to ensure the continued integrity and validity of arbitration awards issued throughout the State of Ohio.

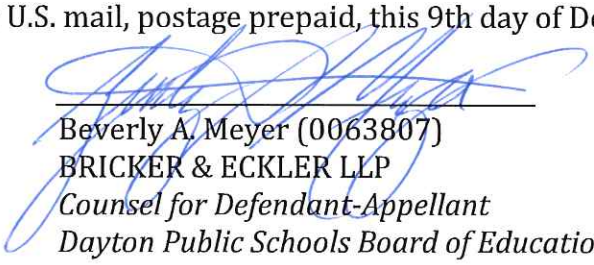
Respectfully submitted,



Beverly A. Meyer (0063807) - *Counsel of Record*
BRICKER & ECKLER LLP
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 **Merit Brief** was sent to Georgia B. Cox, Plaintiff-Appellee, 4191 Mapleleaf Drive, Dayton, Ohio 45416 by placing the same in the regular U.S. mail, postage prepaid, this 9th day of December, 2015.



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APPENDIX

A. Notice of Appeal to the Supreme Court of Ohio, filed March 26, 2015 1

B. Final Judgment Entry of the Second District Court of Appeals, Montgomery County, Ohio, CA 26382, journalized on February 20, 2015 (2015-Ohio-620)..... 3

C. Opinion of the Second District Court of Appeals, Montgomery County, Ohio, CA 26382, journalized on February 20, 2015 (2015-Ohio-620)..... 5

D. Decision, Order and Entry of the Montgomery County Court of Common Pleas, Case No. 2014 CV 01422, journalized on August 12, 2014..... 19

E. R.C. 2711.13 35

Supreme Court of Ohio Clerk of Court - Filed March 26, 2015 - Case No. 2015-0494

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

NOTICE OF APPEAL OF DEFENDANT-APPELLANT DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION

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Plaintiff-Appellee, pro se

NOTICE OF APPEAL OF DEFENDANT-APPELLANT
DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION

Defendant-Appellant Dayton Public Schools Board of Education hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment and opinion of the Montgomery County Court of Appeals, Second Appellate District, in the case captioned *Georgia B. Cox v. Dayton Public Schools Board of Education,* Second District Court of Appeals Case No. 26382, entered on February 20, 2015.

This jurisdictional appeal raises questions of public or great general interest.

Respectfully submitted,

/s Beverly A. Meyer
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Counsel for Defendant-Appellant
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CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of Defendant-Appellant's ***Notice of Appeal*** 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.
A Legal Professional Association

Case: CA 026382
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Dkt: CROAFE

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MONTGOMERY CO. OHIO
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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
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Dayton, OH 45416

Beverly A. Meyer
Cooper, Gentile, Washington & Meyer Co.
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Dayton, OH 45402

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

Supreme Court of Ohio Clerk of Court - Filed March 26, 2015 - Case No. 2015-0494

Case: CA 026382
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CLERK OF COURTS
MONTGOMERY CO. OHIO
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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 Common Pleas Court)
DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION	:	
Defendant-Appellee	:	

. . . . . .

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

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

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GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

Montgomery County Common Pleas Court
General Division

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 EDUCATION,	:	OVERRULING PLAINTIFF'S MOTION TO VACATE OR MODIFY AND SUSTAINING DEFENDANT'S MOTION TO DISMISS
Defendant.	:	

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 a 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. <u>The court likely lacks subject matter jurisdiction to adjudicate Ms. Cox's motion regardless of whether she has standing.</u>

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

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General Divison

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

2711.13 Motion to vacate, modify, or correct an award - notice, service.

After an award in an arbitration proceeding is made, 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 sections 2711.10 and 2711.11 of the Revised Code.

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. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Effective Date: 08-31-1976