Supreme Court of Ohio Clerk of Court - Filed December 14, 2015 - Case No. 2015-0494

Case No. 15-0494

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

BRIEF OF AMICUS CURIAE OHIO EDUCATION ASSOCIATION

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I. STATEMENT OF FACTS AND INTERESTS OF *AMICUS CURIAE*

The Ohio Education Association ("OEA") is a professional association whose affiliated local associations represent more than 121,000 educators, faculty members and support professionals working in Ohio's schools, colleges, and universities.[1] The OEA has a substantial and significant interest in maintaining the integrity of the procedures set forth by the Ohio General Assembly for the narrow and limited review of arbitration awards arising from labor contracts within the state of Ohio. Both labor and management representatives throughout Ohio have a significant interest in ensuring predictability and, to the extent possible, finality regarding labor arbitration decisions. That important interest extends to ensuring that R.C. 2711.13 is interpreted and applied appropriately and in correcting the decision of the Second District Court of Appeals.

The Appellee, Georgia Cox, was employed by the Dayton Public Schools as a licensed intervention specialist and was assigned to teach eight multi-handicapped students. The Dayton Public Schools Board of Education ("the Board") alleged that on October 10, 2012, Ms. Cox physically struck one of the students. The District passed a resolution indicating its intent to terminate Ms. Cox's employment contract. The Dayton Education Association ("DEA"), filed a grievance on behalf of Ms. Cox, which she had the option to arbitrate pursuant to Article 3.07.2 D of the collective bargaining agreement. The arbitrator denied the grievances, finding the Board had good and just cause for termination, and notified counsel for the Board and DEA in an award sent on December 10, 2013.

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[1] The DEA, the employee organization that represents Ms. Cox and other Dayton Public School employees, is a local association affiliated with the OEA. However, the OEA is not a party to the collective bargaining agreement between the DEA and the Board, nor was it involved in the arbitration of the grievances the DEA filed on Ms. Cox's behalf. The OEA, in supporting the Board's merits brief as to the statutory interpretation questions here, does not intend to adopt or support any arguments of the Board relating to the correctness of the arbitration award that might be raised, nor does the OEA take any position on that issue.

Ms. Cox filed a motion to vacate the arbitrator's award in the Montgomery County Court of Common Pleas on March 10, 2014. The motion did not include a proof of service, but the clerk of courts requested service and issued a summons to the Board by placing Ms. Cox's motion in the mail on March 10, 2014. Ms. Cox then mailed a copy of the motion to the Board, postmarked March 11, 2014, which counsel for the Board received on March 13, 2014. The Board received its copy from the clerk of courts on March 12, 2014. The Board challenged Ms. Cox's motion through a motion to dismiss with the trial court. The trial court dismissed Ms. Cox's motion, not only agreeing with the Board that she was not a proper party to the arbitration proceeding but also addressing the timeliness issue of her filing under R.C. 2711.13. The statute provides: "Notice of a motion to vacate, modify, or correct an [arbitration] 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." (Emphasis added.) The trial court concluded that it likely lacked jurisdiction on the motion regardless of the standing issue because the motion was not timely served.

Ms. Cox appealed to the Second District Court of Appeals, which reversed the decision of the trial court. Cox v. Dayton Public Schools Bd. of Ed., 2d Dist. Montgomery No. 26382, 2015-Ohio-620. That court determined not only that Ms. Cox did have standing to challenge the arbitration award in court but also that she had fulfilled the requirements for timely filing a motion under R.C. 2711.13. Id. at ¶¶ 16, 27. The court held that filing the motion with the clerk of courts on March 10, 2014, exactly three months after the issuance of the arbitration award and even though the parties in interest did not actually receive notice prior to that date, met the requirements for timely service under Civ. R. 5(B)(2). Id. at ¶¶ 17-19.

II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. VII

PROPOSITION OF LAW NO. VII: 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.

The decision below effectively enlarges the scope of judicial review of arbitration awards, an area narrowly prescribed by the legislature, by expanding the statutorily created time period for seeking such review. Because the Civil Rules should not be applied in a manner that effectively alters legislatively enacted statutes of limitations, this Court should reverse the decision below and reaffirm the decisions of other courts of appeals that have held that notice of a petition to vacate or modify an arbitration award under R.C. 2711.13 must be *served* upon the other parties or their attorneys within three months after the decision is delivered to the parties.

This Court should not alter the legislatively enacted framework for the private resolution of disputes through arbitration.

There is a strong state and national labor policy favoring the private resolution of disputes through arbitration. United Paper Workers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598-99 (1960); Goodyear v. Local Union 200, 42 Ohio St.2d 516, 520, 333 N.E.2d 703 (1975). The General Assembly has thus crafted a strictly limited avenue for parties seeking judicial review of private arbitration awards under Revised Code Chapter 2711. With respect to challenging an arbitration award, R.C. 2711.13 provides in pertinent part:

> 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 a motion in an action.

R.C. 2711.09 addresses another form of judicial review of arbitration awards, confirming the award. That section provides: "At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award." R.C. 2711.09. This considerable difference in time lends support to the legislature's approval of the finality of arbitration awards; parties have significantly less time to seek to overturn an award than to confirm it. The courts should consider this legislative judgment when effectively amending the time frames through which the parties to an arbitration proceeding – which in this case the appellee is not – may challenge the award.

This Court has already held that the requirements of R.C. 2711.13 are mandatory and jurisdictional; a trial court is without authority to hear a case that does not comply with the clear requirements of that section. City of Galion v. AFSCME Local No. 2243, (1995) 71 Ohio St.3d 620, 622. This Court ruled that "the language of R.C. 2711.13 is clear, unmistakable and, above all, mandatory," and that the arbitration statutes "authorize limited and narrow judicial review of an arbitration award," and that the statutes "set forth specific statutory procedures to vacate, modify, correct, or confirm an arbitration award." In concluding that an action for declaratory judgment is inappropriate under that section, the Court rejected any process to "bypass the stringent requirements that are needed to overturn, modify, or correct an arbitration award." Id. These words are instructive in this case, which also involves the potential expansion of the General Assembly's judgment in establishing a very specific time frame for challenging an arbitration award.

In deciding the matter, this Court should consider the reasoned opinion of the Eighth District Court of Appeals in City of Cleveland v. Laborers International Union Local 1099, 8th District Cuyahoga No. 92983, 2009-Ohio-6313, which held that a movant under R.C. 2711.13

must ensure that the other party has received notice of its motion within the specified time frame. There, the City of Cleveland, a party in interest to the arbitration, filed a motion on May 28, 2008 to vacate an award issued on February 29, 2008. The city did not include a proof of service with the motion but instructed the clerk of courts to serve the document upon the union, which received it via certified mail on June 5, 2008. Id. at ¶ 4. The city asserted that the motion was timely served, arguing that service had been perfected on May 28, 2008 when the clerk of courts "indicated on the court's docket that the city's motion was mailed to the union via certified mail." Id. at ¶ 5. The Eighth District rejected this argument and held that the city did not properly invoke Civil Rule 5 where it did not include a proof of service or serve the union under the terms of that rule. Id. at ¶ 26. The trial court therefore was without jurisdiction to consider the matter.

This ruling is consistent with another decision from the Eighth District holding that R.C. 2711.13 requires a party to the arbitration to "file the present action *and to notify the employer* of its filing within three months." Teamsters Local Union 293 v. Mannesmann Demag Corp., (Nov. 21, 1985), Cuyahoga App. No. 49914 (emphasis added), *citing* Warren Ed. Assn. v. Warren City Bd. of Ed., (1985), 18 Ohio St.3d 170, 173. There, the parties seeking review filed the action within the three-month time period but "failed to serve notice of their motion on the employer until seven days after the allowable time had expired. Hence, they did not comply with R.C. 2711.13." Id. at *2.

The Ninth District also has reached a similar conclusion, noting the clear link between the concepts of service and notice in the context of R.C. 2711.13. In City of Cuyahoga Falls v. FOP, Ohio Labor Council, Inc., 9th Dist. C.A. No. 23870, 2007-Ohio-7060, the court held that, where the adverse party to the arbitration did not receive service and thereby notice, until days beyond the three-month requirement of R.C. 2711.13, the trial court was without jurisdiction to

vacate or modify the arbitration award. 2007-Ohio-7060, ¶ 10. In that case, the award was issued September 22, 2006 and received by the city on September 27, 2006. Id. at ¶ 2. It filed a petition to vacate or modify the award on December 15, 2006, with instructions for service. However the summons did not issue until December 27, 2006 and was not actually served on the respondents until December 30, 2006 and January 3, 2007. Id. at ¶ 3.

The Ninth District rejected the city's argument that service was proper because it had timely filed its application with the trial court, noting that at "a most basic level, however, neither the [Union nor the individual employee involved] had notice of the application as of December 27, 2007 – the latest possibly three-month mark in this case, and a date twelve days after the application was filed." Id. at ¶ 8. 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." Id. at ¶ 9. Critically, that court found that neither the union nor the individual employee "received service – and, therefore, notice" until several days after the three-month requirement of R.C. 2711.13 had expired. Id. at ¶ 10. Given that sequence of events, the court found that because the "City did not serve its application in accordance with R.C. 2711.13, the trial court lacked jurisdiction to vacate or modify the arbitration award." Id.

Contrary to the decision of the court of appeals below, R.C. 2711.13 requires an adverse party upon a motion to vacate, modify or correct an award under that chapter to receive notice of such motion within three months after the award is delivered to the parties in interest. Even in a case such as this one, as in Mannesmann Demag Corp., where the statutory deadline is missed by only a matter of days, the General Assembly's judgment in designating a limited period of time for challenging arbitration awards compels the Court to enforce the dictates of the statute.

This Court must apply the clear and unambiguous language of R.C. 2711.13 in a manner that does not extend statutory limitations through the Civil Rules.

A lesser standard than strict compliance with the requirements of R.C. 2711.13 would open the door to new exceptions to the procedures clearly outlined in that Section, the only vehicle under Ohio law for modifying or overturning arbitration awards. Upholding the opinion of the Court of Appeals below potentially could erode the specific procedures set forth for private dispute resolution through arbitration. Therefore, this Court should reverse that decision.

In City of Cleveland, the court cautioned 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[.]'" 2009-Ohio-6313, ¶ 26. Simply because a motion is filed with the clerk of courts and the clerk advises that the motion will be mailed to the adverse party within the three-month period does not necessarily mean that a party is in compliance with Civil Rule 5. Rule 5(B)(4) provides that each served document "shall be accompanied by a completed proof of service which shall state the date and manner of service, specifically identify the division of Civ. R. 5(B)(2) by which the service was made, and be signed in accordance with Civil Rule 11. Documents filed with the court shall not be considered until proof of service is endorsed thereon or separately filed." (Emphasis added.)

In CACV of Colorado, L.L.C. v. Kogler, 2d Dist. Montgomery No. 21329, 2006-Ohio-5124, the Second District Court of Appeals considered a motion to vacate an arbitration award under R.C. 2711.13 in relation to the service requirements for a motion under Civil Rule 5. The court cited provisions of Rule 5(A) and 5(B), specifically the portion of 5(B) that provides: "'[s]ervice upon the . . . party shall be made *by delivering a copy to the person to be served*,' and that the served copy shall be accompanied by the proof of service required by Civ. R. 5(D)." Id.

at ¶ 9 (emphasis added). In this case, it is undisputed that Ms. Cox did not file the proof of service required by Civ. R. 5(D). The Second District's decision below does not address the impact of this shortcoming, but it is clear from the plain language of the rule that the trial court would have lacked jurisdiction to hear the matter.

III. CONCLUSION

The terms of R.C. 2711.13 are clear, unmistakable, and mandatory. Parties seeking judicial review of arbitration awards have a limited period of time to do so. If the party challenging the award does not give proper notice to the other parties within the three-month limitations period, the trial court is divested of subject matter jurisdiction and is simply without power to hear the matter. The resolution of grievances through arbitration should not be disturbed without strict compliance with the statutory framework for challenging such awards. The narrow and carefully circumscribed review of arbitration awards extends to the jurisdictional limitations at issue in this case, with which the Appellee failed to comply. Consistent with the legislature's stated policy favoring the finality of arbitration awards, this Court should reverse the decision below, which is inconsistent with prior rulings from the Eighth and Ninth District Courts of Appeals and unsupported by the specific language of the statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing brief of Amicus Curiae Ohio Education Association was sent to Georgia B. Cox, Plaintiff-Appellee, 4191 Mapleleaf Drive, Dayton, OH 45416 by regular U.S. mail, postage prepaid, and to Beverly A. Meyer, Counsel for Defendant-Appellant Dayton Public Schools Board of Education, via electronic mail to bmeyer@bricker.com, this 14th day of December, 2015.

/s/ *Susan D. Jansen*