

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

CASE NO. 2015-1581

OHIO PATROLMAN'S BENEVOLENT ASSOCIATION

And

DAVID HILL
Appellants

vs.

CITY OF FINDLAY
Appellees

ON APPEAL FROM THE EIGHTH DISTRICT
COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF OF AMICUS CURIAE
FRATERNAL ORDER OF POLICE OF OHIO, INCORPORATED

Jonathan J. Winters (0089276)
Elizabeth D. Wilfong (0088172)
Allotta | Farley Co. L.P.A.
2222 Centennial Road
Toledo, Ohio 43617
Phone: (419) 535-0075
Fax: (419) 535-1935
jwinters@allottafarley.com
ewilfong@allottafarley.com
Counsel for Appellants

PAUL L. COX (0007202)
Chief Counsel
222 East Town Street
Columbus, Ohio 43215
Phone: 614-224-5700
pcox@fopohio.org
Attorney for AMICUS CURIAE
Fraternal Order of Police of Ohio, Incorporated

William F. Schmitz (0029952)
Eric M. Allain (0081832)
28906 Lorain Road, Suite 101
North Olmsted, Ohio 44070
Phone: 440-249-0932
Fax: 440-540-4538
wschmitz@ealegal.net
eallain@ealegal.net

Donald J. Rasmussen
City Law Director, City of Findlay
318 Dorney Plaza, Room 310
Findlay, Ohio 45840
Phone: 419-429-7338
Fax: 419-429-7245
Counsel for City of Findlay

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STATEMENT OF THE CASE AND FACTS

The Statement of the Case and the Statement of the Facts as provided by the Ohio Patrolman's Benevolent Association, hereinafter OPBA or Appellant in this action will be sufficient and Amicus Curiae Fraternal Order of Police of Ohio, Inc. (hereinafter F.O.P.) will not duplicate those statements here.

PROPOSITION OF LAW NO. 1

ANY LIMITATION ON AN ARBITRATOR'S ABILITY TO REVIEW AND MODIFY DISCIPLINARY ACTION UNDER THE "JUST CAUSE" STANDARD MUST BE SPECIFICALLY BARGAINED FOR BY THE PARTIES AND CONTAINED WITHIN THE FOUR CORNERS OF THE COLLECTIVE BARGAINING AGREEMENT.

ARGUMENT

PROPOSITION OF LAW NO. 1

ANY LIMITATION ON AN ARBITRATOR'S ABILITY TO REVIEW AND MODIFY DISCIPLINARY ACTION UNDER THE "JUST CAUSE" STANDARD MUST BE SPECIFICALLY BARGAINED FOR BY THE PARTIES AND CONTAINED WITHIN THE FOUR CORNERS OF THE COLLECTIVE BARGAINING AGREEMENT.

An agreement between a public employer and an exclusive representative entered into pursuant to O.R.C. Chapter 4117 governs the wages, hours, and terms and conditions of public employees covered by that agreement. O.R.C. § 4117.08(A) provides that "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section. Discipline and matters related to it are a term or condition of employment. If the Appellee meant something other than what is contained in the agreement, it had an obligation to bring that to the table during negotiations. The Appellants relied upon the deal the Employer made at the negotiation table.

The Appellees did not establish that this award is defective in any manner recognized under O.R.C. Chapter 2711. All that the Appellees have shown is that they did not like the arbitrator's decision and disagreed with his interpretation of the language in the collective bargaining agreement. The Appellees then asked the courts to reconsider the facts in this dispute. The Court of Common Pleas improperly complied with their request and the Court of Appeals sustained that re-interpretation. This court should repair the damage created by the decision of those courts because neither O.R.C. Chapter 2711 nor the prevailing precedent entitle

the courts to intrude upon the merits of the arbitration. *Gerl Construction Co. v. Medina County Board of Commissioners* (1985), 24 Ohio App.3d 59.

In accordance with the provisions of their collective bargaining agreement, the parties agreed to the selection of James Mancini to serve as the arbitrator of the grievance that gave rise to this case. It is undisputed that the case was properly before him. He had jurisdiction to decide it and to provide a remedy if he found that to be necessary.

For over thirty years the Courts have reasoned that when parties have commissioned an arbitrator to interpret and apply a collective bargaining agreement, it is the duty of that arbitrator to bring his informed judgment to bear especially when formulating remedies. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). Once the parties determined that Arbitrator Mancini had jurisdiction in this case, it is clear that he also possessed authority to compose an appropriate remedy. Further the parties actually agreed to allow him to do so when they mutually agreed to the issue before him. The issue specifically agreed to by the Appellees during the arbitration was: "Did the employer have just cause for terminating the sergeant, and if not, what's the remedy?" The Appellants admit in framing the issue that 1.) The termination must be for just cause and 2.) The arbitrator had the right to modify the level of discipline by applying an appropriate remedy. The courts below really needed to look no further than the issue to find in favor of the Appellants in this case.

The Courts below should have focused their attention solely on the decision of the arbitrator. Instead the trial court decided to delve into the underlying merits of the case and the Court of Appeals agreed that it had a right to ignore the decision of the arbitrator and craft its own remedy. That type of intrusion into the merits is exactly what the courts have been trying to prevent for over thirty years. The courts have maintained that, had the parties so desired, they

could have drafted restrictive limitations on the arbitrator's remedial powers. *Texas Gas Transmission Corp. v. International Chemical Workers*, 200 F. Supp. 521 (W.D. La. 1962); and *Lodge 12, IAM v. Cameron Ironworks, Inc.*, 292 F. 2d 112 (5th Cir.) (1961). The collective bargaining agreement here, does not contain that type of restrictive language. Moreover the parties agreed at the hearing that he could craft a remedy.

It was only when the Appellees received an award they were not happy with that they decided to revoke that right by reneging on their bargain. The courts are not free to overturn the decision of an arbitrator just because one side or the other disagrees with his findings. The Appellees say that they have final say in the discipline under the disciplinary Matrix. If that were the case there would in fact be no need to submit this case to arbitration and invite the arbitrator to craft a remedy. It was the interpretation of the arbitrator and not the opinion of the Appellees or a court, for which the parties bargained and to which the parties agreed in their submission of the issue.

This is no different than claiming rights under the management rights clause in an agreement. Parties frequently include a management rights clause in a collective bargaining agreement with the caveat that rights under that clause are enforceable **except** as modified by the remainder of the agreement. In this case the parties modified management rights to include such a requirement for finding just cause at arbitration in cases involving discipline.

The Appellees argue that since the disciplinary matrix (which is not part of the collective bargaining agreement) contains a sentence providing for the chief to have sole discretion when a determination is to be made between two levels of discipline, the arbitrator could therefore not modify the discipline. Again that would mean that arbitration was not necessary because the decision of the chief could never be overturned. The appearance of the just cause provision as

well as the arbitration provision in the contract make it clear the parties intent to allow modification of discipline. The exclusion of language preventing the interpretation and remedy devised by the arbitrator more than just implies the parties' intent to allow the arbitrator to determine the efficacy of the discipline imposed.

"Sole discretion", which is not a part of the language of the agreement, does not mean what the Appellees imply. The implementation of the matrix by the Appellees does not devalue the just cause standard contained in the agreement, nor does it lessen the authority given to the arbitrator by the specific agreement of the parties.

The Courts have clearly established that an arbitration award draws its essence from the agreement as long as the award does not conflict with the express terms of the agreement; if the result does not subject the parties to additional procedural requirements within the grievance procedure; or if the result is rationally supported by the terms of the agreement. See *Grand Rapids Die Casting v. United Auto*, 684 F. 2d 413 (6th Cir. 1982), *Sears Roebuck and Company v. Teamsters Local Union No. 243*, 683 F 2d 154 (6th Cir. 1982), and *Timken Co. v. United Steelworkers of America*, 482 F. 2d 1012 (6th Cir. 1973). Essentially what the lower courts have done here would require Arbitrator Mancini to subject the parties to additional requirements not contained in the agreement.

The arbitrator would have had to add the disciplinary matrix to the collective bargaining agreement in order to achieve what the lower courts have ruled. The contract does not allow the arbitrator to add to the agreement. As an experienced arbitrator, Mr. Mancini was aware of his limitations under the agreement. He was well aware that he had to confine his decision to the four corners of the contract at the time of the arbitration. Based upon the language of the agreement he determined that just cause had not been met to uphold a termination. As long he

was attempting to interpret and apply the collective bargaining agreement his award is valid. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 365(1987).

The Arbitrator in this case was applying the contract language he found in the parties grievance and arbitration procedure. The matrix is not contained in the agreement. His award was not arbitrary or capricious. He agreed that discipline was warranted and penalized the grievant accordingly. However, he was not completely satisfied with the evidence presented by the Appellees, on some of the issues presented. (See arbitration award at Page19). The Appellees, claimed during the arbitration, that the most serious violation was the Sexual Harassment and Hostile Environment charge. The Appellees failed to prove that charge during the arbitration hearing. The arbitrator found that the under department's own policy, this charge could not be sustained. Since it was "the most serious" charge, he determined that termination of employment was not reasonable under the circumstances and formulated a remedy based upon the remaining charges.

Arbitrator Mancini did find that the grievant had engaged in conduct unbecoming of an officer by allowing others to talk disparagingly about a co-worker and by using the term Whoregan. That remark was the sole remark that the grievant made. Pursuant to departmental policy, he noted, one remark does not constitute sexual harassment. The policy defines harassment as conduct that is repeated. Since the Appellees failed to meet their burden of proof as to all of the charges, the arbitrator reasoned that discharge was too severe to meet the standard of just cause. It should be noted that the grievant got much more than a slap on the wrist here as the result of this decision. The grievant received what amounts to a five month suspension.

The award of Arbitrator Mancini is grounded within the four corners of the agreement. His appointment carried with it the inherent power to find an appropriate remedy to correct the

damage done by the breach of the just cause standard as contained in the agreement. He did not exceed the scope of his authority but merely crafted an appropriate remedy for the violation he found. His choice of remedy is entitled to the same narrow review and due deference as his decision on the merits.

It was not the judgment of the Appellees for which Appellants bargained when the collective bargaining agreement was agreed upon. To the contrary the parties bargained for the informed judgment of an impartial arbitrator. It was the arbitrator's view of the facts and interpretation of the contract they agreed to accept, and as long as the arbitrator is even arguably construing or applying the contract, the fact that a court or a party may disagree with his award is not a sufficient reason to overturn the decision. *United Paperworkers International Union, AFL-CIO v. Misco Inc.*, 108 S. Ct. 365 (1987), see also *Findlay City School District Board of Education v. Findlay Education Association*(1990);, 49 Ohio St. 3d 129 and *City of Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.*, (1990), 52 Ohio St. 3d 174

A court cannot overrule an arbitrator's decision simply because it would have developed a different interpretation or remedy. *Dispatch Printing Company v. Teamsters Local Union 284*, 782 F. Supp. 1201 (S.D. Ohio 1991). Unless a collective bargaining agreement contains language strictly forbidding a particular remedy, the arbitrator has implicit remedial power and his award is entitled to due reference. *Queen City Lodge No. 69, Fraternal Order of Police Hamilton County Ohio, Inc. v. City of Cincinnati*(1992), 63 Ohio St. 3d 403; *National Post Office Mailhandlers etc. v. United Postal Service*, 751 F. 2d 834 (6th Cir. 1985); and *Sears Roebuck and Co. v. Teamsters Local Union No. 243*, 683 F. 2d 154 (6th Cir. 1982). It is clear in this case that both the Trial Court and the Court of Appeals disagreed with the remedy created by

the arbitrator and decided to vacate the award based upon their own interpretation of the underlying merits.

Apparently the trial court was offended by the prior discipline suffered by the grievant based upon the evidence presented by the Appellees. The evidence presented at arbitration was not presented to the courts and the Court really had no business looking further than the award of the arbitrator to decide this case. The court was not privy to all of the evidence and testimony presented to the arbitrator. Further the prior discipline was grieved and arbitrated in a separate arbitration hearing which had nothing to do with the award before the courts here. It is interesting to note however, that in the previous arbitration the arbitrator also reduced the discipline based upon the just cause standard contained in the agreement. The Appellees did not request that the courts vacate that award despite the fact that the arbitrator modified the discipline. Proof again that the Appellees are simply dissatisfied with this decision.

The Appellees and the Courts below determined that termination was the only possible discipline for this case. The courts acknowledge however that the matrix itself provides a variety of possible discipline, ranging from a 3 day suspension up to termination. While we insist that the matrix was not part of the collective bargaining agreement and could therefore only be used as guidance, the court should recognize that there is nothing in the matrix or the contract that prevents the remedy created by the arbitrator.

The Appellees cite the oft used case of *Office of Collective Bargaining v. Ohio Civil Service Employees Association, Local 11 AFSCME*, (1991) 59 Ohio St.3d 177. That case is distinguishable from the case presented here. The *O.C.S.E.A.* contract specifically left the arbitrator no room to craft a remedy once he determined that abuse of a client had occurred. In fact, the language in the OCSEA contract, strictly and in specific language forbid the remedy

crafted by the arbitrator in that case. That restriction is not relevant to this case. Like the present case, the *O.C.S.E.A.* case involved the interpretation of a just cause standard applied to discipline. However, the *O.C.S.E.A.* contract language went further and specifically stated "In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care of the State of Ohio, **the arbitrator does not have authority to modify** the termination of an employee committing such abuse". This language is clear and unambiguous and does not exist in this agreement with the City of Findlay.

In *O.C.S.E.A.*, once the arbitrator found that a patient had been abused, the arbitrator had no choice but to uphold the termination. In the present case, there is no contract language that requires the dismissal of the grievant. The parties placed no language tying the hands of the arbitrator in this manner in their agreement. The Appellees were free to administer less severe discipline or for that matter to apply no discipline at all even if the matrix were applied. The arbitrator found that the evidence and testimony presented by the Appellees could not sustain the charge it considered to be the "most serious". He determined that the other charges did not justify the termination of the grievant's employment and awarded discipline that was more commensurate with the offense.

The parties without question decided to allow the arbitrator to not only decide the case on the merits but to create a remedy. ("what's the remedy.") The collective bargaining agreement contains no language strictly forbidding the remedy imposed upon the parties. Therefore the arbitrator possessed implicit remedial power and his award is entitled to due deference. *Queen City Lodge No. 69, Fraternal Order of Police, Hamilton County, Ohio, Inc. v. Cincinnati* (1992), 63 Ohio St.3d 403.

After considering the evidence and arguments presented by each of the parties, the arbitrator found that the Appellees' violation of the just cause standard contained in the agreement could not be ignored. Consequently, the arbitrator ordered that the grievant be reinstated to his position with no back pay. The arbitrator decided upon an appropriate remedy for the contract violation he found and invoked a severe form of discipline in the form of a lengthy suspension upon the grievant for those portions of the grievant's behavior he found the Appellees were able to prove warranted discipline. His choice of remedy and not that of a court or one party is what the parties bargained for. His choice of remedy should be reviewed on the same basis as his interpretation of the agreement and is subject to the same narrow review. Had the parties desired to restrict the arbitrator's remedial powers they could have done so when they bargained for the original agreement. They however chose not to do so.

The remedy of Arbitrator Mancini is not as novel as the Appellees would have the courts believe. To the contrary arbitrators are given great latitude in modifying discipline. In accordance with the principals of due process, management is required to meet certain requirements and where it fails to do so most arbitrators refuse to sustain the discipline imposed. (See also Elkouri & Elkouri, How Arbitration Works (Cumulative Supplement 1985-1989), 4th Edition at page 178). Arbitrators regularly refuse to uphold the actions of management when the employer has failed to fulfill procedural requirements specifically agreed to by the parties. (See *Chauffeurs, Teamster and Helpers Local No. 878 v. Coca Coal Bottling Company*, 613 F. 2d 716 (1980)), where the federal appellate court found that the arbitrator's decision ordering the reinstatement of an employee who had been terminated for dishonesty did not exceed the scope of his authority. The arbitrator had determined that an interpretation of the just cause standard in the collective bargaining agreement also had significant procedural implications.

After hearing the testimony of the witnesses at the hearing, viewing the evidence presented and reviewing the collective bargaining agreement the arbitrator determined that the contractual just cause standard had not been met to support the discipline given. "* * * (W)hen interpretation of a term in a collective bargaining agreement such as 'just cause' is at issue, * * * an arbitrator's judgment as to whether evidence is or is not relevant to his determination is part of the bargain, and a court's power to disturb such discretionary determinations is quite limited." *National Post Office v. U.S. Postal Service*, 751 F.2d 834 (1985). Regardless of the view of the trial court and Court of Appeals of the correctness of the arbitrator's interpretation, the parties bargained for that interpretation. *W.R. Grace & Company v. Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177 (1983). The decision is a permissible interpretation of the just cause standard and whether or not the court believed it to be the best interpretation is irrelevant. *Retail Clerks Union v. Murfreesboro Vending Service*, 689 F.2d 623 (6th Cir. 1982). The decision of Arbitrator Mancini is within the permissible range of interpretations of the phrase "just cause" and should have been sustained. The mere fact that a different conclusion could have been reached by a court or a different arbitrator does not show that the arbitrator so exceeded his powers as to empower the court to set aside the award. *N.Y. Advance Trucking Corp. v. Truck Drivers Local Union No. 807*, 240 N.Y.S.3d 203 (1962). Courts do not hold the statutory authority to interpret collective bargaining agreements when the agreement mandates that all unresolved issues be submitted to final and binding arbitration.

There is nothing in the record of this case to show that the arbitrator exceeded his authority. The award has a rational nexus to the collective bargaining agreement. Nothing in the record shows that the award was unlawful, arbitrary, or capricious. According to Ohio precedent, the trial court and the Court of Appeals should have confirmed the award of the

arbitrator. (see *Board of Trustees of Miami Township v Fraternal Order of Police, Ohio Labor Council, Inc.*, (1998), 81 Ohio St.3d 269.)

In order to succeed in having this award vacated the Appellees had the burden to show that the award did not draw its essence from the agreement. The Appellees cannot meet this burden. The fact is the Appellees could not meet this burden because the award meets every prong of the essence test followed by the courts in reviewing arbitration awards. The award does not conflict with the express terms of the agreement. It is instead based upon a clear reading and interpretation of the language contained in the grievance and discipline articles of the agreement. The award imposes no additional requirements upon the parties. It imposes only those terms expressed in the confines of the agreement. Clearly if the parties wanted to restrict his ability to modify discipline they could have provided specific language in the agreement such as the language in *O.C.S.E.A., Supra*. Having failed to include such restrictions in the agreement, shows the intent of the parties to grant the arbitrator wide latitude in deciding upon a remedy. Especially where the parties have specifically asked him to draft a remedy as is the case here.

There is nothing in the collective bargaining agreement which precluded this issue from arbitration. There is nothing in the agreement which precludes the remedy provided in this case. The contract required the arbitrator to apply a just cause standard in this case. The award is based upon a reasonable interpretation of the precise terms of the collective bargaining agreement. The award can be rationally derived from the terms of the agreement. *Federal Packaging Corporation v. United Paperworkers Union*, 940 F.Supp. 1155 (N.D. Ohio 1996).

An award is presumed valid unless it fails to draw its essence from the agreement. An arbitrator's award draws its essence from a collective bargaining agreement when there is a rational nexus between the award and the agreement and the award is not arbitrary, unlawful or

capricious. *Mahoning County Board of Mental Retardation v. TMR Education Association*(1986), 22 Ohio St.3d 80. Arbitrator Mancini interpreted and applied the just cause standard as required by the agreement in discharge cases. He did not add to subtract from or alter the language in the agreement. The language was already there. His interpretation of that language is what the parties bargained for. The Appellees attempt to infer that the arbitrator exceeded his authority is not enough to warrant vacation of the award, since the award clearly draws its essence from the agreement. *Goodyear v. Local Union No. 200*(1975), 42 Ohio St.2d 516. Any reasonable doubt as to whether the arbitrator's decision draws its essence from the agreement must be resolved in favor of the arbitrator. *Enterprise, Supra.*

The decision of the Courts below seriously undermines the authority currently given arbitrators by the Ohio Revised Code. It further undermines the strong public policy favoring arbitration as a method of dispute resolution. The parties originally agreed that Arbitrator Mancini had proper jurisdiction in this matter. His appointment carried with it the inherent power to interpret the agreement and to cure any violation of that agreement he found. His award clearly draws its essence from the collective bargaining agreement. Under the traditional standard of review there is no basis for disturbing this award.

Vacating this award sets a bad precedent. It creates an incentive for parties to contest arbitration awards. If parties come to believe that they have a chance to get a court to review an arbitration award by considering the merits of that award and interpreting the contract, they will be inclined to bring all of their disputes into court to obtain a second opinion. Arbitrators are given great latitude in interpreting contractual language and in fashioning remedies. It is clearly inappropriate to set aside an award simply because one of the parties or a court disagrees with the arbitrators findings. Had the arbitrator tried to apply some external test, the Appellees would

be here arguing that he did not have the right to expand the meaning of language in the contract and yet they are asking the courts to do just that. They want to apply provisions not contained within the four corners of the contract. That is clearly not in keeping with the long standing precedent or the standards for labor arbitration. The parties agreed to accept the arbitrator's findings. The simple answer here is that they must now live with the result.

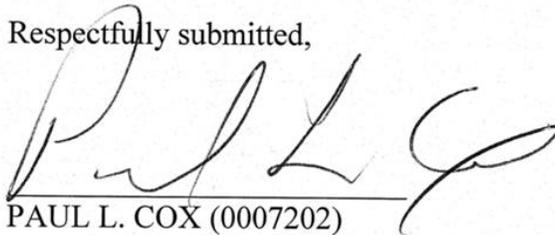
The continuing refusal of this court to permit judicial review of the merits of arbitration awards is essential to the integrity and survival of the arbitration process as an inexpensive, expeditious alternative to litigation. Allowing the courts to apply their own brand of justice by negating the language contained in a collective bargaining agreement would severely undermine the public policy favoring arbitration because the courts would ultimately be required to engage in fact finding hearings to explore the merits of cases. This would be a mistake and has repeatedly been rejected by the courts. *United Steelworkers of America v. Warrior and Gulf Navigation Co.* 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing*, 363 U.S. 564 (1960) and *International Brotherhood of Electrical Workers Local 429 v. Toshiba America, Inc.*, 879 F. 2d 208 (6th Cir. 1989).

CONCLUSION

Arbitrators are given great latitude in fashioning remedies for many good reasons. It is clearly inappropriate to set aside an arbitration decision simply because one of the parties, or a court, does not agree with the remedy. The failure to reverse the decisions of the Courts below in this case will create an enormous incentive for losing parties to appeal arbitration awards in cases where the arbitrator has made an attempt to construct a remedy reasonably related to the violation which he found. When an employer or a union violates a collective bargaining agreement, each party must understand that mere disagreement with the decision of the arbitrator does not justify taking an appeal.

For the foregoing reasons the F.O.P. respectfully supports the request by the Appellants that this court reverse the decision of the Cuyahoga County Court of Appeals and order an entry of a judgment reinstating the award of the arbitrator in its entirety.

Respectfully submitted,



PAUL L. COX (0007202)

Chief Counsel

222 East Town Street

Columbus, Ohio 43215

514-224-5700

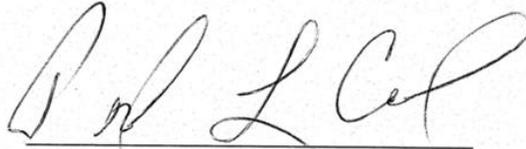
pcox@fopohio.org

Attorney for AMICUS CURIAE

Fraternal Order of Police of Ohio, Incorporated

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion was sent by regular U.S. mail this 5th day of April 2016 to Jonathan Winters and Elizabeth Wilfong, Allota, Farley Co. L.P.A., 2222 Centennial Road, Toledo, Ohio 43617 and to William Schmitz and Eric Allain, 28906 Lorain Road, Suite 101, North Olmsted, Ohio 44070 and Donald Rasmussen, City Law Director, City of Findlay, 318 Dorney Plaza, Room 310, Findlay, Ohio 45840.

A handwritten signature in black ink, appearing to read "Paul L. Cox", written in a cursive style. The signature is positioned above a horizontal line.

Paul L. Cox (0007202)