Supreme Court of Ohio Clerk of Court - Filed April 29, 2016 - Case No. 2015-1581

**IN THE SUPREME COURT OF OHIO**

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| OHIO PATROLMEN'S BENEVOLENT ASSOCIATION, | ) | ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS EIGHTH APPELLATE DISTRICT |
| and | ) | |
| DAVID HILL, | ) | |
| Appellants | ) | Ohio Supreme Court Case: 2015-1581 |
| vs. | ) | Court of Appeals Case: CA-14-102282 |
| CITY OF FINDLAY | ) | |
| Appellee. | ) | |

# BRIEF OF AMICI CURIAE CLEVELAND POLICE PATROLMEN'S ASSOCIATION, TOLEDO POLICE PATROLMAN'S ASSOCIATION, DAYTON FRATERNAL ORDER OF POLICE LODGE 44, AND OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS OPBA AND DAVID HILL

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## I. STATEMENT OF FACTS AND THE CASE

Amici Cleveland Police Patrolmen's Association (CPPA), Toledo Police Patrolman's Association (TPPA), Dayton Fraternal Order of Police, Lodge 44 (DFOP), and the Ohio Employment Lawyers Association (OELA) adopt the Statement of Facts and the Case presented by the Appellant Ohio Patrolmen's Benevolent Association (OBPA)/Sergeant David Hill and will not duplicate those statements here.

## II. STATEMENT OF INTEREST

### A. The Cleveland Police Patrolmen's Association (CPPA), Toledo Police Patrolman's Association (TPPA), and Dayton Fraternal Order of Police, Lodge 44 (DFOP).

The CPPA was formed in January of 1968 and currently represents approximately 1,400 members which are civil servants of the City of Cleveland, Ohio. The bargaining unit includes all non-supervisory Patrol Officers, Detectives, and Radio Dispatchers of the Cleveland Police Department. The CPPA is the sole and exclusive bargaining agent with respect to wages, hours and other conditions of employment for its members. *See* R.C. Chapter 4117. The CPPA and the City of Cleveland are parties to a collective bargaining agreement (CBA). The agreement provides for, among other things, the prompt resolution of grievances through various steps culminating in arbitration. The parties' CBA provides "the employer has the right to…[s]uspend, discipline, demote or discharge for **just cause…**" (emphasis added). The role of an Arbitrator is to determine whether or not the discipline imposed on a grievant comports with the concept of "just cause." According to the CBA all decisions of the Arbitrator shall be final, conclusive and binding on the City, the Union, and its members.

Similar to the City of Findlay, the City of Cleveland (like many other municipalities throughout the State of Ohio) has attempted to unilaterally impose a "disciplinary matrix" into its

collective bargaining agreement. Specifically, on January 1, 2014, the City of Cleveland unilaterally imposed the matrix on the Division of Police through General Police Order (GPO) 1.1.11. The CPPA was not a party to the creation of this matrix, strongly objects to the imposition of this matrix, and is currently awaiting an Arbitration Decision from Arbitrator Jerry A. Fullmer, Esq. in AAA case number 01-14-0000-4842. In that case, the CPPA argued that the City of Cleveland failed to bargain the subject matter contained in GPO 1.1.11 and that the City of Cleveland violated the just cause provision of the parties CBA when it imposed the matrix in direct contradiction to the CBA. It is important to note that while a disciplinary matrix may be designed for administrative guidance, it cannot can not affect and/or alter a previously agreed to and bargained for "just cause" mandate of a collective bargaining agreement. Nor can it be used to modify and/or alter an arbitrator's inherent discretion under a bargained for "just cause" mandate.

The CPPA, TPPA, and DFPO, like any other safety force union in the State of Ohio, have a strong interest in ensuring that employees are not subjected to wrongful discipline/terminations and to ensure that the employer complies with the negotiated provisions of their CBA. The CPPA, TPPA, and DFOP files this amicus brief to cast light on these issues and to call attention to the impact the decision in this case may have on the Cleveland, Toledo, and Dayton patrol officers as well as other similarly situated safety forces throughout the State of Ohio.

In this case, the City of Findlay unilaterally imposed a disciplinary matrix on its employees and is now trying to impermissibly restrict the inherent discretion an independent arbitrator holds under a "just cause" standard. For the following reasons, the decision of the Arbitrator must be upheld in this case. This Honorable Court should repair the damage created

by the Eight District Court of Appeals and uphold the arbitrator's role and authority under an agreed upon "just cause" standard.

### B. Ohio Employment Lawyers Association

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful employment termination, OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated in the workplace.

The OELA has an interest in this case to preserve the just cause standard for employment discipline and/or termination that arises in a collective bargaining agreement. More specifically, the OELA seek to protect the interests of workers who have, through the collective bargaining process, escaped Ohio's at-will employment doctrine and the uncertainty and lack of job security that is an inevitable result of at-will employment.

## III. LAW AND ARGUMENT

**Proposition of Law 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.**

The job protection afforded workers by requiring just cause for an employer to terminate the employment relationship is a defining characteristic of a collective bargaining agreement (CBA). Regardless of whether the term is expressly defined in the CBA, the negotiated just cause standard is an essential term in every collective bargaining agreement. The arguments advocated by the Appellee City of Findlay, if upheld and adopted, would permit unscrupulous employers to terminate employees under a unilaterally designed disciplinary matrix that can supersede the bargained for "just cause" mandate in a CBA.

When management and labor disagree about whether just cause exists, they typically resolve their disputes, pursuant to the CBA, by resorting to arbitration. It is well settled that arbitration is a favored method of resolving disputes,[1] so the scope of judicial review of the arbitration proceedings is limited.[2] Under R.C. 2711.10, a court can vacate an arbitration award for one of four reasons, all of which relate to the conduct of the arbitrator: fraud, corruption, misconduct, or exceeded powers. The court's review under R.C. 2711.10(D) is limited to the question of whether the arbitration award "draws its essence from the...agreement and is not unlawful, arbitrary or capricious."[3]

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[1] *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-294, 700 N.E.2d 859.
[2] *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 42 Ohio St.2d 516, 520, 330 N.E.2d 703 (1975).
[3] *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 132-133, 551 N.E.2d 186 (1990), ¶ 2 of the syllabus.

In *Findlay City School District*,[4] the Supreme Court stated the applicable standard of review under R.C. 2711.10(D):

> [G]iven the presumed validity of an arbitrator's award, a reviewing court's inquiry into whether the arbitrator exceeded his authority, within the meaning of R.C. 2711.10(D), is limited. Once it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary, or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end.

In the case before this Court, the City of Findlay alleged that Sgt. David Hill engaged in conduct unbecoming an officer and failed to carry out his supervisory duties as a sergeant. (Arbitrator's Award at 18, Apx. 60). To determine whether the City had just cause to terminate Sgt. Hill's employment, the arbitrator applied a standard commonly found in the CBA for police and other collective bargaining units: "The just cause standard requires clear and convincing proof that the employee has committed the alleged offense and the penalty imposed is warranted under the circumstances." (Arb. Award at 15, Apx. 57).[5]

Applying this standard, the arbitrator concluded that the City of Findlay did not have just cause to terminate Sgt. Hill's employment. The City refused to honor the decision, and the litigation before this Court followed.

The Court of Appeals below mistakenly concluded that whether the discipline was proper could only be determined by the language in the discipline matrix: "Accordingly, under the plain and unambiguous language of the discipline matrix – which the arbitrator determined controlled the CBA – only one of two discipline levels could be applied . . . ." (¶42, Apx 29). If the court below is affirmed, the second component of the just cause standard – whether the penalty

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[4] *Findlay City School Dist. Bd. of Edn., supra.*

[5] *See also Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St. 3d 269, 272, 690 N.E.2d 1292 (1998) (just cause is determined by "1) whether a cause for discipline exists; and 2) whether the amount of discipline was proper under the circumstances.")).

imposed is warranted --- will be determined not by the just cause provision of the CBA but by the disciplinary matrix unilaterally created by the City of Findlay, presumably under the management rights provision of the CBA.

This Honorable Court should reverse the opinion below because the Arbitrator executed his discretion under the just cause provision of the parties CBA. Any disagreement the City of Findlay might have with the Arbitrator's consideration of "just cause" is not a valid basis for vacating an arbitration award under R.C. 2711.10(D).[6] Since the arbitration award drew its essence from the just cause mandate of the parties' collective bargaining agreement, the courts below erred in vacating the Arbitration Award.

Judge Boyle's dissent to the Eighth District's opinion below merits careful consideration by this Court. As she cogently and meticulously explained, the Arbitrator was not bound to apply the matrix because it can only be used as administrative guidance in imposing discipline. Again, while a disciplinary matrix may be designed for administrative guidance, it cannot affect and/or alter a previously agreed to and bargained for "just cause" mandate of a collective bargaining agreement. Nor can it be used to modify and/or alter an arbitrator's inherent discretion under a bargained for "just cause" mandate.

Arbitrator Mancini's Award properly drew its essence from the "just cause" language of the CBA, which permitted him to issue an award of reinstatement to duty without back pay. It is well established that an arbitration award "draws its essence" from an agreement where there is a "rational nexus" between the agreement and the award.[7] While an arbitrator's authority is confined to interpreting and applying the collective bargaining agreement, guidance for

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[6] *Massillon Firefighters IAFF Local 251 v. Massillon, 5th Dist. No.* 2012CA00033, 2010-Ohio-4729, ¶ 35.

[7] *Cleveland v. Cleveland Assn. of Rescue Emps.*, 8th Dist. Cuyahoga No. 96325, 2011-Ohio-4263, ¶ 9, citing *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland,* 99 Ohio St.3d 476, 2003-Ohio-4278, 793 N.E.2d 484, ¶ 13.

exercising the authority may be found in many sources. And the award is legitimate so long as it draws its essence from the collective bargaining agreement.

In *Queen City Lodge No. 69*[8], the Ohio Supreme Court acknowledged the broad discretion an Arbitrator has in fashioning a remedy. It stated:

> The parties to a collective bargaining agreement cannot anticipate every possible breach of the agreement that may occur during its life and then write an appropriate remedy for each such situation into the agreement. This fact does not, however, preclude an arbitrator from awarding a remedy. Even though the agreement may not spell out an applicable remedy for a matter that is before an arbitrator, the parties usually expect that the arbitrator, if he or she finds a violation has occurred, will proceed to award a remedy of some type.[9]

In considering whether the remedy is appropriate, the Court again noted that a reviewing court's role in evaluating an arbitrator's award is a limited one - the arbitrator's award will not be vacated so long as the award "draws its essence from the collective bargaining agreement."[10] An arbitrator has broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement.[11] Arbitrator Mancini fashioned a remedy he deemed appropriate under the circumstances of Sergeant Hill's misconduct. That is what the parties' bargained for.

If employers can do whatever they wish with regards to the creation and definition of a disciplinary matrix, they essentially take away all considerations of just cause. If this opinion were to stand, the City of Findlay could unilaterally impose a harsher disciplinary matrix. The

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[8] *Queen City Lodge No. 69 v. City of Cincinnati*, 588 N.E.2d 802, 63 Ohio St.3d 403 (Ohio 1992).

[9] *Id.* at 804; *See Miller Brewing v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1163 (C.A.7, 1984), certiorari denied (1985), 469 U.S. 1160, 105 S.Ct. 912, 83 L.Ed.2d 926 (" * * * the agreement must implicitly grant * * * [the arbitrator] remedial powers when there is no explicit grant").

[10] *Id.* citing, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, 1428 (1960); *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn.*, Local 11, AFSCME, AFL–CIO, 59 Ohio St.3d 177, 179, 572 N.E.2d 71, 73 (1991).

[11] *See General Tel. Co. of Ohio v. Communications Workers of America*, AFL-CIO (C.A.6, 1981), 648 F.2d 452, 456-457; *United Steelworkers v. Enterprise Wheel*, supra, 363 U.S. at 597, 80 S.Ct. at 1361, 4 L.Ed.2d at 1428. *Id.* (emphasis added).

courts below believed that the arbitrator exceeded his authority because, in part, the matrix gave sole discretion to the Police Chief to decide between one of two applicable steps of discipline. Thus the Court of Appeals opined: "the arbitrator had no authority to disregard the express requirement that if 'more than one discipline level is indicated, the Chief of Police has sole discretion in determining which of the two levels is appropriate. . . .'" (Op. Below at para. 42, Apx. 29). But because the matrix is not bargained for, nothing can stop Findlay or any other similar employer, such as the City of Cleveland that likewise uses a discipline matrix, from revising the matrix to include the language "the Chief of Police will have the sole discretion to chose the discipline." This would strip the disciplinary decision entirely from the scope of the arbitrator's review and run contrary to the principles of collective bargaining.

Affirming the decision below not only will gut the "just cause" standard included in collective bargaining agreements but also will provide employers with an impenetrable shield against many acts of unlawful discrimination against employees who are subject to collective bargaining agreements and a similar discipline matrix. Most cases of employment discrimination arise from facts that fit a circumstantial evidence proof of discrimination.[12] That method of proof typically has three stages. First, an employee must establish a *prima facie* rebuttable presumption of discrimination. Second, the employer must articulate a legitimate business justification that rebuts the *prima facie* showing of discrimination. Third, the employee must prove that the employer's claim is a pretext for the unlawful discrimination.[13] Shielding a decision maker's discretion from review insulates employers from proof of pretext.

More particularly, a Police Chief could suspend a make police officer for 10 days and terminate a female police officer based upon identical facts. The Chief's discretion could be

[12] *See Mauzy v. Kelly*, 75 Ohio St.3d 578 (1996).
[13] *See, e.g., McDonnell-Douglas v. Green*, 411 U.S. 792 (1973).

based upon gender animus. But if the opinion below stands, that discretion cannot be reviewed by an arbitrator. Without any available review, an employee cannot rebut any stated "legitimate" business reason for the decision.

Indeed, according to the Honorable Steven E. Gall's Opinion, if the City of Findlay created such a matrix and terminated an employee, an Arbitrator would have no ability or authority to review any disciplinary decisions of the City. The City would have ultimate control over all employee discipline. All labor agreements in this regard would become moot and the effect this would have on bargaining units would be unspeakable. A City cannot unilaterally impose a disciplinary matrix that directly conflicts with the specifically negotiated provisions of the parties' CBA and then require that the matrix trump the language of the CBA and/or the discretion afforded an arbitrator under said CBA.

Different municipalities can unilaterally create different disciplinary matrixes with a variety of terms and conditions. For example, the City of Cleveland's disciplinary matrix in GPO 1.1.11 does not even mention the term "just cause." The matrix imposes mandatory minimums for certain offenses which had never previously existed. The matrix also switches the burden from the employer to the employee to present mitigation factors at a pre-disciplinary hearing to move the offense to a "mitigating" section of the matrix, which did not previously exist. Moreover, the matrix has a gap in discipline from a thirty (30) day suspension from duty to termination.

The City of Cleveland has even acknowledged that their intentions in creating and implementing this disciplinary matrix was to "wipe out past practice" because they have disagreed with some of the binding Arbitrator decisions of past grievances. They have, in essence, unilaterally created a new past practice. Additionally, the City of Cleveland did not even

use the past discipline imposed by the City against Cleveland Police Officers in creating its discipline standards for the matrix. Instead of reviewing the past practice between the parties, much of the matrix was based upon what other cities had done, such as Las Vegas, which is completely irrelevant to support the past practice between these two parties.

Municipalities like the City of Cleveland, the City of Toledo, the City of Dayton, and the City of Findlay, must be prohibited from using a unilaterally created and applied disciplinary matrix in place of a bargained for "just cause" mandate. If the Appellee were to prevail in this case, these municipalities essentially could use its unilaterally created disciplinary matrix to supersede the bargained for "just cause" provisions of their CBA. The employer would have complete control and the ultimate decision making over the employees' discipline, with no possibility for meaningful Arbitrator review. The very principle of collective bargaining with regards to discipline would be subverted.

For many well established reasons, public policy and the law favor arbitration. When the parties agree to binding arbitration, they agree to accept the result. A unilaterally created disciplinary matrix can only be a guide for hearing officers when administering discipline. Unless a disciplinary matrix is incorporated into the language of the parties CBA, an Arbitrator is not bound by it. If the City of Findlay, or any other similarly situated municipality, wants to make the disciplinary matrix it created to be binding on employees and Arbitrators, they must bargain for it and incorporate it into their collective bargaining agreement, which they did not do here.

## IV. CONCLUSION

The fundamental goal of bargaining units is to represent the interest of its members. Discipline imposed by an employer is one of the crucial rights bargained for by the union on

behalf of its members. An employer cannot take away rights or benefits achieved through collective bargaining by means of unilaterally imposed rules or regulations.[14] The Appellants should be meritorious in their assignment of error because Arbitrator Mancini did not exceed his authority in reinstating Sergeant David Hill to duty without back pay, Their CBA does not contain any language that forbids the remedy he imposed in his Award.

For the foregoing reasons CPPA respectfully supports the request by the Appellants that this Honorable 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 pursuant to the just cause provision of their CBA.

Respectfully submitted,

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[14] *U.S. Foodservice Inc. and International Brotherhood of Teamsters*, Local 705, 126 LA 840 (2009).

## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2016, a copy of the Brief of Amicus Curiae Cleveland Police Patrolmen's Association, Toledo Police Patrolman's Association, Dayton Fraternal Oder of Police, Lodge 44, and Ohio Employment Lawyers Association in Support of Appellant OPBA and David Hill was electronically served upon the following:

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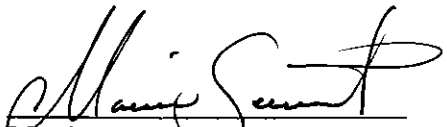

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