**[Cite as *Eastlake v. Fraternal Order of Police/Ohio Labor Council*, 2011-Ohio-2201.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| CITY OF EASTLAKE, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2010-L-057** |
| - vs - | : | |
| FRATERNAL ORDER OF POLICE/ OHIO LABOR COUNCIL, FOP/OLC, | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 003074.

Judgment: Affirmed.

*Joseph R. Klammer*, City of Eastlake Law Director, 6990 Lindsay Drive, Suite 7, Mentor, OH 44060 and *Michael D. Esposito*, 2351 South Arlington Road, Suite A, Akron, OH 44060 (For Plaintiff-Appellee).

*Michael W. Piotrowski*, 2721 Manchester Road, Akron, OH 44319-1020 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

**{¶1}** Appellant, Fraternal Order of Police/Ohio Labor Council ("the Union"), appeals the judgment entry of the Lake County Court of Common Pleas, in which the trial court granted the city of Eastlake's ("the City") motion for order to vacate the arbitration award and denied the Union's motion to confirm the arbitration award. For the following reasons, we affirm the judgment of the trial court.

**{¶2}** The parties entered into a Collective Bargaining Agreement ("the Agreement"), which governs the terms and conditions of employment for patrolmen,

sergeants, and lieutenants employed in the Eastlake Police Department. The Agreement became effective on January 1, 2008. During negotiations for the Agreement at issue, changes were made to the Holiday Pay Provision. A dispute arose concerning the implementation of the contract language contained in Article 34 of the Agreement, entitled "Holidays."

**{¶3}** Prior to negotiations leading to the Agreement, employees of the Union had the option of either taking their 12 paid holidays as a holiday off with pay or working the holiday and then cashing out some or all of their holidays at the end of the year. Therefore, an employee could potentially cash out 96 hours of holiday pay in December of each year. That section read as follows:

**{¶4}** "Employees shall have the option of either taking the time off with pay or to be paid for the holidays at their straight time rate of pay and shall notify the Chief of their election."

**{¶5}** After negotiations, the above-mentioned provision relating to holiday pay was deleted from the Agreement at issue. The Agreement exchanged Veteran's Day and the employee's birthday for two "floating holidays." Further, Section 3, Holiday Work Option, was inserted into the Agreement. Article 34 of the Agreement states, in toto:

**{¶6}** "**Section 1. Recognized Holidays.** All employees shall receive the following paid holidays:

1. New Year's Day
2. President's Day
3. Good Friday
4. Memorial Day
5. Independence Day
6. Christmas Day
7. Labor Day
8. Thanksgiving Day
9. Friday after Thanksgiving
10. Christmas Eve Day
11. 2 Floating Holidays

**{¶7}** "**Section 2. Holiday Pay Eligibility.** In order to be eligible for the above paid holidays, the employee must report to work and actually work either: 1) his last scheduled work day before the holiday and immediately after the holiday; or 2) the holiday, if scheduled; unless specifically excused by the Department Head or the employee is on an authorized vacation.

**{¶8}** "**Section 3. Holiday Work Option.** At the discretion of the respective department head with consideration of workloads and department needs, an employee not regularly scheduled may work designated holidays. The employee may then elect to take the additional holiday compensation in the form of payment.

**{¶9}** "**Section 4. Holiday Time Scheduling.** An employee that works on a recognized holiday or whose regular continuous schedule does not include the day of the observed holiday shall designate the days he wishes to take off at a later date, which shall be subject to the advance approval of the employee's supervisor as to when they may be taken.

**{¶10}** "An employee electing to take time off for holidays, shall be required to take the time during the year it is earned and not be able to carry the time over into the next calendar year.

**{¶11}** "**Section 5. Holiday Overtime Work.** Any employee who works overtime on a holiday shall receive two times his regular hour rate for all such extra hours on the overtime basis."

**{¶12}** Following ratification of the Agreement, the chief of police, in his discretion and in accord with Section 3, notified certain officers that he was going to schedule some of them off for holidays. As a result, these employees of the Union were no

longer able to cash out their holidays, unless he specifically approved an employee to work.

**{¶13}** The Union filed two grievances, one on behalf of the patrolmen and the second on behalf of the sergeants and lieutenants. Both grievances alleged that the bargaining members had been improperly denied their contractual right to cash out ten paid holidays in December 2008, in violation of the Agreement. The parties agreed to jointly select the arbitrator, James M. Mancini.

**{¶14}** The City argued that the chief of police acted properly in that under the Agreement set forth in Article 34, Section 3, employees who are not regularly scheduled to work a holiday, but are called in to work, are the only employees entitled to cash out their holidays. The Union maintained that, with the exception of the two floating holidays, employees retained the right to cash out the ten remaining paid holidays.

**{¶15}** After an arbitration hearing, the arbitrator sustained the grievances of the Union and ordered the City to allow the officers to cash out ten days of holiday pay per year pursuant to the Agreement. The arbitrator determined that since "there is no single, obvious and reasonable meaning appearing from the pertinent language set forth in the Holidays Article, [he] must find that the provision in question is unclear and ambiguous." The arbitrator then stated, "[i]n that it is unclear from the language set forth in Article 34 as to whether bargaining unit members continue to have the right to cash out their ten paid holidays in December of each year, *** it is appropriate to consider other evidence to resolve the ambiguity which exists." In his decision, the arbitrator further reasoned that if the City's interpretation of the Agreement language was upheld, it would create a harsh and unreasonable result and have a substantial impact on the bargaining unit. The arbitrator then determined that the bargaining history

of the parties supported the "conclusion that the changes to Article 34 were never intended to take away the employee's right to convert the ten remaining holidays into cash in December of each year."

**{¶16}** The Union filed an application to confirm the arbitration award. The City filed a motion to vacate the arbitration award, claiming the arbitrator exceeded his powers by rendering an award in conflict with the express language of Article 34 of the Agreement. The City maintained that, instead of relying on the clear and unambiguous language of the Agreement, the arbitrator made his decision based on testimony concerning the history of the negotiations leading to the current Agreement.

**{¶17}** Although the trial court noted its restrictive standard of review, it found that the "arbitrator exceeded his authority by departing from the essence of the [Agreement] as expressed in Articles 12 and 34. The arbitrator exceeded his scope of authority by ignoring the unambiguous language of Article 34 and attempting to interpret those provisions when no interpretation was needed." Thus, the trial court granted the City's motion to vacate the arbitration award and denied the Union's application to confirm the arbitration award.

**{¶18}** The Union filed a timely notice of appeal and asserts the following assignment of error:

**{¶19}** "The Court of Common Pleas erred by vacating the arbitration award issued by Arbitrator James Mancini in its Opinion and Judgment of May 11, 2010."

**{¶20}** Under this assigned error, the Union presents the following three issues for our review:

**{¶21}** "[1.] Did the Court of Common Pleas err in engaging in the re-interpretation of contract language in order to vacate the award of the duly appointed

arbitrator after concluding that the arbitrator was attempting to interpret contractual provisions?

**{¶22}** "[2.] Does a Court of Common Pleas err when it substitutes its own judgment as to the existence of an ambiguity in a collective bargaining agreement for that of an arbitrator who is contractually empowered to make such decision?

**{¶23}** "[3.] Did the Court of Common Pleas err by failing to remand the matter back to Arbitration after vacating the award?"

**{¶24}** We are mindful that "Ohio public policy encourages the resolution of disputes through arbitration." *Dayton v. Internatl. Assoc. of Firefighters, Local No. 136*, 2d Dist. No. 21681, 2007-Ohio-1337, at ¶9. (Citation omitted.) Generally, "arbitration awards are presumed valid, and a reviewing court may not merely substitute its judgment for that of the arbitrator." Id. at ¶10. (Citations omitted.)

**{¶25}** In reviewing an arbitrator's award, courts are bound by R.C. 2711.10. As noted by the trial court, the relevant statutory provision at issue is R.C. 2711.10(D), which provides in part:

**{¶26}** "In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

**{¶27}** "***

**{¶28}** "(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

**{¶29}** "[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." (Emphasis sic.) *Dayton v. Internatl. Assoc. of Firefighters, Local No. 136*, supra, at ¶16.

**{¶30}** "Appellate review of arbitration proceedings is confined to an evaluation of the order issued by the trial court, pursuant to R.C. 2711.10. The substantive merits of the original arbitration award are not reviewable on appeal absent evidence of material mistake or extensive impropriety." *Northern Ohio Sewer Contractors, Inc. v. Bradley Development Co., Inc.*, 159 Ohio App.3d 794, 799, 2005-Ohio-1014, citing *Lynch v. Halcomb* (1984), 16 Ohio App.3d 223. The appellate court does not engage in a de novo review of the merits of the dispute. *Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors* (2000), 139 Ohio App.3d 772, 784.

**{¶31}** Under the first issue for review, the Union outlines the limited scope of judicial review of arbitration decisions, noting that a trial court cannot substitute its interpretation of a collective bargaining agreement for that of the arbitrator. In this case, the Union argues that once the trial court determined that Arbitrator Mancini was interpreting the Agreement, it should have ceased its analysis and upheld the arbitrator's decision. The Union asserts that the trial court "applied its own interpretation of the [Agreement] provisions in order to conclude that the Arbitrator was simply wrong even after finding that the Arbitrator had been interpreting the [Agreement]."

**{¶32}** "'[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' *** Thus, we will accord considerate latitude to an arbitrator, but we recognize his powers are not unlimited in the resolution of labor disputes. 'The arbitrator is confined to the interpretation and application of the collective bargaining agreement, and *although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous language*.' *** Accordingly, it is our duty to determine whether the arbitrator's award was reached in a rational manner from the collective bargaining agreement." (Emphasis added and internal citations omitted.) *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Emp. Assn., Local 11, AFL-CIO* (1991), 59 Ohio St.3d 177, 180, citing *United Steelworkers of America v. Ent. Wheel & Car Corp.* (1960), 363 U.S. 593. See, also, *Internatl. Assn. of Firefighters*, *Local 67 v. Columbus* (2002), 95 Ohio St.3d 101, 104, stating: "a [collective bargaining agreement] is limited to the provisions bargained for and *** an arbitrator may not apply extraneous rules to the agreement, where those rules were not bargained for and are contrary to the plain terms of the agreement itself."

**{¶33}** "An arbitrator's award departs from the essence of a collective bargaining agreement when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement." *Ohio Office of Collective Bargaining*, supra, at syllabus.

**{¶34}** Furthermore, in the Agreement, the parties agreed in Article 12, Section 3 that:

**{¶35}** "The arbitrator shall have no power or authority to add to, subtract from, or in any manner, alter the specific terms of this Agreement or to make any award

requiring the commission of any act prohibited by law or to make any award that is contrary to law or violates any of the terms and conditions of this Agreement."

**{¶36}** Although we recognize that an arbitrator is afforded great deference, his authority is not without limitation. Case law has established that, while a trial court may not reject an arbitrator's findings of fact simply because it disagrees with them, a trial court may determine that an arbitrator exceeds his authority in interpreting unambiguous language of a collective bargaining agreement. The Union's first issue lacks merit.

**{¶37}** Next, the Union argues that the trial court did not have the authority to interpret the Agreement in a way that differed from that of the arbitrator. We must determine if the trial court properly found that the arbitrator exceeded his authority in interpreting Article 34 of the Agreement.

**{¶38}** In its judgment entry, the trial court noted its limited role in reviewing an arbitration award, i.e., whether the arbitrator's decision departed from the essence of the Agreement. The trial court concluded that the arbitrator had exceeded the scope of his authority by going beyond the unambiguous language of the Agreement. The trial court correctly observed that, while an arbitrator has the authority to interpret the terms of the Agreement, there are limits to his authority, as he may not interpret the Agreement in such a way that contradicts its express terms. The trial court further observed that Article 12 of the Agreement prohibits an interpretation of the Agreement that does not reflect its language.

**{¶39}** The trial court found that Article 34 was unambiguous. The arbitrator's decision stated that it was appropriate to consider the other holiday pay sections found under Article 34 when interpreting the applicable language in Section 3 of Article 34.

However, as recognized by the trial court, the arbitrator never mentioned Article 34, Section 4 in its decision, which requires, under certain circumstances, that an employee "*shall* designate the days he wishes to take off at a later date[.]" (Emphasis added.) Notably, there is no language in Article 34, Section 4 "that specifies or implies that it applies only to the two floating holidays and not the other ten holidays." In fact, at oral argument, the Union's attorney acknowledged this language concerning the "two floating holidays" is not reflected in the Agreement.

**{¶40}** The unequivocal language of the Agreement must be followed. Nowhere in Article 34 does it state that the Union would be entitled to cash out ten holidays in December of each year. In fact, as previously mentioned, the part of the Agreement that conferred such a benefit was deleted during negotiations. Under Sections 3 and 4, an employee may fall into only one of three categories: (1) an employee who is not regularly scheduled, but who is called into work by the respective department head; (2) an employee who is scheduled to work on a recognized holiday; and (3) an employee who is not scheduled to work on a recognized holiday. Only under the first scenario, i.e., Article 34, Section 3, may an employee cash out holiday compensation in the form of payment.

**{¶41}** Further, the arbitrator's decision makes note of the fact that if the employees were not entitled to cash out the ten holidays for payment in December, it would be a harsh or unreasonable result and would have a substantial impact on the bargaining unit. However, the Union agreed both to the deletion of the provision, which granted them the holiday cash-out option, and to the addition of Section 3, which unequivocally limits the circumstance in which an employee may cash out holiday compensation in the form of payment.

**{¶42}** Again, "'[a collective bargaining agreement] is limited to the provision bargained for and *** an arbitrator may not apply extraneous rules to the agreement, where those rules were not bargained for and are contrary to the plain terms of the agreement itself.' *** Because a valid arbitrator's award draws its essence from a [collective bargaining agreement], *** an arbitrator exceeds his powers when the award conflicts with the express terms of the agreement or cannot be derived rationally from the terms of the agreement. ***" (Internal citations omitted.) *Summit Cty. Children Serv. Bd. v. Communication Workers of Am., Local 4546*, 113 Ohio St.3d 291, 294, 2007-Ohio-1949.

**{¶43}** We agree with the trial court that the arbitrator interpreted Article 34 when no such interpretation was justified or necessary. We find that the trial court properly vacated the award. The Union's second issue is without merit.

**{¶44}** Under the third issue, the Union maintains that the trial court erred when it failed to remand the arbitration issue to the arbitrator for resolution pursuant to the contractual procedure. This court has already decided that very issue in *Trumbull Cty. Sheriff's Office v. Ohio Patrolman's Benevolent Assn*., 11th Dist. No. 2002-T-0137, 2003-Ohio-7207, at ¶34, stating:

**{¶45}** "R.C. 2711.10 provides in relevant part, 'If an award is vacated and the time within which the agreement required the award to be made has not expired, the court *may* direct a rehearing by the arbitrators.' (Emphasis added.) In statutory construction the word 'may' is generally construed to make the provision discretionary. *** The word 'shall' is generally interpreted to make the provision mandatory. *** 'Ordinarily, the words "shall" and "may," when used in statutes, are not used

interchangeably or synonymously.' *** Appellant would have us hold that the trial court must remand a case to the arbitrator when it vacates an award. We decline to do so."

**{¶46}** The Union's third issue is without merit.

**{¶47}** For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.