[Cite as *Trumbull Career & Technical Ctr. Bd. of Edn. v. Trumbull Career & Technical Ctr. Edn. Assn.*, 2012-Ohio-5838.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

TRUMBULL CAREER AND TECHNICAL CENTER BOARD OF EDUCATION,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2012-T-0034**
- vs -	:	
TRUMBULL CAREER AND TECHNICAL CENTER EDUCATION ASSOCIATION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2011 CV 1937.

Judgment: Affirmed.

Curtis J. Ambrosy, Ambrosy & Fredericka, 144 North Park Avenue, Suite 200, Warren, OH 44481 (For Plaintiff-Appellant).

Ira J. Mirkin and *Charles W. Oldfield*, Green, Haines & Sgambati Co., L.P.A., 16 Wick Avenue, Suite 400, P.O. Box 849, Youngstown, OH 44501-0849 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Trumbull Career and Technical Center Board of Education ("the Board"), appeals the judgment of the Trumbull County Court of Common Pleas, confirming an arbitration award entered in favor of appellees, Trumbull Career and

Technical Center Education Association ("the Association"), the Ohio Education Association ("the OEA"), and Myra Saylor.

{¶2} The arbitration at issue centered on the termination of Myra Saylor, a non-teaching employee of the Trumbull Career and Technical Center. The Association, of which Ms. Saylor is a member, is a party with the Board in a Collective Bargaining Agreement ("the CBA"). Ms. Saylor had an ongoing history of attendance issues and had been progressively disciplined in accordance with the CBA at least three times prior to the incident in question. The event which led to Ms. Saylor's ultimate termination took place on October 27, 2010, when she requested "emergency personal leave" for October 26, 2010: i.e., one day after the leave was already taken. The "request" was rejected by her supervisor, Jason Gray. The Superintendent, Wayne McClain, recommended termination and scheduled a hearing on the matter. Following a hearing on November 11, 2010, the Board found Ms. Saylor violated the terms of the CBA by failing to abide by the personal leave obligations: that is, by taking a personal day without request and permission.

{¶3} Soon thereafter, a grievance was filed by the Association on behalf of Ms. Saylor, purporting to invoke the "grievance procedure" of the CBA, a six-level process whereby a grievant may resolve a dispute stemming from an alleged violation of the agreement, with the final level providing for arbitration. The Board, however, maintained that the grievance procedure was not to be invoked in this situation, but instead, the sections of R.C. 3317 control. Notwithstanding the Board's position, it agreed that, without waiving any objections, the matter would be submitted to arbitration "to make the most efficient use" of time and finances. An arbitration hearing was

subsequently held. During the hearing, the Board took the position that the dispute was non-arbitrable because the grievance procedure was not the proper avenue to resolve the dispute, and even if it were, Ms. Saylor's termination was in accordance with the CBA. The arbitrator disagreed. In a written opinion, he held the dispute to be arbitrable under the CBA and sustained the grievance. Ms. Saylor's employment was reinstated with back pay.

{¶4} The Board filed a motion in the Trumbull County Court of Common Pleas to vacate the arbitrator's award. After briefing on the issue, the trial court confirmed the award. This appeal timely follows with the Board advancing three assignments of error.

{¶5} The Board's first assignment of error states:

{¶6} The Trial Court erred to the prejudice of Appellant when it determined the Arbitrator did not exceed his powers in finding termination of an employment contract to be subject to the CBA's grievance and arbitration provisions, contrary to CBA language specifying termination to be governed by Chapter 3319 of the Ohio Revised Code.

{¶7} Under its first assignment of error, the Board argues that arbitration was not appropriate because Section 700 of the CBA states that the termination of continuing contracts "shall be governed by" R.C. 3319. Thus, the Board contends that the provisions of the Revised Code should control, and arbitration under the CBA's grievance provisions was patently inappropriate.

{¶8} Conversely, the Association contends that the Board's argument is not properly before this court because the Board failed to raise the arbitrability of the

grievance in its merit brief before the trial court and, hence, has waived the issue on appeal. Further, it argues, even if the argument is found to be properly preserved for appeal, Section 700 only applies to certificated employees and to the issuance of contracts—neither one of which is applicable to Ms. Saylor.

{¶9} It must first be decided whether the Board has waived this issue on appeal. It is well founded that a party who fails to raise an issue at the trial court level waives the issue on appeal. *See generally Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, ¶36 (2d Dist.) (Cannon, J., sitting by assignment), quoting *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278. ("It is a universal principle of appellate procedure that '[a] party who fails to raise an argument in the court below waives his or her right to raise it [on appeal].'") Here, we find the Board's argument concerning the arbitrability of the grievance, though introduced in a reply brief, to be before the trial court for consideration *prior* to its judgment. Therefore, this issue is properly before us.

{¶10} Turning to the merits of the Board's contention, it must be recognized that, while public policy favors the arbitrability of labor disputes, "an employer, whether public or private, can only be compelled to arbitrate disputes which it actually agreed to arbitrate." *Ohio Patrolmen's Benevolent Assoc. v. Village of Lordstown*, 118 Ohio App.3d 9, 11 (11th Dist.1997), citing *Davidson v. Bucklew*, 90 Ohio App.3d 328, 331 (11th Dist.1992); *see also Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 665 (1998). Naturally, whether an employer agreed to arbitration is a determination which can be made by turning to the agreement itself, giving the words their plain and ordinary meaning. As such, "[a] clause in a contract providing for dispute

resolution by arbitration should not be denied effect unless it may be said with positive assurance that the subject arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *Id*., quoting *Didado v. Lamson & Sessions Co.*, 81 Ohio App.3d 302, 304 (9th Dist.1992). Moreover, this court has continually held that "a court must indulge a strong presumption in favor of arbitration and resolve any doubts in favor of arbitrability." *Wascovich v. Personacare of Ohio, Inc*., 190 Ohio App.3d 619, 2010-Ohio-4563, ¶24 (11th Dist.); *Alkenbrack v. Green Tree*, 11th Dist. No. 2009-G-2889, 2009-Ohio-6512, ¶14*; Bayes v. Merle's Metro Builders/Boulevard Constr*., *LLC*, 11th Dist. No. 2007-L-067, 2007-Ohio-7125, ¶7.

{¶11} Here, the plain language of the CBA indicates that binding arbitration pursuant to the terms of the grievance procedure is the appropriate avenue to resolve disputes of this nature. Section 300 of the CBA states that the grievance procedure, the provisions of which are set forth throughout Article Three, "shall be the *exclusive method* of resolving disputes concerning the alleged violation, misapplication, or misinterpretation of this Agreement." (Emphasis added.) Section 304.6 of the CBA (known as "Level VI") explains that, if the Association is not satisfied with the disposition of the grievance from the lower level, it may seek binding arbitration. The Section goes on to set forth the specifics of an arbitration request, including the selection of the arbitrator. Pursuant to the sections throughout Article Three, it is clear that arbitration is the avenue to resolve disputes such as those involved here.

{¶12} The Board cites Section 700 for the proposition that the Revised Code governs these disputes. However, if that was indeed the case, the presence of Article Three, specifically Section 304 detailing the grievance procedure, would be rendered

completely unnecessary. Instead, the more reasonable interpretation can be reached upon reading Section 700 in its entirety, which states:

{¶13} Article 7. Employee Contracts

{¶14} 700. Issuance of Contracts

{¶15} Certificated Employees shall be given written contracts as required by the Ohio Revised Code. Termination of limited and continuing contracts, and qualifications for continuing contracts, shall be governed by Chapter 3319. Renewal and non-renewal of teaching contracts shall be governed by this agreement.

{¶16} Based upon the entire provision, this section would logically be limited to its respective article and section headings, specifically "issuance of contracts." This is especially true because there is a separate section under a different article expressly for grievances, which is defined by Section 301.1 as "any alleged violation, misapplication, or misinterpretation of this Agreement." As Ms. Saylor's grievance sets forth an alleged violation and misapplication of the CBA, the relevant sections are found in the grievance procedure under Section 304. As explained above, that procedure clearly provides for arbitration; thus, the trial court did not err in confirming this portion of the arbitrator's award.

{¶17} The Board's first assignment of error is without merit.

{¶18} The Board's second and third assignments of error state:

{¶19} [2.] The Trial Court erred to the prejudice of Appellant when it determined the Arbitrator did not exceed his powers in finding that Appellant did not have just cause to terminate the employment

contract of Appellee contrary to the express, negotiated language that failure to properly and timely invoke contractual leave was 'just cause.'

{¶20} [3.] The Trial Court erred when it failed to vacate an arbitration award that lacked rational support derived from the terms of the CBA.

{¶21} In its second and third assignments of error, the Board argues Ms. Saylor was terminated in accordance with the progressive discipline procedure and for "just cause," pursuant to the CBA. In response, the Association argues the arbitrator correctly found that the CBA failed to provide a procedure for the circumstances of this case, and therefore, there was no provision that applied.

{¶22} A trial court's role in reviewing an arbitration award to determine whether to vacate or confirm the award is limited. *Am. Assn. of Univ. Professors v. Kent State Univ.*, 11th Dist. No. 2010-P-0054, 2011-Ohio-2592, ¶20. "An arbitrator is the final judge of law and facts and, as a result, a court may not substitute its judgment for the arbitrator." *Id*. Judicial deference in arbitration cases is based on the recognition that the parties have bargained and contracted for dispute resolution via arbitration in lieu of court proceedings. *Madison Local School Dist. Bd. of Edn. v. OAPSE/AFSCME Local 4, AFL-CIO and its Local #238*, 11th Dist. No. 2008-L-086, 2009-Ohio-1315, ¶9. "It therefore stands to reason that the parties have agreed to accept the arbitrator's view of the facts and the meaning of the contract regardless of the outcome." *Id*. at ¶10. As explained above, the CBA states that arbitration is to be the final tier of the grievance

procedure which, according to the agreement, is "the exclusive method" of resolving disputes.

{¶23} However, the concept of judicial deference in arbitration cases is not absolute. R.C. 2711.10 provides limited circumstances whereby a trial court may vacate an arbitration award. It states:

> **{¶24}** 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:
>
> **{¶25}** (A) The award was procured by corruption, fraud, or undue means.
>
> **{¶26}** (B) Evident partiality or corruption on the part of the arbitrators, or any of them.
>
> **{¶27}** (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> **{¶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} The Board does not suggest the award was procured by corruption or was the product of misconduct. Instead, the Board argues the trial court erred in not vacating the award under R.C. 2711.10(D) because the arbitrator exceeded his powers. "When determining whether the arbitrator exceeded his powers, the reviewing court

must confirm the arbitration award if it finds that the arbitrator's award draws its essence from the collective bargaining agreement and it is not unlawful, arbitrary or capricious." *Reynoldsburg City School Dist. Bd. of Edn. v. Licking Heights Local School Dist. Bd. of Edn*., 10th Dist. No. 11AP-173, 2011-Ohio-5063, ¶22, citing *Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc*., 81 Ohio St.3d 269 (1998), syllabus. "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 v. Ohio Civil Serv. Emps. Assn., Local 11, AFSCME AFL-CIO*, 59 Ohio St.3d 177, 180 (1991), syllabus.

{¶30} This court's review is limited to the trial court's order confirming the arbitration award. "'The substantive merits of the original arbitration award are not reviewable on appeal absent evidence of material mistake or extensive impropriety.'" *City of Eastlake v. FOP/Ohio Labor Council*, 11th Dist. No. 2010-L-057, 2011-Ohio-2201, ¶30, quoting *N. Ohio Sewer Contrs., Inc. v. Bradley Dev. Co*., Inc, 159 Ohio App.3d 794, 499, 2005-Ohio-1014 (8th Dist.); *see also McGarry & Sons, Inc. v. Marous Bros. Constr., Inc.*, 11th Dist. No. 2009-L-056, 2010-Ohio-823, ¶66 (Cannon, J., concurring in judgment only in part, dissenting in part) (acknowledging that the oft-cited "material mistake or extensive impropriety" standard has not been fully defined by appellate courts).

{¶31} Here, the Board argues the arbitrator exceeded his powers by ignoring the language of the CBA. In reference to this argument, it is worth noting that "'[t]he 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 provisions." *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 180 (1991), quoting *Detroit Coil Co. v. Internatl. Assn. of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 579 (C.A.6 1979).

{¶32} The Board contends the arbitrator particularly ignored Section 911, which provides:

> **{¶33}** Unless the Superintendent grants permission because of extenuating circumstances, all Employees shall fulfill their contract obligations according to this Agreement and the Ohio Revised Code; only the leaves of absence agreed to by the Parties in this contract shall be granted and only in accord with the terms set forth in this Agreement. *Absences occurring outside of the enumerated agreed leaves will be construed as absences without permission, contrary to contractual obligations and just cause for discipline*. 'Days without pay' outside of the agreed leaves are not recognized nor will they be permitted." (Emphasis added.)

{¶34} The problem, as the arbitrator found, is the CBA does not expressly provide the protocol of requesting "emergency leave," though such leave is recognized in the agreement under "personal leave." Section 903 provides that "[e]ach member of the bargaining unit shall be entitled to three (3) days of unrestricted, noncumulative paid personal leave," subject to several enumerated conditions; e.g., leave cannot be taken the day before or after a holiday unless the Superintendent grants permission due to an

emergency. Section 903.3 states, "[e]xcept in the case of an emergency, a written notice of intent to take such leave on a specified date must be filed with the immediate supervisor at least three (3) days in advance of the date on which the leave will be taken."

{¶35} On October 21, 2010, at 8:38 a.m., Ms. Saylor requested a personal day for October 25, 2010, by logging onto an online reporting "kiosk system." At 8:48 a.m., her supervisor, Jason Gray, approved the request. At 8:54 a.m., the superintendent approved the request. Ms. Saylor subsequently went to the veterinary's office to euthanize her gravely-ill cat. Though Ms. Saylor had not intended on taking off the following day (October 26), she ultimately did based on the death of her pet. The arbitrator found the denial of Ms. Saylor's ability to utilize an emergency personal day to be arbitrary and capricious. The arbitrator explained, "[e]mergencies are unpredictable, unscheduled, and subjective based on each person's definition thereof." The arbitrator went on to conclude, "[t]he Employer's decision to arbitrarily deny the Grievant [Ms. Saylor] the request to utilize an emergency personal leave day does not establish that the Grievant was indeed guilty of any wrongdoing."

{¶36} In criticizing the trial court for confirming the arbitrator's award, the Board notes the written opinion does not reference when Ms. Saylor's cat became ill, or whether there was a "suddenness of onset [symptoms]" such that the cat's declining health and ultimate demise could truly be categorized as an emergency. The Board also points out that Ms. Saylor did not disclose the passing of her beloved cat as the reason for the tardy requested leave to the employer. Given the standard of review outlined above, however, this court is not in a position to evaluate the underlying facts

which the arbitrator did or did not rely on in formulating his opinion. Instead, we conclude the arbitrator's determination was based upon the language of the CBA and the facts and circumstances of the case as presented. The award does not conflict with the express terms of the agreement but rather is rationally supported by the terms of the agreement as there is no specific "emergency" protocol in the CBA. It cannot be concluded that the arbitrator departed from the essence of the parties' agreement. As such, the trial court did not err in confirming the award.

{¶37} Appellants' second and third assignments of error are without merit.

{¶38} The decision of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.