[Cite as *Cox v. Dayton Pub. Schools Bd. of Edn.*, 2015-Ohio-620.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GEORGIA B. COX	:	
	:	Appellate Case No. 26382
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2014-CV-1422
v.	:	
	:	(Civil Appeal from
DAYTON PUBLIC SCHOOLS	:	Common Pleas Court)
BOARD OF EDUCATION	:	
	:	
Defendant-Appellee	:	

. . . . . .

O P I N I O N

Rendered on the 20th day of February, 2015.

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GEORGIA B. COX, 4191 Mapleleaf Drive, Dayton, Ohio 45416
Plaintiff-Appellant, *pro se*

BEVERLY A. MEYER, Atty. Reg. No. 0063807, Cooper, Gentile, Washington & Meyer Co., 118 West First Street, Suite 850, Dayton, Ohio 45402
Attorney for Defendant-Appellee

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FAIN, J.

{¶ 1} Plaintiff-appellant Georgia Cox appeals from a judgment of the Montgomery County Common Pleas Court dismissing her motion to vacate, modify or correct an arbitration decision that confirmed the termination of her employment with defendant-appellee Dayton Public Schools Board of Education. She contends that the court erred in finding no jurisdiction to consider the motion based on an untimely filing and her lack of standing.

{¶ 2} We conclude that the court erred by finding that the motion was untimely, because it was filed and served in compliance with R.C. 2711.13 and Civ. Rule 5. We also conclude that the court erred in finding that Cox lacked standing to invoke her statutory rights to pursue a court review of her termination.

{¶ 3} Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings, consistent with this opinion.

I. The Course of the Proceedings

{¶ 4} This is the second appeal initiated by Cox regarding the consequences of an event that occurred on October 10, 2012 in connection with her employment as a teacher at Meadowdale High School. The first appeal, *State v. Cox*, 2014-Ohio-2201, 12 N.E.3d 446 (2d Dist.), affirmed a felony conviction for assault of a functionally impaired student. We concluded that "the evidence in the record permitted the jury reasonably to find that Cox hit the victim's upper right chest, in the area of his shoulder, and the jury could reasonably infer that she intended to cause the victim physical harm in the form of pain." *Cox* at ¶ 2.

{¶ 5} All of the actions taken by the parties in response to the event that occurred on October 10, 2012, are governed by a collective bargaining agreement, referred to as a "Master Contract" between the teacher's union and the school board. Cox was immediately placed on paid administrative leave pending an investigation of the incident. On October 16, 2012, criminal charges were initiated against Cox in Vandalia Municipal Court. On October 16, 2012 the Director of Human Resources prepared a "Notice of Charges and Specifications," and set it for hearing on October 30, 2012. Based on advice of counsel, Cox attempted to have the hearing continued until after the completion of the criminal case.

{¶ 6} On November 6, 2012, Cox was notified that her paid leave status would change to unpaid leave as of November 12, 2012. The union representing Cox, the Dayton Education Association (DEA), filed a grievance over the untimeliness of the Notice of Charges, alleging that the collective bargaining agreement required the notice to be issued within 24 hours of a suspension. In response, the October 16th Notice of Charges was rescinded and reissued with a statement that the hearing would be reset "on a yet to be determined date and pending the criminal charges arising out of the same."

{¶ 7} When the hearing was set for December 19, 2012, Cox's attorney requested a continuance, stating that Cox would not participate in the hearing until after the completion of the criminal case. In response, the Notice of Charges was again reissued with a new hearing date of January 9, 2013. On January 8, 2013, Cox again requested a continuance because the criminal charges were still pending. Notwithstanding the request for a continuance, the hearing was conducted on January 9, 2013; Cox did not appear.

{¶ 8} Shortly before the hearing, the DEA filed two grievances, contesting the decision to convert Cox to unpaid leave and the failure to continue the hearing until after the criminal case was complete. After the hearing, Cox was served with a Notice of Intent to Terminate. The DEA elected to submit the matter to arbitration. The arbitrator made a finding that three matters were properly before him: the two grievances filed by the DEA; and the termination of Cox's employment.

{¶ 9} The arbitrator conducted a hearing on September 17-19, 2013. Cox appeared, represented by counsel. A representative of the DEA also participated in the hearing. The arbitrator issued a decision on December 10, 2013, finding that the District had good and just cause to terminate Cox and that the two grievances should be denied. The arbitrator's decision does not contain a certificate of service to identify the date or method of service of the decision, does not state that it is a final and binding order, and contains no statement regarding any post-arbitration remedies to seek judicial review of the decision. The parties have acknowledged that the decision was emailed to all parties on December 10, 2013. The record also contains a resolution of the Board, dated December 18, 2013, adopting the decision of the arbitrator, and directing that a copy of its order be served on Cox by certified mail.

{¶ 10} On March 10, 2014, Cox, pro se, filed her motion to vacate, modify or correct the arbitration decision with the common pleas court. The motion did not contain a certificate of service, but at the time of filing Cox separately filed a praecipe for service of the motion to the appellee, Dayton Public Schools Board of Education. The docket reflects that the Clerk of Courts did issue service of the motion to the Board on March 10, 2014. The certified mail receipt reflects that the Board received the motion on March 12,

2014. The Board filed a motion to dismiss, upon the grounds that Cox's motion was untimely filed and that she lacked standing to seek judicial review of the arbitrator's decision. The trial court granted the motion to dismiss, finding that the court lacked jurisdiction because Cox failed to comply with the filing requirements of R.C. 2711.13, and because only the DEA had standing to pursue a review of the arbitration decision. From the judgment dismissing her motion to vacate the arbitration award, Cox appeals, pro se.

II. The Standard of Review

{¶ 11} The Board moved to dismiss the motion to vacate pursuant to Civ.R. 12(B)(1) and 12(B)(6). Subsequent to the trial court's dismissal entry, and this appeal, the Supreme Court of Ohio has clarified that a motion to dismiss based on standing is not a jurisdictional issue, and should therefore be raised under Civ.R. 12(B)(6). *U.S. Bank Natl. Assn. v. Perdeau*, 6th Dist. Lucas No. L-13-1226, 2014-Ohio-5818, ¶ 10, citing *Bank of Am., N.A. v. Kuchta,* 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 23.

{¶ 12} A complaint may be dismissed pursuant to Civ.R. 12(B)(6) as failing to comply with the applicable statute of limitations when the complaint shows conclusively on its face that the action is time-barred. *Doe v. Archdiocese of Cincinnati,* 109 Ohio St.3d 491, 2006–Ohio–2625, 849 N.E.2d 268, ¶ 11. Therefore, both grounds for the Board's motion to dismiss are considered under Civ.R. 12(B)(6).

{¶ 13} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted under Civ.R.12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to recovery. *Thompson v.*

Stealth Investigations, Inc., 2d Dist. Clark No. 2009 CA 86, 2010-Ohio-2844, ¶¶ 4-6.

{¶ 14} The standard of review for a Civ.R. 12(B)(6) motion to dismiss, which raises questions of law, is de novo. *Id.* at ¶ 4. De novo review requires an "independent review of the trial court's decision without any deference to the trial court's determination." *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, 863 N.E.2d 189, ¶ 17 (2d Dist.), quoting *State ex rel. AFSCME v. Taft,* 156 Ohio App.3d 37, 2004-Ohio-493, 804 N.E.2d 88, at ¶ 27.

III. Cox Complied with the Filing Requirements of R.C. 2711.13

{¶ 15} Pursuant to R.C. 2711.13, any party to an arbitration may initiate judicial review of an arbitration decision by filing a motion in the court of common pleas to vacate, modify or correct the arbitration. The statute specifically provides, "Notice of a motion to vacate, modify, or correct an award must be **served** upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action." The Board concedes that the motion was filed within the mandatory three-month deadline, but asserts that compliance with the statute failed when a copy of the motion was not delivered to them until three days after it was filed. We have held that service of a motion filed pursuant to R.C. 2711.13 to initiate judicial review of an arbitration decision is governed by Civ.R. 5. *CACV of Colorado, L.L.C. v. Kogler*, 2d Dist. Montgomery No. 21329, 2006-Ohio-5124. Civ. R. 5 (B)(2) specifically addresses when service is completed as follows:

(2) Service in general. A document is **served** under this rule by:

(a) handing it to the person;

(b) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(c) mailing it to the person's last known address by United States mail, **in which event service is complete upon mailing;**

(d) delivering it to a commercial carrier service for delivery to the person's last known address within three calendar days, **in which event service is complete upon delivery to the carrier;**

(e) leaving it with the clerk of court if the person has no known address; or

(f) sending it by electronic means to a facsimile number or e-mail address provided in accordance with Civ.R. 11 by the attorney or party to be served, **in which event service is complete upon transmission,** but is not effective if the serving party learns that it did not reach the person served. (Emphasis added.)

{¶ 16} The record supports that Cox complied with R.C. 2711.13 by filing the motion to vacate within three months of the issuance of the arbitrator's decision. The Board asserts that compliance with the statute was not complete until it actually received a copy of the motion, which did not occur until three days after the three-month filing deadline. We find that Cox complied with Civ.R. 5 when the motion was filed timely and when the clerk of courts issued service of the motion on the day of filing. Civ.R. 5

unequivocally provides that "service" is complete upon mailing or upon delivery to the carrier. Neither Civ.R. 5, nor R.C. 2711.13 require actual delivery of the motion or receipt of the motion by the adverse party prior to the filing deadline in order for service to be complete.

{¶ 17} We recognize that the Eighth District has held that a movant's failure to assure that an adverse party has actually received the notice of a motion to vacate, filed pursuant to R.C. 2711.13, before the expiration of the three-month statutory period will deprive the trial court of jurisdiction, even when the moving party timely filed the motion with the court and requested service by the clerk of courts. *Cleveland v. Laborers Intern. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313. However, the *Cleveland* court failed to address the specific language of R.C. 2711.13, which requires the motion to be "served" in accordance with rules for "service" of a motion, and the provision of Civ.R. 5(B)(2), which specifically states that "service" is complete when the pleading to be served is mailed or delivered to the carrier for service. Instead, the *Cleveland* court focused on the language of Civ.R. 5(D), which states that "[a]ll documents, after the original complaint, required to be served upon a party shall be filed with the court within three days after service." Civ.R. 5(D) does not prohibit any pleading to be filed first, then served on the parties after the filing date. Whether the filing date comports with a statutory deadline requiring "service" by a set date depends on when service is complete, which is defined by Civ.R. 5(B).

{¶ 18} We provided an analysis of Civ.R. 5(D) in *McGlinn v. Zander*, 2d Dist. Montgomery No. 7208, 1981 WL 2547 (Sept. 25, 1981), in which we held that the Rule does not preclude the filing of a motion prior to service of the motion on the opposing

party, and does not apply to the question of when service is made for the purpose of meeting a deadline.

{¶ 19} We conclude that the provisions of Civ.R. 5(D) are inapplicable to the issue of when service is complete for the purposes of meeting the statutory deadline set forth in R.C. 2711.13, which is specifically addressed in Civ.R. 5(B)(2). Thus, we conclude that the trial court erred when it found that it lacked jurisdiction to consider Cox's motion, based on the timeliness of the filing, which did comply with R.C. 2711.13 and Civ.R. 5(B)(2). Furthermore, the court should have addressed whether the three-month statutory deadline began to run from the date the arbitration decision was sent to the parties, December 10, 2013, or the date that the arbitration decision was adopted by the Board, and the termination became effective, on December 18, 2013. Although the arbitration decision does not state that it is a final and binding order, the Master Contract does provide in Section 3.07.2(D)(5) that "[u]nless contrary to law, the decision of the arbitrator shall be final and binding upon the Board, the Association and any Professional Staff Member involved in the matter."

IV. Cox Does Have Standing to Pursue a Judicial Review of her Termination

{¶ 20} The trial court found that Cox lacked standing to pursue a motion to vacate the arbitration decision because she was not a party to the arbitration proceeding. The court relied on Section 3.07.2(D)(1) of the Master Contract, which states that only the DEA shall have the right to appeal any grievance to arbitration. This section of the collective bargaining agreement is applicable to the two grievances that were reviewed by

the arbitrator. However, different sections of the Master Contract apply to the termination. The trial court did not review or consider Article 46 or Article 48 of the Master Contract, which are directed to the procedures that must be followed for termination actions. Section 46.01.1 of the Master Contract provides in pertinent part:

> The procedures the Board must follow in terminating a contract of a Professional Staff Member are outlined in Ohio Revised Code, Section 3319.16 and Article Forty-Eight. Any employee who has received a notice of intention to terminate his/her contract by the Board shall have the right, within 10 days of the receipt of the notice, to proceed with a case under Section 3319.16, Revised Code, or to have his/her case decided by an arbitrator pursuant to Article 3.07.2D
>
> (Arbitration).

Section 46.01.2 of the Master Contract further provides that: "[a]ny Professional Staff Member who has been notified of intent to dismiss under this section must be informed of his/her right to counsel or Association assistance and representation, if desired." Article 48 of the Master Contract establishes a "due process procedure" for the disciplinary and termination process, which includes specific notices directed to the teacher and the Association, and the opportunity to be heard at a prompt hearing.

{¶ 21} Therefore, Articles 46 and 48 of the Master Contract specifically provide individual rights to a teacher to be notified of the intent to terminate, to attend an immediate hearing, to retain a personal attorney and to make a personal decision whether to arbitrate the termination action or whether to exercise her statutory rights instead of her contractual rights. Construing the intent of these sections of the Master

Contract, *in pari materia*, with the arbitration provisions of the contract leads to the conclusion that the teacher is a party to any action involving the teacher's termination. This is consistent with the content of the arbitrator's action, which treated the termination as a separate issue from the two grievances, and allowed Cox to participate in the arbitration with counsel. The arbitrator, however, does not state whether Cox was given any personal choice over the decision whether to proceed to arbitration or to pursue a review of the termination under her statutory rights. The arbitration decision does include a statement that the choice to proceed with arbitration was made by the DEA.

{¶ 22} R.C. 3319.16 provides a specific statutory procedure for termination of any teacher contract by a Board of Education. The statute requires the Board to furnish the teacher with a written notice of its intention to terminate the teacher's contract, and allows the teacher to demand a hearing. The statute allows the Board to refer the hearing to a referee, but makes no reference to arbitration. After the hearing is conducted, the Board must take action to adopt or reject the recommendation for action and its order must be reflected in its minutes, and notice of the order must be served on the teacher. R.C. 3319.16 provides for judicial review of the Board's order as follows:

> Any teacher affected by an order of termination of contract may appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of such order. The appeal shall be an original action in the court and shall be commenced by the filing of a complaint against the Board, in which complaint the facts shall be alleged upon which the teacher relies for a reversal or modification of such order of termination of contract.

{¶ 23} There is no question that a teacher has standing to appeal her termination to the common pleas court, if she chooses the statutory procedure rather than the arbitration procedure. No provision in the Master Contract provides that the teacher is specifically choosing to forfeit her statutory right to judicial review when she chooses to have the hearing conducted by an arbitrator instead of a member of the Board or a referee. In fact, the language of Article 46 of the Master Contract acknowledges that termination procedures are governed by both the Master Contract and R.C. 3319.16, and that the teacher has the right to choose how to proceed with her case. This choice gives the teacher standing in the termination process.

{¶ 24} The trial court's reliance on *Leon v. Boardman Twp*., 100 Ohio St. 3d 335, 2003-Ohio-6466, 800 N.E.2d 12, for its finding that only the union had standing to appeal the arbitration decision ignores the restrictive clause in the holding of the case which makes an exception for collective bargaining agreements where the employee is given the right to choose arbitration. In the *Leon* case, which involved the termination of a patrolman, the court held, "when an employee's discharge or grievance is arbitrated between an employer and a union under the terms of the collective bargaining agreement, the aggrieved employee does not have standing to petition a court to vacate the award pursuant to R.C. 2711.10 *unless the collective bargaining agreement expressly provides the employee an independent right to submit disputes to arbitration*." *Id.* at ¶18. (Emphasis added.) In the present case, the court erred by failing to acknowledge that Section 46.01.1 of the Master Contract does specifically give the teacher the independent right to submit her termination to arbitration.

{¶ 25} The effect of holding that the teacher has no standing to pursue a judicial

review of her termination is a waiver of her statutory rights. The U.S. Supreme Court has recognized that an arbitration clause in a collective bargaining agreement can waive the members' rights to judicial review of statutory claims if the waiver is "clear and unmistakable." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998). Ohio courts have recognized that in some cases, a party's statutory rights can differ from contractual rights she may have under a collective bargaining agreement, in which case an incident that raises multiple issues can result in having a grievance reviewed by arbitration, while the statutory claim can proceed for court review. *Haynes v. Ohio Turnpike Comm.,* 177 Ohio App.3d 1, 2008-Ohio-133, 893 N.E.2d 850, ¶ 18 (8th Dist.). *See also*, *Chenevey v. Greater Cleveland Regional Transit Auth.*, 2013-Ohio-1902, 992 N.E.2d 461, ¶ 17 (8th Dist.)

{¶ 26} The record is not clear whether Cox's waiver of her statutory rights was clear and unmistakable. Even though the Master Contract gives Cox the right to choose the statutory process or arbitration for a review of her termination, it is not clear whether she affirmatively assigned that right to her union, DEA, or made the choice to arbitrate with the knowledge that her choice to do so would materially affect her post-hearing review rights. In addition to different filing deadlines under R.C. 3319.16 and 2711.13, the standard of review for the common pleas court to review a teacher termination under R.C. 3319.16 and the standard of review for the common pleas court to consider a motion to vacate an arbitration award pursuant to R.C. 2711.13 are materially different. R.C. 3319.16 provides that the judicial review of a teacher termination is a "special proceeding," commenced by the filing of a complaint. R.C. 3319.16 provides that the common pleas court may conduct hearings and take additional evidence, whereas the

review process dictated by R.C. 2711.13 limits the common pleas court to a review of the arbitrator's decision to determine if it is "unlawful, arbitrary or capricious". *Martins Ferry City School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emps.*, 7th Dist. Belmont No.12 BE 15, 2013-Ohio-2954, ¶ 18.

{¶ 27} Therefore, based on her statutory and contractual rights, Cox does have standing to pursue judicial review of her termination. On remand, the court must review the merits of Cox's motion to vacate, modify or correct the arbitrator's award by determining if it is contrary to law, arbitrary or capricious, which should include, but is not limited to, whether Cox's waiver of her statutory rights was clear and unmistakable. If Cox did not clearly waive her statutory rights, the court is authorized by R.C. 2711.10(D) to vacate that part of the award terminating her contract, and remand the matter to the Board for proceedings consistent with law.

V. Conclusion

{¶ 28} Upon our de novo review, the judgment of the trial court is Reversed, and this matter is Remanded for further proceedings consistent with this opinion.

. . . . . .

DONOVAN and WELBAUM, JJ., concur.

Copies mailed to:

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Hon. Michael Tucker