IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

OHIO OFFICE OF COLLECTIVE BARGAINING, *et al.*,	:	
	:	Case No. 15-MS-000257
Plaintiffs,	:	
	:	(JUDGE FRYE)
v.	:	
OHIO CIVIL SRVICE EMPLOYEES ASSOCIATION, LOCAL 11,	:	
Defendant.	:	

DECISION, and FINAL JUDGMENT

1) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT AS MOOT; 2) GRANTING PLAINTIFFS' MOTION TO VACATE AND CORRECT ARBITRATION AWARD; AND 3) DENYING OCSEA'S MOTION TO CONFIRM THE AWARD.

I. Introduction

The Office of Collective Bargaining is a party to an agreement with the Ohio Civil Service Employees Association ("OCSEA"). Plaintiffs challenge the validity of an arbitration award relative to Danielle Lazaro, an OCSEA member employed as a Therapeutic Program Worker by co-plaintiff Department of Developmental Disabilities at a center in Youngstown.

There are two unusual features to the case. First, the Arbitrator issued five separate documents entitled "Arbitrator's Opinion and Award." The first was issued on May 28, 2015 at 9:53 p.m. The next was issued at 9:23 a.m. the following morning May 29. The next arrived at 4:21 p.m. on May 30. A fourth iteration of the Award was issued on May 30 at 4:42 p.m. The last was issued at 10:11 a.m. on May 31, 2015. (This sequence is memorialized in the Affidavit of attorney Bower, filed June 10, 2015.) Plaintiffs challenge whether any Award other than the first has validity.

In each document, the Arbitrator provided that she "retains jurisdiction through July 31, 2015 to resolve any dispute in the implementation of this Award." However, the sequential versions of the Opinion and Award did not merely address implementation of it; they morphed in substance. Early versions of the Award found the employee committed "a first offense of [patient] abuse." "Abuse" has a serious meaning in this context. It justifies termination of employment. Apparently thinking that penalty too severe, later versions of the Award were changed to a factual finding of a "first offense of Rules E-3 and E-5" justifying only a 30-day suspension, rather than termination.[1] This is the outcome ordered in the final Award, at p. 27.

A well-developed line of legal authority refuses to recognize changes in the substance of an arbitration award once it is issued. This rule is intended to guard against improper *ex parte* communication or other unfair practice that may trigger multiple rulings. This is the law in Ohio. Hence, the court is required to disregard the sequential Opinions and Awards, and decide this case in reliance on the initial one.

The other significant issue is the Arbitrator's decision to vacate termination of the DODD employee, and instead impose only a 30-day work suspension. Plaintiffs argue this departs from the essence of the collective bargaining agreement, because patient "abuse" is specifically addressed as a ground for termination that cannot be revisited in arbitration. That contract clause was, in fact, applied to comparable facts several decades ago by the Ohio Supreme Court. (Perhaps learning of this precedent caused the Arbitrator to make the material changes to her initial Award, although that can only be inferred.)

Pursuant to R.C 2711.10 - 2711.11 plaintiffs applied to vacate the arbitrator's decision following which the OCSEA filed an answer and counter-claim seeking confirmation. In September 2015, plaintiffs filed a "Motion for summary judgment and opposition to defendant's motion to confirm arbitration award." Defendant filed a response to which plaintiffs replied in October 2015.

Regrettably, at that point this case fell in to a proverbial "black hole" in the docket. At the outset the case was classified as a "miscellaneous" case. Such cases trigger neither a case schedule for counsel nor periodic review by the court or its staff.

[1] Each "Arbitrator's Opinion and Award" is set out in a single document, but the court regards the "Award" portion as equivalent to a court judgment, and the controlling description of the Arbitrator's decision.

We have no record that counsel ever contacted the court to inquire thereafter about the delay. Recent communication from the court suggests, however, that the parties still seek a decision years later.

II. Essential Factual Background.

Danielle Lazaro was a long-time state employee, beginning in 1999. Her position was as a "Therapeutic Program Worker." She provided direct care to developmentally disabled residents.

On July 30, 2013 a hidden Ohio State Highway Patrol camera recorded an incident at the Youngstown Developmental Center (a DODD facility), in which Ms. Lazaro was involved. (Pl. Motion filed 06/10/15, Video, Exhibit C-1 [filed under seal].) The camera was placed in the kitchen to determine who was taking food from a refrigerator, since large amounts of food had been disappearing. (Arbitrator's Opinion at p. 5, fn. 1.) Ms. Lazaro was found to have slapped the hand of a resident at that facility or to have knocked something out of the client's hand, along with other essentially simultaneous behavior including apparently doing nothing after a co-worker kicked the client. (Opinion pp. 5 – 6) The recording shows the resident "going through the refrigerator," a behavior which the facility sought to curb because this "client was known to take items, including food, which she would sometimes eat too quickly putting her at risk of choking." (Opinion p. 5.)

On December 31, 2013 DODD removed Ms. Lazaro from her position for violating DODD's Standard of Conduct in two respects. First, abuse of a client; second, failure to report a co-worker's abuse of a client. (Opinion, p. 21.)

Pursuant to the Collective Bargaining Agreement ["CBA"] the DODD and OCSEA, on behalf of Ms. Lazaro, arbitrated the matter. A hearing was held March 20, 2015 and post-hearing briefs were submitted the following month. Different definitions of the term "abuse" were argued by the respective parties before the Arbitrator In all versions of her Award, the Arbitrator ordered the same remedy of reinstating Ms. Lazaro's employment, with a 30-day suspension reflected on Ms. Lazaro's record.

In both initial versions of the Award, the Arbitrator explicitly held that Ms. Lazaro had committed an "offense of abuse." The final version on May 31 altered this language in a material way; it found a "first offense of Rules E-3 and E-5." Rule E-3

addresses an act towards an individual "that is insensitive and/or inattentive to the needs and/or rights of an individual entrusted to the custody of the Department or State." (May 31, 2015 Opinion and Award, page 24, footnote 6.) Rule E-5 addresses "poor decisions or using poor judgment in a situation that could jeopardize the safety or well being of an individual entrusted to the custody of the Department or State." (*Id.,* page 25, fn. 8.) Neither of the initial Opinions issued May 28 refer to either Rule E-3 or Rule E-5.

The cover e-mails from the Arbitrator to counsel are in the record acknowledging that there were different "versions" of the Opinion and Award. They say "corrections" were being made, and part way through the process promise that "[t]here will be no more corrections" and "apologies for the various versions." (May 30, 2015, at 4:42 p.m. email, filed June 10, 2015.)

III. Analysis.

It is the policy of the law to favor and encourage arbitration. Courts have recognized for decades that arbitration is a particularly appropriate tool for preserving peace in the work place. *Union Switch & Signal Div., American Standard, Inc. v. United Electrical, Radio & Machine Workers, Local 610,* 900 F.2d 608, 615 – 16 (3d Cir. 1990) and cases cited. Thus, arbitration awards are presumed valid. A reviewing court may not merely substitute its judgment for that of the arbitrator. *Bd. of Educ. of Findlay City Sch. Dist. v. Findlay Educ. Ass'n*, 49 Ohio St.3d 129, 551 N.E.2d 186 (1990), superseded by statute on other grounds as stated in *Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St.3d 658, 576 N.E.2d 745 (1991).

R.C. Chapter 2711 recognizes only narrow grounds for which a court may alter or refuse to confirm an award. However, if an arbitrator exceeds their mandate by acting contrary to express contractual provisions, a court is obligated to set-aside the award. An award is considered to depart from the essence of the contract where it conflicts with the express terms of the agreement containing the arbitration clause.[2] *Cedar Fair, L.P.*

[2] The court's analysis of the case is controlled by Chapter 2711 because this is a "special statutory proceeding." A motion for summary judgment is not ordinarily used in a proceeding to address an arbitration award. *See,* Civ. R. 1(C). Because other materials submitted by the parties allow the court to fully address the case, plaintiffs' motion for summary judgment (filed Sept. 4, 2015) is **DENIED** as moot.

v. Falfas, 140 Ohio St.3d 447, 2014-Ohio-3943, ¶ 7; *City of Mt. Healthy v. F.O.P.,* 1st Dist. No. C-170072, 2017-Ohio-9117, ¶ 7.

A. The Doctrine of Functus Officio.

Multiple, sequential Awards issued by the Arbitrator must be addressed first, so that it is clear which of them actually controls. The *functus officio* doctrine is argued by plaintiffs as requiring this court to disregard all but the first version of this Arbitrator's five sequential Awards.

The OCSEA contract with the State of Ohio (covering the period 3/1/2012 – 2/28/2015) was the agreement under which this arbitration was conducted. It does not address the issue of multiple Awards, be they "corrected" or otherwise. ¶ 25.03 on pages 104 – 105 sets out "Arbitration Procedures" and provides only that "[t]he decision and award of the arbitrator shall be final and binding on the parties." There is no clear limitation in the contract on an Arbitrator's ability to make substantive or typographical changes or "corrections" to an Award; but nothing of the sort is authorized, either.

However, as a matter of common law, both state and federal courts restrain an arbitrator's ability to change an award. Many federal court decisions apply a doctrine called *functus officio* which limits an arbitrator's ability to correct an award after it is issued. *E.g., Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000.) "'The policy which lies behind this doctrine is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.'" *Id.* at 976-977 (internal citations omitted). A few exceptions to this rule exist. Foremost is the exception allowing an arbitrator to "correct a mistake which is apparent on the face of his award." *Id.*

Ohio case law appears not to use the term *functus officio* in this context. Nevertheless, many Ohio decisions hold that once the submitted issues are decided an arbitrator's powers expire. Ohio decisions often cite *Citizens Bldg. of West Palm Beach v. Western Union Tel. Co.,* 120 F.2d 982 (5th Cir. 1941) for this rule. *E.g., Miller v. Gunckle,* 96 Ohio St.3d 359, 2002-Ohio-4932, ¶ 23; *Reserve Recycling, Inc. v. East Hoogewerff, Inc.,* 8th Dist. No. 84673, 2005-Ohio-512, ¶ 20; *F.O.P. v. City of Athens,* 4th Dist. No. 01CA18, 2001 Ohio App. LEXIS 5166, * 5 (Nov. 14, 2001); *Lockhart v.*

American Res. Ins. Co., 2 Ohio App.3d 99, 101, fn. 10 (8th Dist. 1981). Other Ohio decisions reach the same result. "'R.C. Chapter 2711 does not confer authority on an arbitration panel to reconsider its awards.' [citation omitted]." *State ex rel. Kralik v. Zwelling*, 101 Ohio St.3d 134, 2004-Ohio-301, ¶ 10 (*Per Curiam*). "Once the issues submitted to arbitration are decided and an award is made, the arbitrator's powers expire. *** R.C. Chapter 2711 does not confer authority on an arbitrator to reconsider its awards." *Reynoldsburg City Sch. Dist. Bd. Of Educ. v. Licking Heights Local Sch. Dist. Bd. Of Educ.,* 10th Dist. No. 08AP-415, 2008-Ohio-5969, 2008 Ohio App. LEXIS 5005, ¶¶ 22 and 27. *See also, City of Cleveland v. Laborers Int'l Union Local 1099,* 8th Dist. No. 105378, 2018-Ohio-161, ¶ 18 ("a second award on a single, circumscribed submission is a nullity.")

The retention of jurisdiction language included in the Awards at issue does not insulate this Arbitrator. Material changes in the Award were attempted. This Arbitrator did not merely "resolve any [remaining] dispute in the implementation of this Award" which is all that retention of jurisdiction language contemplated. Because the first version of the Award on May 28, 2015 was issued as a "final" one, under the law it could not be materially altered. Hence, the court confines its review to that document which unequivocally concluded there had been "abuse" of a patient, albeit of a minor nature.

B. The Implications of a Finding of "Abuse."

At the time in question the Ohio Administrative Code contained a definition of "abuse" specifically applicable to the Department of Developmental Disabilities, and its employees and care providers. OAC 5123:2-17-02(C)(15)(a)(vii). It defined "physical abuse" to include physical force that can reasonably be expected to result in physical harm as defined in the criminal law [R.C. 2901.01(A)] and specified that "[s]uch force may include, but is not limited to, hitting, ***slapping***, pushing, or throwing objects at individuals." *Id.* (emphasis added.) "Physical harm to persons" as defined in the criminal code includes "***any*** injury *** regardless of its gravity or duration." R.C. 2901.01(A)(3) (emphasis added.)

It is undisputed that the Arbitrator explicitly found that Ms. Lazaro slapped her client's hand, or was knocking food items out of the client's hand, and that the video shows her "doing so in a very aggressive manner." Further, the Arbitrator found "[s]uch

slapping or 'knocking' comes within DODD's definition of physical abuse." (May 28, 2015 Opinion, page 23.) She rejected OCSEA's argument that Lazaro's "quick movement" reflected "merely pointing at the food items in the client's hand." *Id.*

The Award is not inconsistent with the Opinion of the Arbitrator, and so the Award called what had occurred "abuse." Having found "abuse" the Arbitrator exceeded her authority under the Collective Bargaining Agreement by modifying the discipline that DODD imposed – termination – to a lesser discipline deemed more appropriate.

Plaintiffs specifically rely upon ¶ 24.01 in the CBA as restricting the authority of the Arbitrator to alter the sanction. It states "[i]n cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, ***the arbitrator does not have authority to modify the termination of an employee committing such abuse***." (CBA ¶ 24.01, emphasis added.) Plaintiffs also rely upon *Ohio Office of Collective Bargaining v. OCSEA Local 11,* 59 Ohio St.3d 177 (1991) as having addressed this identical issue. That decision held that "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 ***." (Syllabus).

Defendant responds that the Arbitrator in this case was highly experienced, and merely modified her analysis related to abuse "to explain and clarify the ambiguity in her reasoning for the award." (Memorandum filed Sept. 21, 2015, p. 3.) Unfortunately, that conclusion cannot be squared with her actual Award as first released to the parties.

IV. Conclusion.

R.C. 2711.09 provides in pertinent part:

> At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code. *** .

In addition, R.C. 2711.10(D) provides that when an arbitrator has "exceeded their powers, or so imperfectly executed them" that a court of common pleas shall make an

order vacating the award. This was the analysis applied in *Ohio Office of Collective Bargaining, supra,* at 179.

FINAL JUDGMENT

Plaintiffs' Motion for Summary Judgement is **DENIED** as moot, but plaintiffs' motion to vacate the arbitration award is **GRANTED.**

Defendant's Motion to Confirm the Arbitration Award is **DENIED.**

Pursuant to R. C. 2711.10(D) and 2711.11(B), the court hereby **modifies and corrects** the Award insofar as the Arbitrator ordered a remedy that is not available for an "abuse" case under the Collective Bargaining Agreement. The Award is corrected to find that "the State did have just cause to terminate the Grievant's employment" and all language inconsistent with that in the Award is deleted.

Court costs are taxed against Defendant OCSEA, Local 11.

*** This is a final appealable Judgment. ***

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date:	05-24-2018
Case Title:	OHIO STATE OFFICE COLLECTIVE BARGAINING ET AL -VS- OHIO STATE CIVIL SERVICE EMPLOYEES ASSOC
Case Number:	15MS000257
Type:	DECISION/ENTRY

It Is So Ordered.

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 15MS000257

Case Style: OHIO STATE OFFICE COLLECTIVE BARGAINING ET AL -VS- OHIO STATE CIVIL SERVICE EMPLOYEES ASSOC

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 15MS0002572015-09-0499980000
   Document Title: 09-04-2015-MOTION FOR SUMMARY JUDGMENT - PLAINTIFF: OHIO STATE OFFICE COLLECTIVE BARGAINING
   Disposition: MOTION IS MOOT