[Cite as *Reynoldsburg City School Dist. Bd. of Edn. v. Licking Hts. Local School Dist. Bd. of Edn.* , 2011-Ohio-5063.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Reynoldsburg City School District Board of Education,	:	
	:	
Plaintiff-Appellant,	:	No. 11AP-173
v.		(C.P.C. No. 10CVH10-15429)
	:	
Licking Heights Local School District Board of Education,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on September 30, 2011

Pepple & Waggoner, Ltd., Christian M. Williams, and *Mark J. Jackson*, for appellant.

Bricker & Eckler, LLP, *James P. Burnes*, and *Jennifer A. Flint*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Reynoldsburg City School District Board of Education ("Reynoldsburg"), plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court denied its motion to vacate arbitration award.

{¶2} Reynoldsburg and Licking Heights Local School District Board of Education ("Licking Heights"), defendant-appellee, entered into a June 18, 1991 territorial

agreement ("agreement"), pursuant to which the parties agreed to transfer certain territories between their districts and share tax proceeds from these territories. Pursuant to the agreement, the parties also agreed to the following binding dispute resolution process:

> 9.4. Issues which the Boards of Education or their designated representatives are unable to resolve between themselves concerning administration of the tax revenue sharing requirements of this Agreement shall be referred at the request of either Board of Education for determination by a school finance expert agreed upon by the Boards of Education. The decision of such expert shall be in writing and shall be final and binding. The cost of such expert's services shall be divided equally between the Boards of Education. If the Boards of Education are unable to agree upon a school finance expert, the selection shall be made by the Sate Superintendent of Public Instruction or his successor.

{¶3} On August 13, 2008, Licking Heights requested that the State Superintendent of Public Instruction ("state superintendent") appoint a hearing officer, pursuant to paragraph 9.4 of the agreement, to resolve a dispute between the parties regarding the split of certain tax proceeds. On October 10, 2008, with the agreement of both parties, the state superintendent appointed Robert Barrow as the hearing officer. After it became apparent that the parties disagreed over the method of calculating the "charge-off" portion of the calculation, on March 30, 2009, the hearing officer asked whether the parties desired to participate in a meeting between their respective chief financial officers or have charge-off "simulations" performed by the Ohio Department of Education ("ODE"). Although the parties initially agreed to meet with each other to discuss the disagreement, Licking Heights subsequently requested the charge-off simulations be performed by ODE. On April 22, 2009, the hearing officer asked

Reynoldsburg to agree to allow ODE to perform the simulations. Reynoldsburg objected to the use of ODE, claiming the agreement did not provide for ODE's participation in the charge-off calculation.

{¶4} On September 29, 2009, the hearing officer issued an order requesting ODE to perform the charge-off simulations, and indicating the parties would have the opportunity to submit their agreement or disagreement with ODE's simulations. On December 3, 2009, ODE submitted its simulations to the hearing officer and parties. ODE modified its simulations on December 18, 2009, and February 9, 2010. Licking Heights submitted questions to the hearing officer regarding ODE's simulations, and ODE presented responses to the hearing officer and the parties.

{¶5} On April 14, 2010, based upon ODE's simulations and other calculations performed by the hearing officer, Licking Heights requested that the hearing officer order Reynoldsburg to pay Licking Heights $1,108,439, and submitted a proposed order to that effect. On June 1, 2010, Licking Heights again requested that the hearing officer order Reynoldsburg to pay Licking Heights $1,108,439. On June 13, 2010, Reynoldsburg responded to Licking Heights' request, pointing out its continuing objection to the use of ODE to perform the charge-off calculation and pointing out several errors made by ODE and Licking Heights in performing the calculations.

{¶6} In late June or early July 2010, the superintendent of Licking Heights, Thomas Tucker, requested a lunch meeting with the superintendent of Reynoldsburg, Stephen Dackin, and the two met on July 20, 2010. During the meeting, Tucker indicated that Reynoldsburg owed Licking Heights $1.1 million and asked Dackin if he had received

the "letter" from the hearing officer "about the money," to which Dackin replied he had not. Tucker promised to send Dackin a copy of the letter upon returning to his office.

{¶7} On July 21, 2010, the hearing officer issued an order concluding Reynoldsburg owed Licking Heights $1,108,439.

{¶8} On July 23, 2010, Dackin received an e-mail from Tucker's secretary attaching a copy of the "letter" from the hearing officer that Tucker had referenced at the July 20, 2010 lunch meeting. The attached "letter" was the hearing officer's July 21, 2010 order.

{¶9} On July 30, 2010, Reynoldsburg requested that the hearing officer explain various parts of his decision and requested that the hearing officer disclose any ex parte communications he may have had with Licking Heights. The hearing officer did not respond to the requests.

{¶10} On October 21, 2010, Reynoldsburg filed a motion to vacate arbitration award in the Franklin County Court of Common Pleas. On January 27, 2011, the trial court issued judgment, in which it denied Reynoldsburg's motion to vacate arbitration award. Reynoldsburg appeals the judgment of the trial court, asserting the following assignments of error:

> 1. The Franklin County Court of Common Pleas ("Trial Court") erred to the prejudice of Plaintiff-Appellant Reynoldsburg City School District Board of Education ("Appellant") and in violation of due process in ruling on the Motion to Vacate Arbitration Award without affording Appellant the opportunity to conduct and complete discovery by the discovery cutoff date of August 11, 2011, as provided under the Trial Court's Case Scheduling Order of October 21, 2010.
>
> 2. The Trial Court erred to the prejudice of Appellant in denying the Motion to Vacate Arbitration Award filed by

> Plaintiff-Appellant pursuant to O.R.C. §2711.10 and §2711.13.

{¶11} Reynoldsburg argues in its first assignment of error that the trial court erred when it denied its motion to vacate arbitration award without affording it the opportunity to conduct discovery by the discovery cutoff date of August 11, 2011, as provided under the trial court's case scheduling order of October 21, 2010. A trial court maintains the discretion to manage the discovery process. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55. Accordingly, a trial court's decision regarding the regulation of discovery will not be reversed on appeal absent an abuse of discretion. Id. at 57. A trial court abuses its discretion only if its decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Reynoldsburg maintains that the trial court abused its discretion by failing to give it an opportunity to conduct discovery. Reynoldsburg asserts that the trial court issued a scheduling order at the beginning of the case with a discovery deadline of August 11, 2011, but the trial court issued its decision without notice on January 27, 2011, before any discovery could be conducted. Reynoldsburg also points to Civ.R. 26(B)(1), which entitles parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Reynoldsburg also claims it articulated specific circumstances warranting discovery, specifically that it appeared that the superintendent of Licking Heights knew the contents of and received the hearing officer's July 21, 2010 order concluding Reynoldsburg owed Licking Heights $1,108,439 prior to the issuance of such decision.

{¶13} Licking Heights counters that the trial court's scheduling order is automatically generated by the clerk of courts after the filing of any civil action and is not applicable to a motion to vacate arbitration, as it is a motion and not an original action filed via a complaint. Licking Heights points to R.C. 2711.05, which provides that application made to the common pleas courts will be made and heard in the manner provided by law for the making and hearing of "motions," and R.C. 2711.13, which provides that any party may file a "motion" to vacate after an arbitration award is made. Further, Licking Heights asserts that Loc.R. 21 indicates that a motion is deemed submitted to the court on the 28th day after the motion is filed, and the trial court issued its decision over three months after the motion to vacate was filed. Licking Heights also contends that the broad discovery principles relied upon by Reynoldsburg are applicable in regular civil cases but not in R.C. 2711 proceedings, which are special statutory proceedings. In addition, Licking Heights counters that, although Reynoldsburg claims it identified a "credible object for discovery," the trial court apparently disagreed, and this decision was within its discretion.

{¶14} With regard to Reynoldsburg's reliance upon the clerk's original case schedule, appellant is correct that the schedule indicated the discovery cutoff was August 11, 2011. As indicated above, Licking Heights contends that the clerk's schedule is automatically created by the clerk's office upon the filing of every civil action, and is applicable to the typical case commencing with a complaint, but is inapplicable to a case commencing with a motion pursuant to R.C. 2711. Thus, the issue is whether the trial court was required to abide by the discovery cutoff date provided in the case schedule.

{¶15} Local Rule 39 provides for the creation of the case schedule. Loc.R. 39.01 provides, in pertinent part, "[w]hen an initial pleading is filed and a new case file is opened, the Clerk of Court shall prepare and file a paper entitled 'Case Schedule' and shall provide one copy to the plaintiff or the plaintiff's agent." Loc.R. 39.05 establishes the time limits in the case schedule, including the discovery cutoff. However, R.C. 2711.05 provides that "[a]ny application to the court of common pleas under sections 2711.01 to 2711.15, inclusive, of the Revised Code, shall be made and heard in the manner provided by law for the making and hearing of motions." Therefore, the applicable rules in both the local rules and Ohio Rules of Civil Procedure are those pertaining to motions rather than those pertaining to the commencement of an action. See *Mahan v. Columbus Midway, Inc.* (Apr. 13, 1982), 10th Dist. No. 81AP-387 (Whiteside, J., dissenting) (in R.C. 2711 actions, the applicable Civil Rule provisions are those pertaining to motions, rather than those pertaining to commencement of an action); see also *MBNA Am. Bank, N.A. v. Anthony*, 5th Dist. No. 05AP090059, 2006-Ohio-2032, ¶13 (the applicable Civil Rule provisions in R.C. 2711 actions are those pertaining to motions, rather than those pertaining to commencement of an action). Because Loc.R. 39.01 applies to initial pleadings filed in order to open a new case, it pertains to commencement of an action. Accordingly, the time limits in the case schedule do not apply to appellant's motion filed pursuant to R.C. 2711.

{¶16} We concluded likewise in *Geiger v. Morgan Stanley DW, Inc.*, 10th Dist. No. 09AP-608, 2010-Ohio-2850. In *Geiger*, Geiger filed a motion to modify an arbitration award rendered in his favor pursuant to R.C. 2711.11. The trial court denied the motion. On appeal, Geiger asserted that the trial court, after docketing his motion to modify the

arbitration award, generated a typical case schedule for the matter, including the date for discovery cutoff, but the trial court did not comply with its own case schedule and denied him the right to make discovery in the case. We first explained "[a] motion filed under R.C. 2711.11 occupies a hybrid procedural position, only vaguely defined by the statutes that provide for it. In practice, it is not a full complaint initiating a civil matter, even though it may result in an appealable final order and judgment." Id. at ¶19. We concluded that the trial court was not required to follow the case schedule produced by the clerk of courts upon the filing of a motion pursuant to R.C. 2711 because "[t]here is no authority for the proposition that a trial court must apply any greater procedural enlargement to the parties than would be accorded to any other motion before the trial court." Id. Therefore, consistent with *Geiger*, the trial court, in the present case, was not required to follow the automatically generated case schedule.

{¶17} However, having found the case schedule providing for discovery did not apply in *Geiger*, we then went on to address whether Geiger should have been permitted to conduct discovery based upon "the basic criteria for due process accorded to the litigants." Id. at ¶19. We concluded that "[w]hile Geiger claims that he was entitled to discovery, he points to no credible object of discovery that would have assisted the court of common pleas in ascertaining the merits of his motion." Id. at ¶21. Here, in the text portion of its assignment of error, Reynoldsburg also argues that it pointed to a "credible object of discovery," that being evidence of alleged ex parte communications between the hearing officer and Licking Heights. However, the only ground argued in Reynoldsburg's actual assignment of error is that the trial court should have allowed it to conduct discovery consistent with the cutoff date as provided in the case schedule. This court can

sustain or overrule only assignments of error and not mere arguments. See App.R. 12(A)(1)(b) and 16; *State v. White*, 10th Dist. No. 05AP-1178, 2006-Ohio-4226, ¶34.

{¶18} Nevertheless, we find this argument without merit. The trial court apparently disagreed that Reynoldsburg could point to any credible object of discovery. Reynoldsburg indicated that it wished to conduct discovery to depose the hearing officer and Tucker, submit interrogatories to them, and request communication records between the hearing officer and Licking Heights school officials and representatives, to determine if there were any ex parte conversations and whether Tucker received the hearing officer's decision before Reynoldsburg officials. The trial court found that the evidence contending that ex parte communications took place lacked merit. The court found that, besides Dackin's beliefs and allegations, the evidence indicates, "at best," that Tucker's reference to the "letter about the money" was the order itself that Tucker received one day before it was actually filed by the hearing officer. Although Reynoldsburg asserts that this situation, if true, would still be improper, Reynoldsburg nevertheless fails to present any evidence that an ex parte communication occurred that affected the actual merits of the hearing officer's decision. For these reasons, we find the trial court did not err when it ruled on the motion to vacate prior to the discovery cutoff date indicated on the case schedule. Reynoldsburg's first assignment of error is overruled.

{¶19} Reynoldsburg argues in its second assignment of error that the trial court erred when it denied the motion to vacate arbitration award. "[I]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts." *Lake Cty. Bd. of Mental Retardation Developmental Disabilities v. Professional Assn. for*

the Teaching of the Mentally Retarded (1994), 71 Ohio St.3d 15, 17. Arbitration awards are presumed valid, and a reviewing court may not merely substitute its judgment for that of the arbitrator. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, reversed on other grounds, *Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St.3d 658.

{¶20} R.C. 2711.10 provides, in pertinent part:

> 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:
>
> (A) The award was procured by corruption, fraud, or undue means.
>
> (B) There was evident partiality or corruption on the part of the arbitrators, or any of them.
>
> (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.
>
> (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.

{¶21} In the present case, Reynoldsburg's motion to vacate was based upon the following two grounds: (1) the hearing officer exceeded his powers under the agreement when he appointed and delegated his powers to ODE; and (2) the arbitration award was procured by corruption, fraud, and there was evident partiality and misbehavior by the hearing officer. With regard to Reynoldsburg's contention that the hearing officer exceeded his powers under the agreement when he appointed and delegated his powers to ODE, Reynoldsburg claims the hearing officer essentially rewrote the parties'

agreement and unilaterally permitted ODE to serve as the ultimate arbiter of the dispute, rather than perform that function as he was appointed to do. Reynoldsburg asserts that the agreement does not provide that the hearing officer may determine the matter with ODE's assistance.

{¶22} 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. *Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 1998-Ohio-629, syllabus. On appellate review, this court is confined to an evaluation of the order issued by the trial court pursuant to R.C. 2711, and the substantive merits of the award are not reviewable absent evidence of material mistake or extensive impropriety. *Warren Edn. Assn. v. Warren City Bd. of Edn.* (1985), 18 Ohio St.3d 170, 173.

{¶23} We agree with the trial court that the hearing officer did not exceed his powers here. Section 9.4 of the agreement, as provided above, in no way prohibits the hearing officer from seeking advice or input from other sources as to the pertinent issues. Section 9.4 merely indicates that the hearing officer must make a determination and issue a final and binding decision in writing. The hearing officer did so in the present case. We disagree with Reynoldsburg's contention the hearing officer "abrogated" his duty and "delegated" his arbitral function by requesting that ODE perform charge-off simulations. The hearing officer sought input from ODE regarding the calculations, permitted the parties to submit their objections to the calculations, and then issued his own independent decision, in which he presented his own conclusions. Although the hearing officer used

ODE's calculations in arriving at his conclusions, the hearing officer remained the ultimate arbiter of the parties' dispute, performed the function he was appointed to do, and could have rejected ODE's calculations if he disagreed. The hearing officer also provided ODE various figures of his own and the formula to be used in performing the simulations. The agreement between the parties simply did not prohibit the hearing officer's actions herein, and we see no apparent, latent or implied conflict between the agreement and his actions. The agreement called for a "determination by a school finance expert," and the hearing officer, in fact, issued his own determination. If the parties had otherwise wished to limit the authority or procedures of the hearing officer, they could have done so explicitly. Therefore, we find the hearing officer did not exceed his authority in the present case.

{¶24} Reynoldsburg also contends the hearing officer erred when he refused to hold a hearing on the dispute. In support, Reynoldsburg cites several definitions of "arbitration" from case law and dictionaries, which include the term "hearing" in their definitions. We find these generic definitions of little assistance in determining whether a hearing was required in this instance. As the trial court found, the agreement did not indicate the hearing officer was required to hold a hearing on any matters. Furthermore, although Reynoldsburg argues that the hearing officer had held hearings on issues in prior disputes between the parties, this fact does not in any manner affect whether there was a requirement to hold a hearing in the present matter.

{¶25} Reynoldsburg also argues that the arbitration order was the result of evident partiality by the hearing officer and was a result of misconduct and procured by undue means. Arbitration awards are entitled to a presumption of regularity and formality, and

implicit in this presumption is that the arbitrator acted with integrity. See, e.g., *Campbell v. Automatic Die & Prods. Co.* (1954), 162 Ohio St. 321, 329; *Corrigan v. Rockefeller* (1902), 67 Ohio St. 354, 367. To overcome the presumption of regularity because of an alleged bias on the part of the arbitrator, the appellant must demonstrate "evident partiality." See R.C. 2711.10(B); *Gerl Constr. Co. v. Medina Cty. Bd. of Commrs.* (1985), 24 Ohio App.3d 59, 63. The mere imaginative appearance or suspicion of partiality does not sufficiently establish "evident partiality," within the meaning of R.C. 2711.10(B). *Furtado v. Hearthstone Condo. Assn.* (May 19, 1987), 10th Dist. No. 86AP-1003. "[E]vident partiality" must be "more than a mere suspicion or appearance of partiality." Id., citing *Merit Ins. Co. v. Leatherby Ins. Co.* (C.A.7, 1983), 714 F.2d 673, 681-82; *Internatl. Produce, Inc. v. A/S Rosshavet* (C.A.2, 1981), 638 F.2d 548, 551. The appellant must present some evidence of actual bias or evidence of circumstantial fact which would give rise to a question of bias. *Beck Suppliers, Inc. v. Dean Witter Reynolds, Inc.* (1988), 53 Ohio App.3d 98, paragraph four of the syllabus.

{¶26} In the present case, Reynoldsburg was concerned that the arbitration award resulted from ex parte communications between the hearing officer and Licking Heights, based upon the previously described communications of Licking Heights' superintendent to the Reynoldsburg superintendent during their lunch meeting on July 20, 2010. The trial court found that, at best, the "letter about the money" referenced by Licking Heights' superintendent was the actual order. Reynoldsburg counters that, even if the referenced letter was, in fact, the actual order, Licking Heights still had advanced notice of the order before it was issued. Reynoldsburg argues this demonstrates bias. Reynoldsburg also points out that partiality was evident based upon the hearing officer's insistence upon

using ODE over the objection of Reynoldsburg and pursuant to the wishes of Licking Heights; the hearing officer's refusal to schedule a meeting with the parties as initially agreed upon by the parties in a joint letter on April 15, 2009 and as requested by Reynoldsburg; the hearing officer's verbatim use of Licking Heights' proposed order in rendering his decision; and the hearing officer's refusal to provide any analysis or explanation for his findings in the order.

{¶27} However, Reynoldsburg fails to present any evidence of partiality on behalf of the hearing officer. What Reynoldsburg does present is the question of whether Licking Heights somehow received a copy of the hearing officer's decision at least one day prior to the issuance thereof. Even if Licking Heights did, in fact, receive an early copy of the hearing officer's decision, this does not demonstrate evident partiality in the hearing officer's determination of the merits of the case. Any claim to partiality and bias affecting the outcome of the case is based upon pure speculation.

{¶28} Furthermore, Reynoldsburg's other alleged examples of partiality do not show such. That the hearing officer utilized ODE over the objection of Reynoldsburg and pursuant to the wishes of Licking Heights, does not show bias, as we have found that the hearing officer was within his powers to do so. Also, the hearing officer could have properly used the exact language of Licking Heights' proposed order without any presumption of partiality. Further, despite Reynoldsburg's protestations, the hearing officer was not required to hold a meeting even though the parties agreed to such meeting in an April 15, 2009 letter, particularly when Licking Heights submitted a letter on April 16, 2009 informing the hearing officer that the parties were still in disagreement over the charge-off and the involvement of ODE. We also find no provision in the agreement

that would require such a meeting after the hearing officer has been appointed and the matter submitted to arbitration. In addition, the hearing officer was not required to provide any analysis or explanation for his findings in the order under the terms of the agreement or under R.C. 2911. See *Mike McGarry & Sons, Inc. v. Marous Bros. Constr., Inc.*, 11th Dist. No. 2009-L-056, 2010-Ohio-823, ¶60 (finding Ohio law does not require an arbitrator to issue findings of fact or conclusions of law at all). Therefore, finding no evidence of partiality or abuse of authority on the part of the hearing officer, we find the trial court did not err when it denied Reynoldsburg's motion to vacate arbitration award. Reynoldsburg's second assignment of error is overruled.

{¶29} Accordingly, Reynoldsburg's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.

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