[Cite as *Madison Local School Dist. Bd. of Edn v. OAPSE/AFSCME Local 238*, 2015-Ohio-2896.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2014-L-071**
- vs -	:	
OAPSE/AFSCME LOCAL 238, et al.,	:	
Defendants-Appellees.		

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CV 000501.

Judgment: Affirmed.

David Kane Smith and *David S. Hirt*, Britton, Smith, Peters & Kalail Co., L.P.A., 3 Summit Park Drive, Suite 400, Cleveland, OH 44131-2582 (For Plaintiff-Appellant).

Matthew M. Banal, 6805 Oak Creek Drive, Columbus, OH 43229 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Madison Local School District Board of Education ("Board"), appeals the trial court's confirmation of an arbitral award to appellees, Ohio Association of Public School Employees/AFSCME, Local 4, AFL-CIO and its Local 238 ("OAPSE"), Sylvia Hendricks, Dawn Jones, and Margaret Lillis. The arbitrator found that when the Board terminated Hendricks, Jones, and Lillis, due to the Board's outsourcing of their jobs, Hendricks, Jones, and Lillis were entitled to continue their employment with the Board at their previous positions. The Board also asserts the trial court erred in

confirming the award of back pay to Lillis and Hendricks because Lillis is receiving disability payments for retirement and Hendricks does not hold the necessary permit to return to her position. For the following reasons, we affirm.

{¶2} The arbitrator made the following findings of facts in its opinion:

{¶3} "At a regular meeting of the School District Board on June 17, 2008, the Board adopted a resolution abolishing transportation staff positions; and also resolved that the various employees holding those positions were separated from employment on July 1, 2008. On June 19, 2008, Treasurer Edward Szabo issued letters to the Grievants as well as other employees in transportation staff position, including the transportation supervisor, mechanics, bus drivers and bus assistants, that on June 17, the Board approved a resolution to contract with Community Bus Service, 'CBS', a private agency or company to provide school transportation services.

{¶4} "In his June 19, 2008 letter, Szabo advised the Grievants that their position with the Board will terminate as of June 30, 2008. Szabo also stated:

{¶5} "'Under §3319.0810, you have the opportunity to fill any vacancy within Madison Local School District for which you are qualified. Any vacant position will be filled according to the procedures established in Article 7 of the Collective Bargaining Agreement in force at the time of termination. In considering applicants for vacant positions the Board will award such position to the most senior applicant provided he or she meets the requisite qualifications. Should the Board reinstate your position before June 17, 2009 you have the right to fill that position. Further, you have the right under R.C. §119.12 to appeal the Board's decision to terminate your position, not to hire you for another position, or not to rehire you to your former positions should it be reinstated within one year of termination.'

{¶6} "In July, 2008 the Union filed with the State Employment Relations Board, 'SERB', various unfair labor practice charges against the Board involving the following: the decision to privatize bus transportation services in June, the termination of the various transportation employees, the refusal of the Board to accept or process grievances which were filed in July, and the refusal of the Board to engage in good faith bargaining. After a complaint was issued by SERB, the charges were dismissed. Further litigation followed, including various appeals brought by the Union but without success.

{¶7} "In July, 2008, grievances were filed by the Union with the Board which in part alleged that by subcontracting transportation services and terminating the transportation employees, the Board violated the subcontracting clause of the Collective Bargaining Agreement. On January 8, 2011, Arbitrator Robert Vana issued his award which in part, stated:

{¶8} "'The arbitrator finds that the School District termination of the Bus Drivers and Bus Assistants was not a violation of the CBA, and the School District's subcontracting of the Bus Driver's work and the Bus Assistant's work to CBS was not a violation of the CBA. Accordingly, the grievances as they relate to the Bus Drivers and the Bus Assistants are denied in their entirety.'

{¶9} "These circumstances during the past four (4) years precede the current dispute between the parties.

"I

"**THE GRIEVANTS**

{¶10} "This brings me to consider the grievances in this case. Each of the Grievants claim that as a result of the Board's abolishment of the bus transportation position and their termination, the Board violated the Agreement, by not granting them the right of displacement.

"a. DAWN JONES

{¶11} "It was stipulated by the parties that Dawn Jones was hired in October 2000 by the Board in the cafeteria to perform 'kitchen help'. She had 1.83 years of service in the classification of 'Cafeteria Personnel'. Of the 40 employees in the seniority list, dated June, 2008, Grievant Jones was number '33'.

{¶12} "Grievant Jones 'moved' into the classification of 'Bus Driver Personnel' in August, 2002. She had 5.92 years of services as a Bus Driver. On the June 30, 2008 seniority list, Grievant Jones was ranked '16' of 32 employees in the Bus Driver Personnel classification.

{¶13} "After receiving Szabo's June 19, 2008 letter of termination which referred to filling vacancies, Grievant Jones was aware that a janitorial position was open, for which she applied. She did not receive a response from the Board. Grievant Jones had not previously worked as a Janitor for the Board. She was aware that other positions were 'open'.

{¶14} "In her grievance, Grievant Jones said she wanted to return 'to the school system [and] have the opportunity to go back and continue to work'. She added that she wanted to bump into 'any position [she] could get, whatever was open'.

{¶15} "By July 8, 2008 when her grievance was filed with the Board, Grievant Jones was aware that she would not be allowed to return to her previous classification

in the Cafeteria Department. Sometime during the summer of 2008, Grievant Jones received unemployment benefits which continued 'maybe a year [or] two'.

{¶16} "After her unemployment benefits ended, Grievant Jones was employed by K-Mart. She applied for a position with CBS and was interviewed. CBS extended an offer to her as a Bus Driver but she declined the offer. She indicated she was hoping to return to the cafeteria where she would continue to be a public employee and receive the benefits under the Collective Bargaining Agreement; and she would have maintained her 'SERS' or retirement level and pension contributions.

"**b. MARGARET (PEG) LILLIS**

{¶17} "In June, 2008 Grievant Lillis was a Bus Aid. Her duties consisted of riding on the school bus and seeing to it that Pre-K and autistic children were under control and safe. As a Bus Aid in the Bus Assistant classification, Grievant Lillis was ranked second among the four (4) Bus Assistants, with 3.92 years of service. She had been hired in August, 2004.

{¶18} "Prior to filling the Bus Assistant Classification, Grievant Lillis worked in the Custodial Personnel classification, where she ranked '16' of '23' employees. She had 8.08 years of service in the Custodial classification. She had been hired in July, 1996.

{¶19} "After receiving Szabo's June 19, 2008 letter, Grievant Lillis wanted to bump back into the Custodial job. She sent a registered letter to the then Superintendent James Herrholtz and to Matthew Chojnacki, the then Assistant Superintendent requesting 'to bump back'. She talked to Herrholtz, by telephone and he told her that there were no bumping rights and nothing was available.

{¶20} Grievant Lillis received unemployment benefits from 2008 to February, 2010. She applied for a Bus Aide position with CBS. After her interview, CBS asked if she was willing to learn how to drive a bus; and 'they also talked to her' about filling a Bus Assistant position – they wanted her to serve in both positions. No offer was forthcoming from CBS.

{¶21} "Grievant Lillis said that in February, 2010 when her unemployment compensation benefits stopped, she applied for disability retirement. At first, her application was rejected and then it was approved in June, 2010 when she re-applied for disability. At the conclusion of her testimony, she said that she no longer wanted the job as Custodian.

"**c. SYLVIA HENDRICKS**

{¶22} "When Szabo issued her termination letter on June 19, 2008 Grievant Hendricks was 'in transportation with special need'. She rode on the school bus and assisted children with disabilities. She was number '3' of '4' Bus Assistants on the seniority list on June 30, 2008. Her entry into the classification of Bus Assistant was October, 2004; and she had 3.75 years of service in the position.

{¶23} "Prior to becoming a Bus Assistant in October 2004, she served in the classification of Education Assistant where she was ranked '22' of 31 employees. Her classification hire date as an Education Assistant was August, 2002; she served 2.17 years in the position.

{¶24} "In order to fill the position of an Education Assistant, Grievant Hendricks acknowledged that a permit or license is required from the Ohio Department of Education. The Grievant had two (2) annual certifications from the Department of

Education, beginning July 1, 2003 and July 1, 2004. She served as a Bus Assistant from October 2004 until June 30, 2008.

{¶25} "Upon receiving Szabo's June 19 termination letter, she applied for two (2) positions – as an Educational Aide at North Madison and as a Monitor at the High School. Grievant Hendricks said that in submitting the application for the positions, she just wanted to remain with the School District. She did not receive any response from the Board. Grievant Hendricks said that since she was not permitted to bump back into a previous position, she lost her 'SERS seniority and my dignity and love of the job'.

{¶26} "After not receiving a reply from her applications to fill either of the two vacancies, Grievant Hendricks filed for unemployment benefits. While on unemployment benefits, she submitted a job application for Bus Assistant with CBS; after her interview, she heard nothing from CBS.

{¶27} "After receiving unemployment compensation for five (5) months, she was employed as a Bus Driver for Laketran, a public rapid transit system of Lake County. After eight months, Grievant Hendricks was laid off; she received a 'couple more months' of unemployment compensation and then applied and obtained a job as a Van Driver for Lake Erie College. After about one and one-half years as a Van Driver, she was unemployed due to illness. The Grievant acknowledged that her grievance is not about filling the vacancies which were available after June 30, 2008; rather, it was filed because she was not permitted to bump into her old position as an Educational Assistant."

{¶28} As its first assignment, the Board asserts:

{¶29} "The trial court committed prejudicial error when it denied the Board's Motion to Vacate Arbitration Award, and granted OAPSE's Motion to Confirm the

Award, because the arbitrator exceeded his powers by failing to draw the essence of the Award and Opinion from the collective bargaining agreement."

{¶30} Within this assignment, the Board raises three issues. First, the Board asserts that the arbitrator failed to incorporate R.C. 3319.0810 into its interpretation of the CBA, and that had the arbitrator done so, he would have found the CBA did not provide Hendricks, Jones, and Lillis a right to their previous jobs. The Board also argues that the CBA itself does not provide Hendricks, Jones, and Lillis the right to their previous jobs. The Board finally argues that Hendricks, Jones, and Lillis were not terminated for "economic reasons," and therefore, their right to their previous jobs, should it exist, was not triggered.

{¶31} The standard of appellate review of an arbitrator's award has been set forth by this court in *Eastlake v. Fraternal Order of Police/Ohio Labor Council*, 11th Dist. Lake No. 2010-L-057, 2011-Ohio-2201:

{¶32} "'We are mindful that 'Ohio public policy encourages the resolution of disputes through arbitration.' *Dayton v. Internatl. Assn. of Firefighters, Local No. 136*, 2d Dist. No. 21681, 2007-Ohio-1337, at ¶9. 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.)

{¶33} "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:

{¶34} "'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:

{¶35} "'* * *'

{¶36} "'(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.'

{¶37} "'[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.

{¶38} "* * *

{¶39} "'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*.' (Emphasis sic.) * * * Accordingly, it is our duty to determine whether the arbitrator's award was reached in a rational manner from the collective bargaining agreement.'

{¶40} "* * *

{¶41} "'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. Emp. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 syllabus (1991)]." *Id*. at ¶24-33.

{¶42} The Board first argues that former R.C. 3319.0810 (2008) governed the termination of school district employees in transportation services in a school district that was outsourcing its transportation services. It claims that because former R.C. 3319.0810 was silent on the issue as to whether a former employee whose job was outsourced would be entitled to secure other available jobs in the school district, this silence indicates that the legislature did not desire this result and did not intend the parties to create such a right. Thus, as we understand it, the Board argues former R.C. 3319.0810 operates like the dormant Commerce Clause; i.e., former the statute's silence on the issue of terminated employee's further employment with a school district demonstrates the legislative intent to prevent parties from creating such a right. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1996) (recalling that the Commerce Clause restricts the states' power to regulate interstate commerce even when Congress has not passed legislation on a particular subject matter). The Board further claims Article 3(C) of the CBA, the basis on which Hendricks, Jones, and Lillis' assert their right to further employment with the Board, conflicts with former R.C. 3319.0810 and that the statute trumps Article 3(C).

{¶43} In response, appellees assert that statute's silence on the right to further employment with the Board demonstrates that former R.C. 3319.0810 is irrelevant to the interpretation of Article 3(C) of the CBA.

{¶44} Former R.C. 3319.0810(A) permitted a school district to terminate its transportation staff positions for "reasons of economy and efficiency" and contract out the transportation work if six conditions were met. Neither party disputes that the conditions were met in this case. Former R.C. 3319.0810(B) provides certain rights to employees who are terminated when the conditions under former 3319.0810(A) are not

met. However, nothing in former R.C. 3319.0810(B) provides a right to a previous job in the school district if someone is terminated pursuant to this section of the Revised Code.

{¶45} Article 3(C) of the CBA states in pertinent part:

{¶46} "2. When by reason of decreased enrollment, reduction of workload, return of employees from Board-approved leaves of absences, or for economic reasons, the Board makes reductions in the number of employees * * *.

{¶47} "3. * * * The Board shall provide the Union with financial statements and rationale when the reduction in force is due to economic reasons.

{¶48} "* * *

{¶49} "5. Employees may displace a less senior employee in another classification if they have held a position previously in that classification and hold more seniority in that classification. The employee shall be placed on the same step of the new, appropriate salary schedule.

{¶50} "* * *

{¶51} "7. Displacement (Bumping) Procedures

{¶52} "a. An employee affected by such reduction in force may displace (bump) a less senior employee based upon the following criteria.

{¶53} "i. Within the same classification.

{¶54} "ii. Within another classification provided, however, that he held that position previously and has more overall seniority.

{¶55} "* * *."

{¶56} The relationship between provisions of a collective bargaining agreement and the Revised Code are set forth in R.C. 4117.10(A), which states in pertinent part:

{¶57} "(A) An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. * * * Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees." The Ohio Supreme Court has found that "it logically follows [from R.C. 4117.10(A)] that if no state or local law makes a specification about a matter (i.e., if there is no conflict between the agreement and a law), then the agreement governs the parties as to that matter." *Streetsboro Edn. Assn. v. Streetsboro City School Dist. Bd. of Edn.*, 68 Ohio St.3d 288, 291 (1994).

{¶58} Consequently, the Ohio Supreme Court has rejected the Board's interpretation that a statute's silence on a subject prohibits the parties from creating contractual rights, and as such, the first issue is without merit.

{¶59} Next the Board argues that the arbitrator created a right of displacement. Specifically, the Board argues that Article 1(C)(2) of the CBA, the article governing the procedure for subcontracting work, does not provide a work right of displacement to appellees and therefore such a right does not exist in the CBA. Appellees claim that the previously quoted portions of Article 3(C) provide the right of displacement.

{¶60} Article 1(C)(2) provides in pertinent part:

{¶61} "a. The Board shall not enter into agreements with private or public contractors, or private individuals, to do work normally performed by employees within the scope of their normal duties, unless the Superintendent or designee first provides:

{¶62} "i. Notice of and rationale for the intent to execute such agreements to the Union President and Union Field Representative; and

{¶63} "ii. An opportunity for the Union to discuss the effects of such a decision."

{¶64} The absence of a right of displacement in Article 1(C)(2) does not mean that the CBA lacks a right of displacement. The right of a displacement exists in Article 3(C) of the CBA. The fact such a right appears in Article 3 as opposed to Article 1(C)(2) does not demonstrate reversible error.

{¶65} Finally, the Board argues that the Hendricks, Jones, and Lillis are not entitled to their previous jobs because there was not a "reduction in force" as defined in Article 3(C)(2) of the CBA. Appellees contend that a "reduction in force" occurred because Hendricks, Jones, and Lillis were terminated for "economic reasons." The Board maintains that Hendricks, Jones, and Lillis were terminated to save money, and that such a reason is not an economic reason because the Board still had the ability to pay their salaries. Appellees reply that terminating someone to save money constitutes an economic reason. The arbitrator agreed with appellees.

{¶66} In support of its position, the Board directs our attention to a previous case between the parties interpreting Article 3(C) where, according to the Board, this court found that "economic reasons" required an economic crisis. *Madison Local School Dist. Bd. of Edn. v. OAPSE/AFSCME Local 4,* 11th Dist. Lake No. 2008-L-086, 2009-Ohio-1315, ¶31 ("Madison 2009"). Therefore, the Board argues *Madison 2009* acts as binding precedent on the current arbitrator, or, at the very least, demonstrates the unreasonableness of the arbitrator's interpretation.

{¶67} In *Madison 2009*, we stated: "We acknowledge that Article 3(C)(1) does not explicitly require an actual economic crisis. The phrase 'economic reasons' may

therefore legitimately encapsulate perceived, projected, or actual economic downturns. Nevertheless, the arbitrator chose to interpret Article 3(C) as mandating a manifest economic crisis. While our reading of the contract may differ from that of the arbitrator, "'[t]he arbiter was chosen to be the Judge. That Judge has spoken. There it ends.'" * * * The arbitrator drew the conclusion from the terms of the CBA and, in doing so, did not render an unlawful, arbitrary capricious award." (Citations omitted.) *Id.* at ¶31.

{¶68} As the last sentence indicates, we were not interpreting Article 3(C)(2); rather, we were reviewing the arbitrator's interpretation of the CBA to see if it was unlawful or arbitrary. Therefore, there is no binding or persuasive interpretation of the CBA from this court on the matter. Furthermore, unless the CBA indicates otherwise, prior interpretations of the CBA by an arbitrator are not binding upon subsequent arbitrators. *See Internatl. Union UAW v. Dana Corp.*, 278 F.3d 548, 555-56 (6th Cir. 2002) (collecting cases). As the Board has not directed our attention to any provision of the CBA that makes arbitral decisions binding precedent, the arbitrator in this case was free to disregard the prior interpretation of Article 3(C). Therefore, as in *Madison 2009*, the only issue is whether the arbitrator's interpretation of "economic reasons" was arbitrary. We conclude it was not.

{¶69} The first assignment of error lacks merit.

{¶70} As its second assignment the Board asserts:

{¶71} "The trial court committed prejudicial error when it denied the Board's Motion to Vacate Arbitration Award and granted OAPSE's Motion to Conform the Award because the Arbitrator so imperfectly executed his power that a mutual, final, and definite award was not made."

{¶72} The Board challenges the award to Lillis because it claims she should not receive back pay during her receipt of disability retirement payments. The Board also argues that the arbitrator erred in reinstating Lillis to her prior job because she has been on disability retirement for years and she did not want her job back. Additionally, the Board argues that Hendricks is not entitled to back pay because she did not hold the requisite permit to lawfully perform her prior position.

{¶73} Appellees first argue that the Board waived these objections by failing to bring these issues to the arbitrator during the 60-day window he retained jurisdiction. However, we decline to consider this argument, as other courts have found that this issue should be resolved through arbitration rather than the courts. *United Steel, Paper & Forestry v. Sekisui Specialty Chems. Am., LLC*, 2012 U.S. Dist. LEXIS 26972, *21; *Internatl. Bd. of Teamsters Local 959 v. Horizon Lines of Alaska*, *LLC,* 2014 U.S. Dist. LEXIS 68969. In any event, the Board loses on the merits of these issues.

{¶74} As to Lillis, although the award clearly reinstates her to her previous position, despite being on disability retirement and her lack of desire for the job, this does not demonstrate reversible error. Nothing in this part of the award is ambiguous. Although this may not be the most sensible outcome, as noted in *Madison 2009*, we are not to displace the judgment of the arbitrator because the award may not be what we view as the most logical or fair outcome. As for back pay, there is no dispute that Lillis is not entitled to back pay once she retired. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974. Therefore the issue is whether Lillis' award is not mutual, finite, or definite because the arbitrator did not specify the date that her back pay ceased. However, the determination of when Lillis' back pay ends is essentially a ministerial task that does not preclude the award from

being final and definite. *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 640 (S.D. Tex. 2002). Consequently, the Board has not demonstrated reversible error as to Lillis.

{¶75} As for Hendricks, the Board argues that she cannot be reinstated as an educational assistant because her educational aide permit was not renewed, and the Ohio Department of Education requires a person employed by the Board as an educational assistant to have such a permit. This argument is without merit. A.C. 3301-25 states: "(A) The one-year educational aide permit may be renewed *upon the request and recommendation* of the employing superintendent of a city, local, exempted village, or joint vocational school district, educational service center, or the governing authority of a chartered nonpublic school or community school upon evidence of meeting the following requirements:

{¶76} "(1) The applicant is deemed to be of good moral character;

{¶77} "(2) The applicant has successfully performed tasks assigned in accordance with a written job description, as verified by the hiring authority; and

{¶78} "(3) The applicant has participated in and benefited from in-service training, as verified by the hiring authority." (Emphasis added.)

{¶79} Therefore, as appellees argue, one of the principle reasons why Hendricks could not obtain the required permit is due to the Board's decision not to request and recommend such a renewal. Furthermore, the Board has not directed our attention to any evidence suggesting that Hendricks would not meet the permit requirements if the Board took the necessary steps. Rather, it appears that the Board seeks to deny Hendricks her previous job due to the Board's decision not to renew her permit. Therefore, the arbitrator's determination that Hendricks should be reinstated to her

previous job did not order the Board to do something illegal. Instead, the award forces the Board to act in good faith in accordance with Article 3(C) of the CBA, as is required in all contracts. *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶26-27. Accordingly, the Board has not demonstrated reversible error.

{¶80} The judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.