[Cite as *Terra Faculty Assn. v. Terra State Community College*, 2017-Ohio-7996.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Terra Faculty Association	Court of Appeals No. S-17-013
Appellant	Trial Court No. 16 CV 317
v.	
Terra Community College	**DECISION AND JUDGMENT**
Appellee	Decided: September 29, 2017

* * * * *

Thomas P. Timmers and Gregg A. Peppel, for appellant.

James B. Yates, Sarah E. Pawlicki, and Sarah E. Stephens, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an accelerated appeal from a judgment of the Sandusky County Court of Common Pleas which granted the motion for summary judgment by the appellee and denied the cross-motion for summary judgment by the appellant. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} On April 8, 2016, and as amended on May 12, 2016, appellant Terra Faculty Association (the "Union") filed a complaint and petition to enforce the arbitration agreement against appellee, Terra State Community College (the "College"), setting forth claims of breach of collective bargaining agreement and a failure to arbitrate. The Union alleged its members suffered a grievance under the collective bargaining agreement between the Union and College ("CBA"), and the College failed to arbitrate the grievance as required under the CBA. The College generally denied the allegations asserting there was no obligation to arbitrate where there was no grievance. Following a briefing schedule set forth in the trial court's scheduling order, appellant and appellee each filed cross-motions for summary judgment. On March 8, 2017, the trial court granted appellee's motion and denied appellant's motion. Appellant then filed its notice of accelerated appeal on April 5, 2017, and the parties filed their briefs with this court according to the accelerated schedule.

{¶ 3} Appellant sets forth two assignments of error:

I. The Trial Court Erred in Granting Summary Judgment for the Appellee

II. The Trial Court Erred in Failing to Grant Summary Judgment for the Appellant

{¶ 4} Appellate review of trial court summary judgment determinations is de novo, employing the same Civ.R. 56 standard as trial courts. *Chalmers v. HCR ManorCare, Inc.*, 6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678, ¶ 21; *Hudson v.*

Petrosurance, Inc., 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29. In cases where the parties filed cross-motions for summary judgment, the court must consider each motion separately on its merits. *See Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir.).

{¶ 5} Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * * [and] that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 6} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought and identify those portions of the record that affirmatively demonstrate the absence of a genuine issue of material fact -- not the reliance on conclusory assertions that non-movant has no evidence to prove its case -- regarding an essential element of the non-movant's case. *Beckloff v. Amcor Rigid Plastics USA, LLC*, 6th Dist. Sandusky No. S-16-041, 2017-Ohio-4467, ¶ 14. When a properly supported motion for summary judgment is made, an adverse party may not rest

on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact for trial in accordance with Civ.R. 56(E). *Id*. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Id*.

{¶ 7} We conducted a de novo review of the record. The following facts are relevant to the issues raised on appeal.

{¶ 8} Chapter 4117 of the Ohio Revised Code addresses public employees' collective bargaining. It is undisputed that the Union is an "employee organization," R.C. 4117.01(D), the College is a "public employer," R.C. 4117.01(B), and the non-tenured faculty exclusively represented by the Union are "public employees" R.C. 4117.01(C), (E). The record shows the CBA at issue entered into between the Union and College was in effect from September 1, 2011 to June 30, 2014, and thereafter remained in full force and effect while the parties negotiated a successor agreement. It is undisputed the parties agree the CBA was in effect at all times relevant in this case, including the events begun on April 15, 2015.

{¶ 9} College President Webster sent identical letters dated April 15, 2015 (the "Non-Reappointment Letters"), to Profs. Daniel Chudinski, Tammie Ferguson, Dennis Gnage, Cindy Hall, Terry Holmes, and James Perlberg, which each recipient does not dispute receiving. The letters stated the following:

> This letter is written to inform you of the College's decision to not reappoint you for the 2015-2016 academic year. This action is in

compliance with the *Agreement between the Board of Trustees, Terra Community College, and the Terra Faculty Association* (Article XI, Section 11.04) regarding non-reappointment of non-tenured faculty. *** Thank you for your service to the College.

{¶ 10} Each recipient of the Non-Reappointment Letters subsequently filed an identical grievance with the College stating in part:

> Facts upon which the grievance is based: In his "Get Current Students Registered for Next Semester" email of 1 April 2015, President Webster wrote: "If we do not his enrollment targets, the College will incur additional personnel reductions prior to June 30. We must do everything we can to get current students registered for the next semesters by April 30. I strongly encourage you to engage students in the registration process." Based upon the statement above and his actions to date, we claim President Webster is intentionally misusing §11.04 to avoid the contractual language of §11.08. Moreover, we claim that the phrase "strongly encourage" is widely recognized as coercive, intimidating, threatening, and indicative of bringing undue pressure; the net effect is interference with employee work performance by creation of a hostile work environment. *** We therefore additionally claim a pattern of contract abuses in which President Webster is using §11.04 to avoid the Reduction in Force language of §11.08.

{¶ 11} In turn, the College denied each grievance for the reasons that: 1) the grievances did not comply with CBA Article VI "Grievance Procedure"; 2) "the non-renewal of non-tenured faculty members is covered by Section 11.04, 'Non-Reappointment of Non-Tenured Faculty'"; 3) the "College denies any violation of Section 11.08 ['Reductions in Force'] because it did not determine a reduction in force shall occur"; and 4) among reserved procedural and substantive defenses, "the issue was not grievable in the first instance."

{¶ 12} In response, each grievant through the Union pursued progressive steps in the CBA grievance process continuing the same arguments from prior steps until a hearing for all the grievances was held on May 26, 2015, before College President Webster. On March 29, 2015, each grievance was again denied on the same grounds as the previous denials. It is undisputed no arbitration of these grievances occurred, and the Union eventually initiated litigation against the College.

{¶ 13} Article XI, Section 11.04 of the CBA states:

> Non-Reappointment of Non-Tenured Faculty
>
> (A). Notice – a full time member who is not recommended for reappointment must receive written notice of that intention from the President or his/her designee not later than the final day grades are due at the conclusion of Spring semester commencement in the academic year in which the recommendation is to be made.

(B). Non-renewal of a non-tenured faculty member's contract is final and not subject to the grievance procedure or other review except for failing to comply with the procedural requirement of Section 11.04(A).

{¶ 14} Article XI, Section 11.08 of the CBA states: "Reductions in Force" and opens with "[w]henever the College determines that a reduction in force shall occur, the following procedure shall apply." This Section then contains subsections providing for the "Definition of a 'Day'" (A), "Seniority" (B), "Part-Time Positions" (C), "Probationary Contract Faculty" (D), "Non-Probationary Contract Faculty" (E), and "Recall Rights" (F). There is no mention of or reference to non-tenured faculty in Section 11.08.

{¶ 15} Appellant argued in its motion for summary judgment, which appellee opposed, that no genuine issue of material fact exists and that appellant was entitled to judgment as a matter of law. In support of both assignments of error, appellant argues the parties agreed in two ways to arbitrate the dispute about whether the Non-Reappointment Letters constitute a "reduction in force" grievance subject to arbitration. First, because CBA Article IV, Section 4.011 broadly defines a "grievance" as "any dispute regarding the interpretation or application of the collective bargaining agreement between the College and [Union]." Secondly, because the College used Section 11.04 language as a disguise to avoid 11.08 "Reduction in Force" requirements due to the contemporaneous email statements by College President Webster that if enrollment targets are not met,

"additional personnel reductions [will occur] prior to June 30." The Union argues that a "grievance" subject to binding arbitration under the CBA exists as to whether or not the Non-Reappointment Letters constituted a "reduction in force" and urges this court to determine the grievance was subject to arbitration on the authority of *Toledo Police Command Officers' Ass'n v. City of Toledo*, 6th Dist. Lucas No. L-13-1022, 2014-Ohio-4119, ¶ 53.

{¶ 16} In that case this court acknowledged Ohio recognized four general principles to guide the interpretation of the reach of an arbitration clause in collective bargaining agreements: 1) whether the parties agreed to submit the grievance to arbitration, 2) which is exclusively a court determination, 3) which is limited so as to not rule on the potential merits of the underlying claims, and 4) in light of a presumption of arbitrability "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* Appellant argues that when all four principles are applied and the evidence is construed most strongly in appellee's favor, no genuine issue of material fact exists and reasonable minds can come to but one conclusion that appellant was entitled to judgment as a matter of law that the dispute was a grievance subject to arbitration.

{¶ 17} Appellant's motion was supported by documents numerically marked as Exhibits 1 to 9 and purported to represent the various steps appellant took in the CBA grievance process. The record shows that appellee filed a response opposing appellant's motion on various grounds. One of appellee's arguments was that appellant failed to

meet its burden under Civ.R. 56(C) because none of the documents was a pleading, deposition, answers to interrogatories, written admissions, affidavit, transcript of evidence, or written stipulations of fact. Nor did appellant attempt to properly bring in the documents as evidence not specifically authorized by Civ.R. 56(C) by incorporating them by reference in a manner authorized by Civ.R. 56(E). We agree that the exhibits supporting appellant's motion do not comply with Civ.R. 56 and are not properly before this court on de novo review. However, we note that appellant's exhibits are substantially, not entirely, included in appellee's motion, which does comply with Civ.R. 56(E) and is properly before this court on de novo review.

{¶ 18} Appellee argued in its motion for summary judgment, which appellant opposed, that no genuine issue of material fact exists and that appellee was entitled to judgment as a matter of law for two primary reasons. First, the non-reappointment of non-tenured faculty is not grievable because the specific language of Section 11.04(B) clearly excludes that event from the CBA grievance process, and, second, because Section 11.08 requires the College to determine "that a reduction in force shall occur," and the College both did not make that determination nor did a "reduction in force" occur. Appellee argued that no "reduction in force" can be assumed to be the result of every non-renewal under Section 11.04(B). Appellee supported its motion with an affidavit indicating that although the Non-Reappointment Letters went to six non-tenured faculty, the College subsequently posted eight faculty positions and hired seven for the

Fall 2015 semester. The record shows that although appellant filed a response opposing appellee's motion, appellant did not rebut appellee's testimony supporting its motion for summary judgment. Appellee argues that even when all the Civ.R. 56 evidence is construed most strongly in appellant's favor, no genuine issue of material fact exists and reasonable minds can come to but one conclusion that appellee was entitled to judgment as a matter of law that the dispute was not a grievance subject to arbitration.

{¶ 19} To prove arbitrability, appellant must establish there was a grievance the parties agreed to arbitrate in the CBA. "We review the question of whether, as a matter of law, a particular claim is subject to arbitration under a de novo standard of review. Because arbitration is a matter of contract, a party may only be forced to arbitrate a dispute that it has agreed to submit to arbitration. Nevertheless, a presumption in favor of arbitration applies to claims that are within the scope of an arbitration provision." (Citations omitted.) *Wetli v. Bugbee & Conkle, LLP*, 6th Dist. Lucas No. L-15-1009, 2015-Ohio-4213, ¶ 17.

{¶ 20} The rules of contract formation in Ohio dictate that courts look to the plain language of the contract language the parties chose to use to determine contractual intent and to not disturb what is clear and unambiguous. *Dana Ltd. v. Sypris Techs., Inc.*, 6th Dist. Lucas No. L-15-1058, 2015-Ohio-5311, ¶ 18. "Where the terms are clear and unambiguous, a court need not go beyond the plain language of the agreement to determine the rights and obligations of the parties." *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 614, 2004-Ohio-7104, 821 N.E.2d 159, ¶ 29. In the event

arbitration is found to be applicable, "the court should not address the merits of the grievance." *Toledo Police Patrolman's Ass'n, Local 10 v. City of Toledo*, 127 Ohio App.3d 450, 458-459, 713 N.E.2d 78 (6th Dist.1998).

{¶ 21} To overcome the presumption of arbitrability, the grievance must be "expressly excluded" or there exists "forceful evidence of a purpose to exclude the claim from arbitration." *Internat. Brotherhood of Teamsters, etc., Local Union 20 v. Toled*o, 48 Ohio App. 3d 11, 13, 548 N.E.2d 257 (6th Dist.1988), *quoting United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-585, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."). The burden is on the party contesting arbitrability to demonstrate that the language in the collective bargaining agreement excludes a dispute from arbitration. *Toledo Police* at 458.

{¶ 22} It is undisputed the recipients of the Non-Reappointment Letters, Profs. Daniel Chudinski, Tammie Ferguson, Dennis Gnage, Cindy Hall, Terry Holmes, and James Perlberg, were each non-tenured faculty members of the College. Since the recipients of the College's non-renewal letter were non-tenured faculty and acknowledged receiving the letters, both CBA Sections 11.04(A) and 11.04(B) requirements were met by the College.

{¶ 23} We conclude the record reflects that CBA Section 11.04(B) contains specific exclusionary language from "the grievance process" for the non-reappointment of non-tenured faculty. There is no mention of or reference to non-tenured faculty in Section 11.08. The CBA grievance exclusion language is clear and unambiguous. This specific exclusion in Section 11.04(B) from the CBA's grievance process is what the Union and College bargained for and must prevail over any broad, generic grievance clause. *Toledo Police* at 469; *Toledo Police*, 6th Dist. Lucas No. L-13-1022, 2014-Ohio-4119, at ¶ 53.

{¶ 24} In further support of both assignments of error, appellant argues the trial court's role was to compel the College to arbitrate the dispute. Appellant also argues the law favors a presumption of arbitrability of the dispute in CBA interpretation or application. In light of this court's determination the Non-Reappointment Letters issued by the College to the six non-tenured faculty members were not subject to the CBA's grievance procedures, the College was not required to arbitrate a non-grievable issue, and the trial court was correct to not compel otherwise.

{¶ 25} In further support of both assignments of error, appellant also argues the trial court impermissibly ruled on the merits of the underlying grievance as to whether there was a "reduction in force" under the CBA. Appellant points to the trial court's acceptance of the affidavit accompanying appellee's motion for summary judgment as such "impermissible" determination of the underlying merits of the grievance. We must disagree. Summary judgment in this case was determined using the well-established

standards under Civ.R. 56. *Dresher v. Burt*, 75 Ohio St.3d 280, 293-294, 662 N.E.2d 264 (1996). Affidavits are specifically permitted among the support for the court's consideration of a summary judgment motion. Civ.R. 56(C).

{¶ 26} In response to appellee's motion and supporting evidence, appellant had the duty to respond with specific facts showing that there is a genuine issue of material fact – one which would affect the outcome of the suit under the applicable substantive law -- for trial in accordance with Civ.R. 56(E). *Beckloff, supra,* 6th Dist. Sandusky No. S-16-041, 2017-Ohio-4467, at ¶ 14. The record shows that appellant failed to rebut the affidavit by Ms. Kosanka supporting appellee's motion for summary judgment. Ms. Kosanka gave unrebutted testimony in her affidavit that the College never determined there was a CBA Section 11.08 "reduction in force" resulting in the Non-Reappointment Letters sent to the six non-tenured faculty members, nor has a "reduction in force" occurred, and the Non-Reappointment Letters were sent pursuant to CBA Section 11.04. Appellant argues it was not required to rebut appellee's affidavit for Civ.R. 56 purposes because to do so went to the merits of appellant's claim the dispute was grievable, which the court is prohibited from considering, and appellant insists the dispute was grievable because any dispute is grievable. The only evidence in the record the Non-Reappointment Letters were grievable disputes are appellant's own conclusions. Civ.R. 56 is clear in what this court may consider for summary judgment purposes: "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written

stipulations of fact *** No evidence or stipulation may be considered except as stated in this rule." Civ.R. 56(C).

{¶ 27} This court finds appellant's circular argument does not overrule Civ.R. 56 requirements placed on the party opposing summary judgment. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E). Merely labeling any review of appellee's affidavit as impermissibly determining the merits of appellant's case in light of presumptions favoring arbitrability does not satisfy appellant's burden in opposing summary judgment.

{¶ 28} Appellant's first and second assignments of error are not well taken.

{¶ 29} On consideration whereof, this court finds that there remain no genuine issues of material fact and, after construing all the evidence most strongly in favor of appellant, appellees are entitled to summary judgment as a matter of law. The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE