

**IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO**

FILED  
COMMON PLEAS COURT

2015 DEC -9 PM 11:35

RENAE E. ZARLPOWIL  
CLERK OF COURTS  
MADISON COUNTY OHIO

Tolles Career & Technical School  
Board of Education,

:

Plaintiff(s),

:

Case# CVH 20150102

-vs-

:

DECISION & ENTRY

:

Tolles Education Association,

:

Defendant(s).

On May 1, 2015, the Plaintiff, Tolles Board of Education filed a Complaint for Declaratory Judgment requesting the Court to declare a determination of criteria and evidence that an evaluator uses in teacher evaluations is reserved for management and not the proper subject of arbitration. The Plaintiff further requested an order of the court to the Defendant to withdraw its request for arbitration and cease and desist from filing similar grievances.

On June 4, 2015, the Defendant filed a Petition to Enforce Arbitration Agreement between it and the Plaintiff and additionally filed a Motion to Dismiss the Plaintiff's Declaratory Judgment Action.

On June 18, 2015, the Court put on an entry giving the Plaintiff thirty days to respond to the Defendant's Motion.

On July 2, 2015, Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Dismiss and Petition to Enforce Arbitration Agreement.

On July 13, 2015, Defendants filed a Reply in support of their Petition to Enforce the Arbitration Agreement and Motion to Dismiss Plaintiff's Declaratory Judgment Action.

The matter arises out of dispute involving the Collective Bargaining Agreement covering the periods of June 1, 2013 to June 30, 2016. The issue giving rise to the dispute involves a teacher evaluation that included, among other things, an attendance percentage. On March 27, 2015, the President of the Tolles Education Association filed a grievance with the Superintendent. On April 13, 2015 that grievance was denied by the Superintendent. On April 23, 2015, Tolles Education Association requested arbitration.

The Plaintiff, in its Complaint for Declaratory Judgment, suggests the dispute is not appropriate pursuant to the Collective Bargaining Agreement for an arbitrator to resolve. The Plaintiff suggests that Article IV, Section E specifically limits the authority of an arbitrator and further points out that Article VII, Section 10(H)(3) specifically states that “No grievance or aspect of any grievance that concerns an administrator’s exercise of his/her professional judgment in matters such as evaluation and observation may be taken to Step Four”, that is, arbitration. The Defendants suggest that Article VII, Section 11(A-C) contains extensive provisions in the Collective Bargaining Agreement regarding evaluations. Included in these sections are deadlines for the Board of Education to adopt a standards based teacher evaluation policy and a paragraph entitled “Due Process” which, among other things, allows for a grievance challenging procedural or legal compliance with state and federal law and adopted Board policy. Among the due process options is arbitration. Defendant further suggests that the Plaintiff’s reliance on Article VII, Section 10(H)(3) is misplaced because it relates to grievances disputing the accuracy, relevancy, timeliness, completeness of information placed in personnel file as opposed to the evaluative process. Defendants in their Motion include the Board of Education Policy on Teacher Evaluation approved September 19, 2013. Defendant argues that attendance

as a part of evaluation is not an exercise of professional judgment because it is not included in the evaluation criteria approved by the Board.

Ohio Revised Code Section 4117.08 governs subjects appropriate for collective bargaining with public employees. ORC Section 4117.08(C) states:

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to:

(2) Direct, supervise, evaluate, or hire employees (emphasis added.)

ORC Section 4117.08(C)(2) clearly vests a public employer with the right to evaluate employees. However, Subsection C provides that power can be limited if the employer impairs that right through collective bargaining.

The issue before the Court is whether the Board of Education through the Collective Bargaining Agreement in any way limited its ability to evaluate its employees. The Plaintiff clearly asserts that it did not. The Defendant on the other hand asserts that the Collective Bargaining Agreement specifically included a section titled "Evaluations" which limited the manner in which the public employer could evaluate its employees. The Collective Bargaining Agreement at issue before the Court was signed by the Board of Education on September 19, 2013 and signed by Tolles Education Association officers on September 27, 2013. The Agreement was effective July 1, 2013 through June 30, 2016.

Article IV of the agreement is titled "Grievance Procedure". "Grievance" is defined in paragraph 2(A) as the following: "Grievance shall mean a claim by an employee that there has been a violation, misinterpretation or misapplication of the language in this contract. The employees making the claim shall sign the grievance." Article IV, Subsection 5, describes the grievance procedure which can be summarized as a four step process starting with the immediate

supervisor of the employee thereafter allowing appeals to the superintendent, Board of Education and finally submission for arbitration. Article IV, Section E, paragraph 3, sentence 4 states "Binding arbitration shall be the sole and exclusive remedy for an alleged violation of this agreement." Paragraph 4 of the same section places specific limitations on the authority of the arbitrator.

Article VII, Section 10 is titled "Personnel Files." Paragraph G states "A Bargaining Unit Member shall be given a copy of any written evaluation or reprimand." Paragraph H states "If a unit member disputes the accuracy, relevance, timeliness, or completeness of material in his/her file, or compliance with any provision of this Article, he/she may file a written complaint with the Superintendent, who shall conduct an investigation." In Subsection 3, the agreement states:

"If, with the Association's concurrence, the unit member elects to submit the dispute to Step Four (Arbitration) of the grievance procedure after receiving the Superintendent's decision, the arbitrator may not order material removed from the Bargaining Unit Member's personnel file unless the Bargaining Unit Member demonstrates that the material is factually inaccurate, irrelevant, untimely or incomplete. No grievance or aspect of any grievance that concerns an administrator's exercise of his/her professional judgment in matters such as evaluation and observation may be taken to Step Four. Moreover, an arbitrator is specifically prohibited from substituting his/her judgment for that of an administrator in matters of professional judgment."

Article VII, Section 11 is titled "Evaluation". Section 11(A)(1) states:

"The evaluation procedure established in this agreement conforms to the framework for the evaluation of teachers developed pursuant to section 3319 of the Ohio Revised Code. Each completed evaluation will result in the assignment of a teacher performance rating. The teacher effectiveness rating shall be derived from a summative evaluation where fifty (50) percent of the overall evaluation is based on student growth measures and fifty (50) percent of the overall evaluation is based on a teacher's performance rating as provided for in this agreement."

Section 11(B)(1) states:

“No later than July 1, 2013 the Tolles Board of Education shall adopt a standards-based teacher evaluation policy that conforms to the evaluation of the teachers developed under Section 3319.112 of the Ohio Revised Code, and as endorsed by the Tolles Education Association.

Said policy appears to have been approved on September 19, 2013 and is titled “Board of Education Policy on Teacher Evaluation Pursuant to ORC 3319.11, Standards Based Teacher Evaluation.”

At the bottom of page 65 of the agreement, a paragraph titled “Assessment of Teacher Performance” appears. That paragraph states:

Teacher performance will be evaluated during formal observations and periodic informal observations also known as “classroom walkthroughs.” Such performance, which will comprise fifty (50) percent of a teacher’s effectiveness rating will be assessed through a holistic process by trained and credentialed evaluators based upon the following *Ohio Standards for the Teaching Profession*:

- a. Understanding student learning and development and respecting the diversity of the student they teach;
- b. Understanding the content area for which they have instructional responsibility;
- c. Understanding and using varied assessment to inform instruction, evaluate and ensure student learning;
- d. Planning and Delivering effective instruction that advances individual student learning;
- e. Creating learning environments that promote high levels of learning and student achievement;
- f. Collaborating and communicating with students, parents, other educators, district administrators and the community to support student learning; and
- g. Assuming responsibility for professional growth, performance and involvement.

In the first full paragraph of page 67 the following paragraph appears:

In evaluating teacher performance in these areas, the Board shall utilize the measures set forth by the Ohio Department of Education’s OTES “Teacher Performance Evaluation

Rubric” for instructional planning, instruction and assessment, and professionalism as they may be modified from time to time.

Article VII, Section 11, paragraph C is titled “Due Process.” It states:

Employees shall be evaluated in accordance with state and federal law and adopted Board policy. A grievance challenging procedural or legal compliance must be filed in writing with the Superintendent at Step Two of the grievance procedure of Article IV within seven (7) calendar days of the employee’s receipt of the written evaluation, in lieu of Sections 4 and 5 (A-C) of Article IV. If the Association does not agree with the Superintendent’s response, the Association may within ten (10) days of receiving the Superintendent’s response file with the Superintendent a written request for arbitration. The arbitration shall be conducted on an expedited basis before attorney James Nusbaum.

Plaintiff has argued that Article VII, Section 10, Paragraph H(3) specifically prohibits an arbitrator from accepting a grievance regarding the exercise of professional judgment by an administrator. The Defendants argue that the action before the Court does not involve a request for arbitration regarding matters contained in a personnel file. Indeed, under the rules of construction, the Court finds that Article VII, Section 10, does not apply to the issues before this Court as specifically as Article VII, Section 11 which specifically governs evaluations. However, Article XI provides a limited basis upon which employees may seek arbitration. Those grievances must challenge procedural or legal compliance. The authority as described in the collective bargaining agreement for evaluations is state and federal law and adopted board policy. Therefore, if an employee challenges procedural or legal compliance with state and federal law and board adopted policies, there may be an avenue towards arbitration. As previously stated, the Board of Education adopted on or about September 13<sup>th</sup>, a teacher evaluation policy which provided criteria to evaluate teachers. The Defendant’s position is that nowhere contained in that policy adopted by the Board of Education are criteria that includes attendance percentage. Therefore, because attendance percentage was not included in the policy adopted by the Board of Education that it is a procedural violation to include it in a teacher evaluation. Conversely, the Board of Education

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argues that the Policy adopted by the Board contains a number of factors for the evaluator to consider in evaluating teachers, however the policy does not detail how the evaluator established the factors which must be considered. The Plaintiff therefore argues that this absence of specificity leaves those matters up to the professional judgment of the evaluator, i.e. there is no issue of procedural or legal compliance therefore the matter should not and cannot proceed to arbitration.

On July 2, 2015, Plaintiff filed a response brief arguing that the Defendant's petition is governed by ORC 2711.03(A) and that the Defendant's petition is premature because the parties have agreed to table the arbitration until the Court resolves the Declaratory Judgment Action.

On July 13, 2015, Defendants filed a reply in support of their petition to enforce arbitration agreement and their Motion to Dismiss Plaintiff's Declaratory Judgment Action. The briefs filed on July 2<sup>nd</sup> and July 13<sup>th</sup> respectively acknowledge that while the mechanisms to bring the matter before the Court are different, the issues to be addressed in the Declaratory Judgment Action or the petition to Enforce Arbitration are the same. Both parties agree that arbitrability is the issue and that there are four general principles that govern this issue: 1.) agreement to arbitrate, which has a presumption in favor of arbitrability; 2.) arbitrability is a question of law; 3.) underlying merits, that is, the Court is not to rule on potential merits of the case and 4.) presumption of arbitrability unless assurance otherwise. Council of Smaller Enterprises v. Gates, McDonald & Co., 80 Ohio St.3d 661, 1998-Ohio-172. Doubts should be resolved in favor of coverage. AT&T Technologies, Inc. v. Communications Workers of Am. (1986), 475 U.S. at 650.

Because the evaluation process is a part of the Collective Bargaining Agreement and because the Board of Education adopted a policy regarding evaluation which incorporated the Ohio Standards for the Teaching Profession, which contain seven standards with which to assess

the teacher. The issue becomes whether the attendance percentage constitutes a procedural or legal compliance issue with the evaluation policy adopted by the Board of Education. Arguably, adding a factor that is not specifically enumerated in the Standards for Evaluation violates the procedure adopted by the Board of Education. On the other hand, the Board of Education believes this silence on what evidence the evaluator may use to judge the standards mean such matters are left to the judgment, discretion and management of the board.

On December 7, 2015, the matter came on for hearing before the Court. The parties submitted exhibits for the Court's review and made argument before the Court in support of their respective positions.

The Court finds that there are doubts as to coverage. These doubts must be resolved in favor of coverage. Therefore, it is the judgment of the Court that Article VII, Section 10 of the Collective Bargaining Agreement bars arbitration on matters in personnel files where the grievance concerns an administrators exercise of his/her professional judgment in matters such as evaluations and observation. However, Article VII, Section 11 of the Collective Bargaining Agreement provides for arbitration where an evaluation is claimed to have been done in violation of procedure or law. Here, the Defendant asserts attendance percentage violated the evaluation procedure approved by the Plaintiff. Because it is unclear whether this unarticulated standard for evaluation constitutes a procedural violation the matter is appropriate for arbitration.

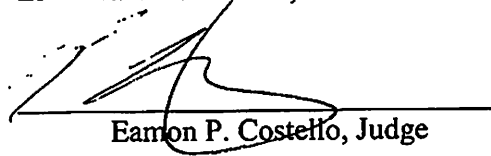
Therefore, it is the judgment of the Court with respect to the Plaintiff's Declaratory Judgment Action that the prayers for relief requested in Plaintiff's Action are hereby Denied in each and every particular. The Court further grants Defendant's Petition to Enforce the Arbitration Agreement and hereby issues an Order compelling arbitration pursuant to O.R.C. 2711.03.



There is no just reason for delay.

Judgment is entered accordingly.

ENTER: December 8, 2015



Eamon P. Costello, Judge

cc: Nicole M. Donovsky  
Robert W. Sauter  
Court Administrator