

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JANOS M. ROPER,	:	APPEAL NO. C-170106
	:	TRIAL NO. 16CV-24052
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
	:	
UNIVERSITY OF CINCINNATI	:	
MEDICAL CENTER,	:	
	:	
Defendant-Appellee.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Janos Roper appeals the decision of the municipal court dismissing his case because he failed to exhaust his administrative remedies for his claim against the University of Cincinnati Medical Center (“UCMC”) for failure to pay him bonuses. For the following reasons, we affirm the trial court’s decision.

Roper was a nurse at UCMC and was a member of the Ohio Nurses Association (“ONA”), a union that had a collective bargaining agreement (“CBA”) with UCMC. Pursuant to the CBA, nurses were entitled to earn bonus pay for working extra hours in addition to their shifts. The basis of Roper’s suit is that he worked additional hours from 2014 through 2016, but was not informed of the procedure to reflect the bonus pay on his time card. Upon realizing he was not given the bonus for his extra hours, he communicated with his human resource personnel at UCMC, who informed him that

under UCMC's policy he would only be awarded bonus pay for the last six months. Roper then filed a complaint in Hamilton County Small Claims Court to recover the additional monies that were owed to him. Roper also separately filed a claim with the National Labor Relations Board claiming unfair labor practices against UCMC.

UCMC filed a motion to dismiss the complaint, which was granted by the trial court. On appeal, Roper presents three assignments of error. Our review of the trial court's dismissal pursuant to Civ.R. 12(B)(1) is de novo. *Brown v. Cincinnati Public Schools*, 1st Dist. Hamilton No. C-150345, 2016-Ohio-4675 ¶ 5.

Roper's first assignment states that the trial court erred by granting a dismissal because its entry determined that, "[p]laintiff is subject to binding arbitration." Roper argues that because he is no longer employed by UCMC, he is no longer covered by the CBA and cannot be subjected to its mandate of arbitration. Roper makes this argument for the first time on appeal. An appellate court will not consider an error which the complaining party could have called but did not call to the trial court's attention at a time when the error could have been corrected. As the trial court was not given an opportunity to decide this issue, we do not consider it. *First Nat. Community Bank v. Garretson Firm Resolution Group*, 1st Dist. Hamilton No. C-160745, 2017-Ohio-7582. The first assignment of error is overruled.

Roper's second assignment of error is that the trial court's dismissal of his case was based on his need to exhaust all internal bargaining unit measures prior to suing UCMC.

Article 8 of the CBA sets out the grievance procedure for nurses at UCMC. It provides that "[f]or the purpose of this Agreement, the term "grievance" is defined as a dispute between the Medical Center and ONA, or between the Medical Center and a nurse concerning the interpretation and/or application of, or compliance with, any

provision of this Agreement or violation of a Medical Center work rule and/or policy.” The CBA then sets out the steps to follow if a nurse has a grievance and how to proceed if the grievance is not satisfactorily resolved. Ultimately, the grievance can be appealed to arbitration with “[t]he decision of the arbitrator* * * final and binding on the parties.”

The record before us does not indicate whether UCMC is a public or a private employer, but the result is the same under both state and federal law. Public employers in Ohio fall under R.C. Chapter 4117 and private employers fall under the National Labor Relations Act, 29 U.S.C. 151 et seq. Both require an employee who is subject to a CBA to exhaust their administrative remedies prior to the filing of a lawsuit. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed.638 (1938); *Garrett v. Columbus Civ. Serv. Comm.*, 10th Dist. Franklin No. 11AP-1113, 2012-Ohio-3271 (July 19, 2012). See *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, 564 N.E.2d 477 (1990) (a physician must exhaust all internal administrative remedies of the hospital before seeking judicial review). Moreover, the very language of the CBA requires both the employer and the employee to follow the steps outlined in the grievance procedure. The CBA provides in Article 8, Section 1, that nurses are “encouraged to discuss informally with their [ONA] representative and the nursing leader any differences or disputes they have. Should no understanding be reached, the following procedure **shall** be observed,” and thereafter sets out the internal bargaining unit measures that are to be undertaken, with binding arbitration being the final step. (Emphasis added.)

Roper argues that following the grievance procedure set out in the CBA would have been futile because the union already knew about his efforts to recover his back-pay. Roper had tried to address the issue informally with both UCMC and the union,

and had not resolved the dispute. He presented the trial court with evidence that UCMC would only pay up to a six months' arrearage, and that his union representative was involved in conversations regarding Roper's limited back-pay disbursement. The record before us does not show, however, that the union refused to pursue the CBA grievance procedure, or that Roper's utilizing the steps outlined by the CBA would have been futile. *See Renner v. East Mfg. Corp.*, 11th Dist. Portage No. 2001-P-0135, 2002-Ohio-6691. The second assignment of error is overruled.

Roper's third assignment of error is that the trial court "dismissed a case that is within its realm to adjudicate" and that the court had "full authority to rule on monetary disputes." R.C. 1925.02 does permit the Hamilton County Small Claims Court to hear monetary suits for up to \$6000. The court is required, however, to follow the precedent of superior courts, which requires parties to a CBA to follow an outlined grievance procedure and exhaust the administrative remedies set out in it. *See Myers; Garrett* at ¶ 20. The third assignment is overruled and the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

MOCK, P.J., ZAYAS AND MILLER, J.J.

To the clerk:

Enter upon the journal of the court on April 4, 2018

per order of the court _____.
Presiding Judge