85-021

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,

Employee Organization,

and

Cuyahoga County Sheriff's Deparment,

Employer.

Case No: 84-RC-04-0077
84-RC-04-0078
84-RC-04-0030

INTERLOCUTORY ORDER GRANTING MOTION TO DISQUALIFY COUNSEL; DIRECTION OF HEARING

Before Chairman Day, Vice Chairman Sheehan and Board Member Fix; May 15, 1985.

The Fraternal Order of Police, Ohio Labor Council Inc., (FOP) has filed a Motion to disqualify the law firms representing the Northern Ohio Patrolmen's Benevolent Association (NOPBA) and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,(UAW). The hearing officer's recommendation in this matter results from the Board's remand of this action for an evidential hearing.

The Board has completed an extensive review of the facts, law, and ethical principles associated with this matter. For the reasons stated in the attached opinion, incorporated by reference, the Board grants the FOP's Motion. The law firms of Climaco, Seminatore, Lefkowitz and Kaplan Co, L.P.A. and Liviola, Bobulsky, and Gervelis are recused from this case. The UAW and NOPBA are given twenty days from the date of this order to obtain new counsel before the scheduling of a hearing date for consideration of the consolidated petitions.

It is so directed.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.

Jack G. Day

JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 15TH DAY OF May, 1985.

KENNETH W. BARRETT
EXECUTIVE DIRECTOR

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

United Automobile Workers,

Employee Organization,

v.

Cuyahoga County Sheriff's Department,

Employer.

Case Nos. 84-RC-04-0077
84-RC-04-0078
84-RC-04-0030

OPINION

Day, Chairman:

I

On April 1, 1984, the Northern Ohio Patrolmen's Benevolent Association (NOPBA) filed for a representation election (Case No. 84-RC-04-0030) in a unit comprised of part of the employees of the Cuyahoga County Sheriff's Department (employer, sheriff or respondent). That same day the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) petitioned for two units in the same department (Case No. 84-RC-04-0077 and 84-RC-04-0078). The Fraternal Order of Police, Ohio Labor Council, Inc. (FOP)[1] and Communications Workers of America (CWA) moved to intervene claiming that at least 10% of the employees in one or more of the proposed units wished representation by the movants. The cases were consolidated and set for a hearing on May 7, 1984.

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[1]Ohio Labor Council, Inc. is an arm of the FOP specifically organized to work in public sector labor relations on behalf of the FOP. Hearing Officer's Supplemental Proposed Order on Motion to Disqualify Counsel (Doc. B), F. of F. No. 1.

Before the hearing FOP moved to disqualify Climaco, Seminatore, Lefkowitz & Kaplan, L.P.A. (CLIMACO) as counsel for NOPBA and Liviola, Bobulsky & Gervelis (LIVIOLA) as counsel for the UAW because of claimed conflicts of interest. The motion is granted for reasons assessed below.

II

The Fraternal Order of Police, Inc. (State Lodge) is chartered by the Fraternal Order of Police, a national police organization.[2] It is a not-for-profit corporation whose members are subordinate entities granted charters by the State Lodge.[3] The subordinates (local Lodges) are subject to State Lodge direction and control.[4] A condition of membership is that each local lodge agree to be bound by the articles of incorporation, constitution, and by-laws of the State Lodge.[5] Local lodge membership in the state organization requires the payment to the latter of a lodge initiation fee, membership initiation fees, dues of ten dollars per year per member, and fines for delinquency. Suspensions or expulsions of local lodge members can be appealed to the State Lodge board of trustees.[6]

The board of trustees meets quarterly.[7] In addition, it meets with delegates from each local lodge at the annual conference.[8] The conference is

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[2] Hearing Officer's Proposed Order on Motion to Disqualify (Doc. A), F.of F. No.1.

[3] Id.

[4] Id.

[5] Id.

[6] Doc. A, F. of F. No. 3.

[7] Hearing Officer's Supplemental Proposed Order on Motion to Disqualify (Doc. B), F. of F. No. 10.

[8] Cf. Doc. A, F. of F. No. 2.

the governing body of the State Lodge and, through a legal advisory committee, entertains requests for legal aid filed by subordinate lodges.[9]

Although the State Lodge created and financed the FOP, Ohio Labor Council, Inc. (Labor Council) to conduct collective bargaining on behalf of its membership,[10] a person may be a member of the State Lodge without becoming a member of the Labor Council.[11] The converse is also possible.[12] Moreover, subordinate lodges do not have to engage the services of the Labor Council.[13]

The local lodges involved in the instant case, Lodge No. 8 and Lodge No. 26, are members in good standing of the State Lodge. They are not members of the Labor Council.[14] Both prefer to conduct their own collective bargaining negotiations and in the past have engaged counsel of their choice to assist them.[15] The Cleveland Lodge No. 8 has used the Climaco firm and Lodge No. 26 the Liviola firm.[16]

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[9]Id. The state board of trustees and delgates from local lodges constitute the conference. The State Lodge may pay as much as one-third of the legal fees incurred by a subordinate lodge.

[10]Id. No. 4.

[11]Doc. B, F. of F. No. 2. See also Doc. A, F. of F. Nos. 4,5,6,7,9 and 10.

[12]Doc. B, F. of F. No. 2.

[13]While not explicitly stated in the findings of fact, support may be found in the fact that both Lodge Nos. 8 and 26 have historically engaged alternative representation without sanction.

[14]Doc. A, F. of F. Nos. 4, 6 and 9; Doc. B, F. of F. No. 4.

[15]Id.

[16]Doc. B, stipulations Nos. 5,6 and 8; Doc. A, F. of F. Nos. 5,6 and 7.

CLIMACO is a firm of twelve (12) lawyers, and while five have done work for Lodge 8,[17] the partner most involved has been Paul Lefkowitz.[18] Climaco has not been the exclusive legal representative of Lodge 8, but over the last 10 years has provided counsel for it on a variety of matters including the negotiation of two collective bargaining agreements.[19] The firm has never represented any FOP entity other than Lodge 8.[20] And it recently suspended its relationship to Lodge 8 pending the outcome of these proceedings.[21]

LIVIOLA is a four attorney firm which has never represented any FOP entity other than Lodge 26.[22] The only member of the firm who has done legal work for Lodge 26 has been William Bobulsky.[23] His work has involved a variety of matters, including collective bargaining negotiations.[24]

Neither of the two law firms has ever been paid by their respective lodge clients with funds obtained from any other FOP entity.[25] Additionally, both Lodge No. 8 and Lodge No. 26 are aware that CLIMACO and LIVIOLA are

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[17] Doc. B, F. of F. No. 11.

[18] Doc. A, F. of F. No. 5.

[19] Id.

[20] Doc. A, F. of F. Nos. 5,6 and 8.

[21] Doc. B, F. of F. No. 11.

[22] Doc. A, F. of F. Nos. 9,10, and 11; Doc. B, Stip. of F. No. 8.

[23] Doc. B, Stip. of F. No. 8.

[24] Id.

[25] Doc. A, F. of F. Nos. 6,9 and 10.

representing the interests of the NOPBA and UAW respectively and have no objection to such representation.[26] But, neither the FOP State Lodge nor the FOP Labor Council has ever given permission to either the Climaco or the Liviola firm for such representation.[27] On the other hand, the record does not reflect that permission has ever been sought.

Members of subordinate lodges can serve as district trustees to the State Lodge.[28] Michael Viancour, for example, is a member of FOP Lodge 8 and is the 7th District trustee to the State Lodge.[29] District trustees of the State Lodge receive minutes of meetings of the executive board of the FOP Labor Council.[30] Furthermore, at quarterly meetings of the State Lodge Board of Trustees collective bargaining and other labor matters are discussed.[31]

The State Lodge has conducted labor seminars occasionally attended by officers of FOP Lodge 8.[32] Collective bargaining has been a subject at these seminars.[33]

III

The questions in these cases are:

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[26] Climaco has suspended representation of Lodge No. 8 (see p. 4, supra) and Lodge No. 26 has consented to Liviola's representation of the UAW in the instant proceedings. See Doc. A, F. of F. Nos. 7,9 and 10.

[27] Doc. B, F. of F. No. 3.

[28] Cf. Doc. B, F. of F. No. 8.

[29] Id.

[30] Id.

[31] Doc. B, F. of F. No. 10.

[32] Doc. B, F. of F. No. 9.

[33] Id.

1. Whether an administrative hearing officer of the State Employment Relations Board (SERB) has authority to recommend and the Board authority to rule on a motion to disqualify counsel as a result of alleged violations of Canons 4, 5 and 9 of the Code of Professional Responsibility.[34]

2. Whether the facts in this instance warrant the disqualification of the CLIMACO and LIVIOLA law firms from further participation in this case.

IV

An unfair hearing violates Due Process. Conflict of interest questions mount issues that impinge directly on the fairness of the hearing. Obviously, then, an administrative hearing whose procedures contravene fairness is vulnerable. It follows that administrative tribunals must have the power, to the extent necessary to protect Due Process, to regulate conflict of interest questions implicating attorneys who practice before them.[35]

In Matter of Huie, (3d Dept. 1956) 2 A.D. 2d 163, 153 N.Y.S. 2d 881, 883 the court cast a principle which is both necessary to the integrity of hearings and, so far as research has determined, universal:

> "The court of original jurisdiction in which the proceeding is pending has inherent power to disqualify an attorney for a party upon a finding that it is improper for him to represent the litigant or to participate in the proceeding."

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[34]The Hearing Officer is the agent of SERB. His authority is derived by delegation from it. (See Appendix A for the Canons 4,5 and 9).

[35]Ohio administrative tribunals cannot control the admission of lawyers to practice or the discipline of lawyers for violations of professional conduct or decide whether a given activity constitutes the practice of law. Those matters are within the original and exclusive jurisdiction of the Supreme Court of Ohio, Constitution of Ohio, Art. IV Section 2(B)(1)(g). And, of course, all administrative decisions in those limited areas in which an administrative agency may act are subject to judicial review.

"Where the determination of the application for disqualification may turn upon questions of fact, it is especially appropriate that the application should be made in the court in which the proceeding is pending. The question of whether the proceeding in which the attorney appears for claimants against the City of New York bears a substantial relationship to the proceedings in which he appeared on behalf of the City is a question of fact which can be resolved only upon a plenary inquiry."

While the New York decision was concerned with court proceedings, the same principle applies to the administrative process:

"The agency must decide the motion before it to protect the integrity of its own hearings, and to implement the public policy of deterring conflict of interest.

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Summing it up, the (BZA) has the inherent authority and the duty to protect the integrity of its proceedings by entertaining a motion to disqualify an attorney who was alleged to have violated the revolving door rule."

Brown v. D.C. Board of Zoning Adjustment, (D.C. Cir. 1980) 413 A. 2d 1276, 1282, 1284."

The Ohio cases are in substantial accord.[36] Case law apart, the statute creating the State Employment Relations Board empowers it to "establish standards of persons who practice before it."[37]

The first question is answered, "Yes."

V

The nature of the lawyer-client relationship is a trust or fiduciary one, cf. White Motor Corp. v. White Consolidated Industries, Inc., (1978) 60 Ohio App. 2d 82, 87-88, warranting the concern of Canons 4, 5 and 9 of the Code of Professional Responsibility for confidentiality, independent professional

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[36]See e.g., State of Ohio, Dept. of Taxation v. Ohio Civil Rights Commission (1982)(Ct. of App. 10th District) No. 81 AP-503, Vol. 82 p. 820; State v. Mabry (1982) 5 Ohio App. 3d 13, 21.

[37]R.C. 4117.02(H)(7).

judgment and the appearance of propriety between lawyer and client. So sensitive are these points, and so important to the professional obligation, that it has been held that when a current representation in opposition to a former client involves a matter "substantially related" to the previous representation:

"The court will assume that during the course of the former representation, confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent." T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., (S.D.N.Y. 1953) 113 F. Supp. 265, 268. And a "court need not 'inquire whether the lawyer did, in fact, receive confidential information'", Hull v. Celanese Corp., (2d Cir. 1975) 513 F. 2d 568, 572. That he "'might have acquired information related to the subject matter of his subsequent representation'" is sufficient to disqualify. Emle Industries, Inc. v. Patentex, Inc. (2d Cir. 1973) 478 F. 2d 562, 571.[38]

Some decisions may reflect a more relaxed view of professional behavior[39] but the principles discussed embody an arctic standard for lawyer-client relationship which bodes better than any other for both the fact of integrity in SERB's processes and the public perception of that integrity.

VI

The relationships between the local lodges and the parent lodge are close. This is enough to warrant a supposition that lawyers representing

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[38] Indeed, the court cannot inquire and preserve the confidentiality required. Id. The Emle court gives the rationale for avoiding even the "appearance" of professional impropriety.

[39] cf. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation (2d Cir. 1975) 518 F. 2d 751.

local lodges in labor matters, as these lawyers did, might very well acquire knowledge of a confidential nature sufficient to disadvantage the parent lodge in a controversy with third parties represented by the same lawyers. Where this possibility exists, SERB will bar the lawyers representing the third parties from proceedings before the Board.

The second question is answered, "Yes."

This position is strict. It is intended to be. The purpose is to forge and implement a pristine policy both in fact and in appearance. It will be followed whenever there is a hint of conflict as on this occasion and in the future.

VII

The present cases are the first to bring conflict questions before the Board. The issues were close. They were without SERB precedent. Their outcome was not clear. The lawyers in question had every right to contest the questions. Therefore, granting the motion to disqualify the Climaco and Liviola firms[40] is no reflection on the integrity of the firms or the partners in them. Without their efforts the issues would not have been raised and would have evaded resolution until another time. All have acted honorably in bringing these matters to a seasonable head.

Sheehan, Vice Chairman, and Fix, Member, concur.

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[40]Apparently not all the partners in the firm worked on the matters in issue here. That makes no difference. See Ohio Code of Professional Responsibility, DR 5-105(D): "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

APPENDIX A

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

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