

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

89-029

In the Matter of  
State Employment Relations Board,  
Complainant,

and

Ohio Council 8, American Federation of State, County  
and Municipal Employees, Local 2312,

Respondent.

CASE NUMBER: 86-JLP-05-0188

OPINION AND ORDER

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané:  
September 27, 1988.

Davis, Vice Chairman:

I. Facts<sup>1</sup>

This action began with a charge by Evelyn Zemen ("Zemen" or "Charging Party") that her unit's exclusive representative, Ohio Council 8, American Federation of State, County and Municipal Employees, Local 2312 ("AFSCME" or "Union"), committed an unfair labor practice by failing to fairly represent her in the pursuit of a grievance regarding her rate of pay. The facts relating to this issue, set forth in the hearing officer's report (incorporated herein by reference), are summarized and supplemented below.

For nearly forty years, Charging Party has been employed by the City of Youngstown ("Employer" or "City") within the fire department's bureau of fire prevention. At all times, she has held the position of clerk/stenographer. Her duties have included typing, filing, and other clerical functions. In 1981, she acquired primary responsibility for the fire department's emergency demolition program. (Finding of Fact ["F.F."] No. 1). Thus, in addition to her prior clerk/stenographer duties, Zemen's job involves these responsibilities:

<sup>1</sup>References to the hearing officer's findings of fact, to the transcript, to exhibits or to other documentation on the record are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the facts stated.

Examining fire reports, estimating the loss caused by the fire, contacting owners and insurers to determine whether demolition is appropriate, devising the appropriate forms for escrow and insurance companies, releasing monies from escrow account either to the insured or to a contractor, performing title searches, recommending dwellings for demolition, putting together bid lists, preparing the contract stipulations for demolition, awarding bids for prior performance of the contractor, receiving invoices and authorizing payments. (Transcript ["T."] pp. 25, 28, 29, and 31, SERB Exhibit 10).

In December 1984, Zemen first discussed with AFSCME representatives her concern regarding entitlement to a higher rate of pay. Carmen Fortunato, President of AFSCME Local 2312, advised Zemen to prepare two lists: one of her duties as clerk/stenographer and one of her demolition-related duties. Zemen was instructed to label the lists as a grievance and was told that this would initiate the grievance process. (F.F. No. 3).

During February and March 1985, AFSCME was preparing to begin negotiations for a collective bargaining agreement to succeed the contract that was set to expire on June 30, 1985. Being aware that Zemen desired a \$5000 per year salary increase, AFSCME included in its contract proposal a demand for such an increase as an "inequity adjustment" in addition to any general wage increase. The Union repeatedly refused to agree to any inequity adjustment. (T. Vol. III, pp. 11-14, 40-48, 80, 95-98, 162, 165, 202, 206, and 209.) AFSCME then pursued another approach, obtaining instead the grouping of classifications and a combination of pay rates that resulted in Zemen receiving a 18.16% increase over the life of the contract, while the average unit employee's increase was 11.75%. (T. Vol. III, pp. 98, 165, 192-199, and 205-206). The negotiations were concluded and the contract was executed on September 25, 1985. (T. Vol. III, p. 157 and Joint Exhibit 1).

Throughout this eight-month period of bargaining preparation and negotiations, Zemen continued to insist upon a \$5000 annual increase. On May 15, 1985, Zemen provided AFSCME with the listings of job duties. Five months after AFSCME had requested such lists. (F.F. No. 3).

<sup>2</sup>The Respondent has objected to this finding of fact, contending that during the December 1984 conversation, AFSCME Staff Representative William Van Zandt, not Fortunato, advised Zemen merely to prepare the lists and that there was "no mention of filing a grievance." Respondent's Exceptions, filed July 18, 1988, p. 4. The hearing officer's account of the discussion, testimony; he credited Charging Party's account of the discussion. Th hearing officer had the benefit of observing the witnesses' testimony with the context of the full hearing. Hence, absent substantial evidence to the contrary, the Board will, and in this instance does, defer to the hearing officer's credibility determination. Warren County Sheriff, SERB 88-01 2-74 and 3-75 (9-28-88), aff'd, 1989 SERB 4-7 (C.P., Warren, 1-13-89).

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In June 1985, Fortunato and Zemen discussed the situation; Fortunato advised Zemen that he felt her demolition duties were related to her position as clerk/stenographer. In the course of the discussion, Fortunato raised his voice to Zemen and said, "I can't seem to get it through that blockhead of yours that this is relative work as required that you are performing." Zemen continued to insist that she was performing work outside of her classification. (F.F. No. 3). In August 1985, in a conversation with Delores McGuire, the Union's Secretary-Treasurer, Zemen learned that AFSCME had decided not to pursue a grievance regarding her rate of pay.

AFSCME advised Zemen that, pursuant to the terms of the new contract, effective September 25, 1985, she should file a claim seeking compensation for work performed outside of her classification. Zemen refused and continued to demand a \$5000 salary increase. (T. Vol. III, pp. 67, 92-93, and 125-126). Zemen and McGuire spoke again in January 1986 and more thoroughly discussed the proposed grievance. As a result of this discussion, the Union reconsidered its prior decision not to pursue the grievance. On January 17, 1986, a grievance was filed regarding Zemen's contention that she was working out of her classification. AFSCME sought compensation at the rate of \$8.13 per hour for time spent by Zemen on tasks outside of her job classification. (F.F. No. 4). Zemen's regular rate of pay for her clerk/stenographer position was \$6.28 per hour. (T. Vol. III, p. 198.)

Although the record does not reveal the extent of the research AFSCME performed in determining the proper rate of compensation to seek for the demolition work in question, it is clear that Secretary-Treasurer McGuire examined the duties of "monitoring specialist" and concluded that those duties most closely corresponded to Zemen's demolition-related duties. The record indicates that, while the duties were similar, the incumbent monitoring specialist, Michael Damiano, performed on-site inspection work while Zemen did none. Evidence was introduced that another city employee, Steven Serednesky, performed demolition duties similar to Zemen's and was compensated at \$10.18 per hour. Serednesky, however, was classified and compensated as a "rehabilitation assistant," the duties of which did not correspond in any way to demolition duties. Thus, while Serednesky may have performed duties more similar to those performed by Zemen, the inappropriateness of his classification rendered comparison unfruitful. Hence, AFSCME used the classification of monitoring specialist and sought the corresponding compensation rate of \$8.13 (F.F. No. 5).

The grievance was pursued through Step 3. At Step 3, a meeting was held with Zemen, AFSCME representatives, and the Fire Chief. AFSCME representatives argued to the Chief that Zemen should be paid \$8.13 per hour for demolition-related duties. Zemen objected, contending that she should receive a higher rate. She referred to the Union representatives as "a bunch of liars" and suggested that they had taken bribes. Angry words were exchanged between Zemen and Fortunato and, finally, Fortunato stated that the grievance would stand "as is" (i.e., seeking \$8.13 per hour) and ended the meeting. (F.F. No. 5).

On March 18, 1986, the Employer denied the grievance, thus concluding Step 3 of the process. The next step under the procedure would have been arbitration, but AFSCME and the Employer reached a settlement of the

grievance. The settlement provided that Zemen would be paid \$8.13 per hour for duties performed beyond those of the clerk/stenographer classification. Zemen began recording time spent performing duties other than those properly within the scope of clerk/stenographer. Such settlement and procedure were consistent with the provisions of the applicable collective bargaining agreement. (F.F. No. 6 and No. 8).

Zemen, dissatisfied with the settlement, requested in writing that AFSCME pursue another grievance. The Union determined that it would not, and Zemen then filed the unfair labor practice charge that gave rise to this action. (F.F. No. 7). Pursuant to an investigation conducted in accordance with Ohio Revised Code ("O.R.C.") § 4117.12, the Board found probable cause to believe that an unfair labor practice had been committed. On January 3, 1987, a complaint was issued alleging a violation of O.R.C. § 4117.11(B)(1) and (6).

## II. Analysis

### A. Introduction

This Board has not previously stated the standard to be employed in resolving complaints alleging a breach of the duty of fair representation.<sup>1</sup> Without such standards, the hearing officer in the instant action had to wade through murky waters formed by the multiplicity of analytical approaches used by other jurisdictions. The hearing officer, attempting to reconcile the variety of approaches, recommended that the Board dismiss the complaint as to the handling of the January 1986 grievance but that the Board find a violation regarding AFSCME's conduct in dealing with the May 1985 document and related issues. The Respondent filed exceptions to the hearing officer's recommendations, to which the Complainant responded. AFSCME also filed motions to reopen the record, to file a reply brief, and for oral argument. These motions have been denied by the Board.

In the analysis that follows, we apply the provisions of O.R.C. § 4117.11(B)(6) in a way that should elucidate the appropriate standard for assessing the duty of fair representation.

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<sup>1</sup>In In re Williams, SERB 85-059 (11-7-85), the Board addressed "one condition that is not" a violation of the duty of fair representation. The Board stated that a "disagreement between the grievor and the union does not demonstrate, per se, a violation of the duty." To date, this has been the Board's only precedent on the issue. The Board in Williams, supra, at 200, noted that "[t]he cases coming to [the Board] have not yet posed the issues necessary to develop a full concept of the duty of fair representation." The case at bar, together with In re Nicolaci, SERB 89-030 (10-16-89), also released today, do pose issues appropriate for development of the foundational concepts of the duty.

B. The Basics of Ohio Law

O.R.C. § 4117.11(B)(6) makes it an unfair labor practice for an employee organization to "fail to fairly represent all employees in a bargaining unit." This provision is an example of one of the outstanding characteristics of O.R.C. Chapter 4117, Ohio's statutory bargaining scheme: it is a comprehensive law governing both employers and unions, that is, in large part, the synthesis of the best components of the statutes and systems produced by the variety of jurisdictions that have preceded Ohio in the development of successful bargaining programs.

O.R.C. § 4117.11(B)(6) reflects this synthesis in that it codifies the widely recognized concept that a "duty of fair representation" is owed by an exclusive representative to all employees it represents. Under federal labor laws and many comparable state systems, this concept has no express statutory reference but is, rather, the result of common law evolution. O.R.C. § 4117.11, however, adds clarity to the concept by clearly specifying the duty and by establishing that the breach of that duty is an unfair labor practice subject to resolution through the procedures of O.R.C. § 4117.12. This simplifies the Ohio system and spares Ohio's unions and public employees from struggling with the procedural morass and common law debates that have characterized the concept in other jurisdictions, especially the federal sector.<sup>4</sup>

Specifically, this foresight has relieved Ohio of the legal dispute over whether a breach of the duty is an unfair labor practice,<sup>5</sup> of the

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<sup>4</sup>The approach taken by the Ohio General Assembly can be compared to that of the Canadian legislative bodies. In Canadian Merchant Service Guild and Gagnon, 1 R.C.S. 509 (1984), the Supreme Court of Canada, after summarizing the evolution of the duty of fair representation within the United States, stated:

But Canadian legislatures have not waited for the evolution of common law principle to run its course. Instead, they have uniformly moved to write the obligation explicitly into the statute and entrust its administration to the Labour Relations Board which is responsible for the remainder of the legislation.

Id. at 519.

<sup>5</sup>See, e.g. Miranda Fuel Co., Inc., 140 NLRB 181, 51 LRRM 1584 (1962), enf. denied, 326 F. 2d 172, 54 LRRM 2715 (2d Cir. Ct. App. 1963); Local 12, Rubber Workers (Goodyear Tire & Rubber Co.), 150 NLRB 312, 57 LRRM 1535 (1964), enf'd., 368 F. 2d 12, 63 LRRM 2395 (5th Cir. Ct. App. 1966), cert. denied, 389 U.S. 837, 66 LRRM 2306 (1967); and Denver Stereotypers v. NLRB, 623 F. 2d 134, 104 LRRM 2656 (10th Cir. Ct. App. 1980).

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complexities caused by a multiplicity of fora,<sup>6</sup> and of confusion as to the procedures to be applied in such cases.<sup>7</sup> Of necessity, however, the wording of O.R.C. § 4117.11(B)(6) is simplistic, stating only that no union shall "fail to fairly represent all employees" in the unit it represents. The statute does not specify what constitutes fair representation. Hence, this Board is left with the task of identifying what type of conduct by an employee organization--or lack of conduct--is a breach of its duty.

The Board has frequently stated that where the Ohio statute uses terms comparable to those used in other jurisdictions, the Board will examine and consider the precedents of those jurisdictions for their instructive value. Of course, the Board will not be bound by such precedents. In re Cleveland City School Dist. Bd. of Ed., SERB 85-003 (2-1-85) at 28 and 29; In re Mad River-Green Local Bd. of Ed., SERB 86-029 (7-31-86) at 303; and In re City of Mauseon, SERB 88-019 at 3-114 (12-23-88). In the case of fair representation, there may be a legitimate question as to whether the prevailing precedent under the federal law (to the extent it can be ascertained) is of any guidance. As one commentator has said, "the United States Supreme Court has spoken with such impenetrable ambiguity that the federal courts, which bear the brunt of construing the nature and scope of the duty, are understandably in disagreement as to what the law is." B. Aaron, "The Duty of Fair Representation: An Overview," in the Duty of Fair

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<sup>6</sup>Under federal labor statutes one noted scholar has summarized the judicial jurisdictional possibilities in the private sector as follows:

Since the employees are asserting a federal right arising under a law regulating commerce, the action may be brought in a federal district court without diversity of citizenship, and regardless of the amount in controversy. Alternatively, the employees may sue in a state court of general jurisdiction and take any federal question to the Supreme Court of the United States, either by certiorari or in appropriate cases by appeal.

Cox, Duty of Fair Representation, 2 Vill. L. Rev. 151 at 170 (1957). This commentary, of course, omits the possibility of National Labor Relations Board ("NLRB") jurisdiction, since the article was written prior to the development of the unfair labor practice approach to duty cases. See footnote 11, infra. In contrast, this Board, by virtue of O.R.C. § 4117.11(B)(6) and § 4117.12(A), has exclusive original jurisdiction of duty of fair representation challenges. Gray v. City of Toledo, 1987 SERB 4-86, Case No. L-86-113 (6th Dist. Ct. App., Lucas Cty., 5-15-87).

<sup>7</sup>For example, debate in the private sector continues as to whether there is a right to a trial by jury in cases alleging a breach of the duty of fair representation. Cf. Quinn v. DiGiulian, 739 F. 2d 637, 116 LRRM 3321 (D.C. Cir. Ct. App. 1984), with Deringer v. Columbia Transportation, 866 F. 2d 859, 130 LRRM 2451 (6th Cir. Ct. App. 1989), and Roscello v. Southwest Airlines Co., 726 F. 2d 217, 119 LRRM 3372 (5th Cir. Ct. App. 1984), rehearing denied, 732 F.2d 941 (1984).



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when it acknowledged in Steele that the function of an exclusive representative is "not unlike that of a legislature"; the exercise of an exclusive representative's powers may adversely affect some of its constituency but, as with a legislative body, the power to produce such results is not absolute. There must be checks to ensure that a union is adequately and properly protecting all whom it represents. The Court elaborated that "... the statutory representative of a craft is [not] barred from making contracts which may have unfavorable effects on some members of the craft represented" but that such results may not be based upon "irrelevant and invigilous" considerations, Id. at 203. In Steele, such an improper consideration was one of race; the seniority system negotiated by the union was discriminatory against black employees.

Several years after Steele, the Supreme Court in Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953), addressed the duty of fair representation as applied under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq.<sup>10</sup> The Court stated that exclusive representatives' "statutory obligation [under Section 9 of the National Labor Relations Act] to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any." Ford Motor Co. v. Huffman, supra. at 337. The Court went on to explain:

The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness

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<sup>10</sup>Issued the same day as Steele was The Wallace Corp. v. NLRB, 323 U.S. 248, 15 LRRM 697 (1944), in which the Court did address the existence of the duty of fair representation under the NLRA, stating that:

[t]he duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected Union at the time it is chosen by the majority would be left without adequate representation.

This statement, however, was not central to the action and, because the issue in the case was not the union's action but the employer's unlawful domination of an in-house union, the statement constitutes dicta. Therefore, Ford is generally regarded as the first case in which the Court dealt squarely with the issue.

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must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of discretion.

Ford Motor Co. v. Huffman, *supra*, at 338.<sup>11</sup> After Huffman came Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964), and then Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), considered the Court's leading pronouncement on the issue.

In Vaca, the Court dealt not with allegations regarding the product-of-bargaining, but, rather, with the processing of a grievance and the union's decision that it would not pursue a grievance to arbitration. In determining that the union had not breached its duty, the Court offered an analysis of the process of collective bargaining and contract administration and adopted as the applicable standard the now-ubiquitous duty-of-fair-representation linchpin: arbitrariness. The oft-quoted language from Vaca is: "a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 207.

This pronouncement then set in motion years of litigation over the question of what constitutes arbitrariness and/or bad faith.<sup>12</sup>

<sup>11</sup>Ten years after the Supreme Court established the existence of the duty under the NLRA, the NLRB entered the picture through Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962), *enf. denied*, 326 F. 2d 172, 54 LRRM 2715 (2d Cir. 1963), in which it concluded that a union's breach of the duty constituted an unfair labor practice under 29 U.S.C. § 153(b)(1). The NLRB declared this standard: employees have a right "to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." *Id.* at 185.

<sup>12</sup>Consider, for example, the following selection of cases from different jurisdictions, each of which resulted in the particular court rendering a variation in interpretation of the Vaca test: Barr v. United Parcel Service, 868 F.2d 36, 130 LRRM 2593 (2d Cir. Ct. App. 1989); Deringer v. Columbia Transportation, 866 F.2d 859, 130 LRRM 2451 (6th Cir. Ct. App. 1989); Dober v. Roadway Express, 707 F. 2d 292, 113 LRRM 2594 (7th Cir. Ct. App. 1983); Medlin v. Boeing Vertol Co., 620 F. 2d 957, 104 LRRM 2247 (3rd Cir. Ct. App. 1980); Smith v. Husoman Refrigeration Co., 619 F. 2d 1229, 103 LRRM 2321 (8th Cir. Ct. App. 1980), *cert. den.*, 449 U.S. 839, 105 LRRM 2657 (1980); Prince v. Southern Pacific Transportation Co., 586 F. 2d 750, 100 LRRM 2671 (9th Cir. Ct. App. 1978); Whiteen v. Anchor Motor Freight, 521 F. 2d 1335, 90 LRRM 2161 (6th Cir. Ct. App. 1975), *cert. den.*, 425 U.S. 981, 94 LRRM 2201 (1976); Fligeroa de Arroya v. Sindicato de trabajadores Packinghouse, 425 F. 2d 281, 74 LRRM 2028 (1st Cir. Ct. App.), *cert. den.*, 400 U.S. 877, 75 LRRM 2455 (1970), *reh. den.*, 400 U.S. 953 (1970), *reh. den. again*, 401 U.S. 926 (1971); Coleman v. Outboard Marine Corp., 285 N.W. 2d 631, 103 LRRM 2455 (Wisc. Sp. Ct. 1979); Goolsby v. City of Detroit, 358 N.W.2d 856, 120 LRRM 3235 (Mich. Sup. Ct. 1984).

D. The Standard Under O.R.C. § 4117.11(B)(6)

In this Board's quest to provide an analysis that offers unions and employees some guidance for future conduct, consideration has been given to the wisdom of creating new, more precise terminology to define "fair representation." Such efforts, however, are counter-productive for two reasons: (1) there is little merit to adding further to the current jumble of ambiguous adjectives used to delineate the nature of the duty, and (2) because the determination of most duty of fair representation cases turns upon the facts, a more definitive terminology is not readily apparent. While we cannot improve upon existing analyses, we are fortunate that under Ohio law only one forum for original application of the duty exists. Hence, the parties will be faced with only this Board's interpretation of arbitrariness.<sup>13</sup> We thus endeavor to elaborate upon the meaning of "arbitrary," "discriminatory," and "in bad faith."

The evaluation of cases alleging a union's breach of its duty to fairly represent all employees must be grounded in a pragmatic understanding of labor relations. At the local level, a union is the product of the workforce it represents. It derives both its strength and its limitations from the constituent employees. Often, basic representational activities--both in terms of bargaining preparation and contract administration--are handled by lay co-workers rather than professional labor relations representatives. This is both wise and economical. The quality of and access to representation are enhanced because on-site co-workers are immediately available, have first-hand understanding of workplace issues, and are readily recognizable by the members, and are financially essential; if a union were to provide full-time professional staff members to service all unit needs, the expense of such personnel demands would have to be met through potentially prohibitive increases in dues and fair share fees. Thus, for entirely legitimate and systemic reasons, much of the work of an employee organization is performed by lay persons.

Indeed, some employee organizations that are properly formed and fully functioning under O.R.C. § 4117.01(D) are staffed entirely by lay persons; many "independent" employee organizations have no affiliation with statewide or nationwide umbrella organizations. While a union should attempt to ensure proper training and guidance for its staff and its locally-elected officers, a union's performance must be viewed with a realistic understanding that many matters are handled not by professional, full-time personnel but by individuals whose expertise is in the tasks of their employment rather than in the field of labor relations.

<sup>13</sup>This, of course, is based upon the presumption that Ohio courts will conduct review under O.R.C. § 4117.13 in a manner consistent with the concept of administrative expertise. Lorain City School Dist. v. SERB, 40 Ohio St. 3d 257, 1989 SERB 4-2 at 4-3 and 4-4 (1988).

Also essential to the analysis of the duty is an understanding that the concept of "representation," in this instance, is not the equivalent of "legal representation" which, in general, prescribes zealous advocacy of the client's lawful position regardless of the representative's perception of the merits. See Code of Professional Responsibility, Canon 7 and EC 7-4 and 7-5 (as adopted by the Supreme Court of Ohio, 10-5-70). Rather, the union's representative duty involves balancing the interests of a diverse group. This balancing occurs most often in bargaining, as noted by the Supreme Court in Steele, but it also may be a legitimate concern in resolving grievances and other contract administration issues. Given this essential component of an exclusive representative's function, flexibility and deference must be accorded the union in its efforts to seek benefits and enforcement for the unit as a whole, even though the desires of individual employees or groups of employees within the unit may go unfulfilled.

The foregoing practical considerations form the foundation for our determination of whether a union's action is "arbitrary." In making such an assessment, this Board will look to the union's reason for its action or inaction. Is there a rational basis for the union's position? If there is, the action is not arbitrary. We accord the union great deference in evaluating approaches to bargaining and contract enforcement. Exclusive representatives must be able to form, evaluate, and pursue strategies for bargaining and contract enforcement. In interpreting and pursuing contract rights, unions must have leeway to assess and allow for ramifications and merits. Thus, a union's reason for a given approach will be examined not for its wisdom, for we cannot second-guess a union on its assessment of merit, but to determine merely whether the reason is rational.<sup>14</sup>

If there are no apparent factors that show legitimate reason for a union's approach to an issue, the Board will not automatically assume arbitrariness. Rather, we will look to evidence of improper motive: bad

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<sup>14</sup>In Vaca v. Sipes, the trial court had examined the ultimate merits of the grievance that was at issue, concluding, contrary to the union's assessment, that the grievants could have succeeded had the matter been taken to arbitration. The Supreme Court rejected this approach and explained the folly of an adjudicator's efforts to assess success or failure of a grievance:

... the standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

faith or discriminatory intent. An element of intent must be present; it may be evinced by discrimination based upon an irrelevant and invidious consideration,<sup>15</sup> or it may be indicated by hostile action or malicious dishonesty--i.e., bad faith. In the absence of such intent, if there is no rational basis for the action, arbitrariness will be found only if the conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment.<sup>16</sup>

E. Application Of O.R.C. § 4117.11(B)(6) To The Case At Bar

The allegations that AFSCME breached O.R.C. § 4117.11(B)(6) can be divided into three component issues: the handling of the May 15, 1985, document; the handling and settlement of the January 17, 1986, grievance; and the refusal to pursue an additional grievance as requested in May 1986.

In evaluating AFSCME's actions in these matters, the fundamental inquiry in each instance is whether AFSCME had a rational basis for the actions

<sup>15</sup>In the interest of precision, we specify that discrimination must be based upon irrelevant considerations. While the term "discrimination," standing alone, has come to imply discrimination on improper bases, greater specification of the term is necessary here because, in the course of negotiations or grievance settlement, certain employees may come away with lesser results than others in the unit. This inevitable result of balancing and bargaining could be labeled "discriminatory," even though the discrimination may be the result of innocuous or duty-related distribution of resources or restrictions. Thus, we specify that discrimination violative of O.R.C. § 4117.11(B)(6) is limited to that based upon invidious considerations that are irrelevant to the work performed. This approach is reflective of language used by the Supreme Court in Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944) (discrimination based upon irrelevant and invidious considerations such as race prohibited) and by the NLRB in Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962), enf. denied, 326 F. 2d 172, 54 LRRM 2715 (2d Cir. Ct. App. 1963) ("labor organizations are prohibited from taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair.").

<sup>16</sup>Applying this standard to the case at bar, we find--for reasons to be developed below--AFSCME's conduct was adequately supported by rational bases. Future cases will present fact patterns through which the Board may elaborate on specific types of actions which, measured by the standard articulated herein, are or are not breaches of the duty. We do not engage in such elaboration today, for only the facts of the instant case are before us, and attempts to give examples would be presumptive and could pollute our attempt to present a straight-forward standard. It is suggested, however, that in considering the obligations and potential liability under these standards, employee organizations also should remember that even if an act or omission may not constitute a violation of O.R.C. § 4117.11(B)(6), recall or replacement through the electoral process is another avenue available to dissatisfied employees. O.R.C. § 4117.07.

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taken. As is elaborated below, in each case AFSCME did have rational reasons for its actions. Moreover, there is no evidence in any of the three instances that there was any bad faith or discriminatory intent.

1. The May 15, 1985. Document

The actions regarding the Charging Party's first attempt to pursue her grievance must be examined against the backdrop of AFSCME's other actions. In December 1984, AFSCME officers became aware of the Charging Party's situation. A listing of duties was requested, but Zemen did not comply with that request until May 15, 1985. In the interim, AFSCME investigated and considered Zemen's situation, ultimately deciding to pursue negotiations for a substantial annual salary increase that would serve as an "inequity adjustment." This was what AFSCME believed Zemen wanted. In the course of negotiations with the City, the Union found it necessary to switch tactics, and it then sought to obtain a grouping of classifications that gave Zemen an increase significantly larger than the average employee increase.

Although AFSCME decided not to pursue the May 15, 1985, grievance, they had a rational basis for the decision: the Union was in the process of attempting to achieve the desired result at the bargaining table. That AFSCME was unable to win precisely what the Charging Party wanted is not relevant. The critical factor is that AFSCME pursued resolution of the problem in a rational way. The Union's judgment in this matter is entitled to deference.

While there is evidence in the record that harsh words were exchanged between Zemen and the local president, the exchange is not indicative of hostile or bad faith motivation. The comment made by the president of Local 2312 does not taint AFSCME's decision-making. There is no indication that AFSCME's approach to the grievance was based upon hostility toward Zemen. Strained personal relationships or even open contentiousness between an employee and union officers will not support a finding of bad faith if the union's justification for its action is legitimate and rational. Indeed, the mere fact that an individual employee may not be able to attain what he or she seeks often can spark tense moments between a frustrated employee and the union. Similarly, an employee's insistence upon a given approach that is contrary to the union's strategy may produce friction. Such were the circumstances in the instant case. Frustration on both sides created a volatile atmosphere. The president's harsh words (and Zemen's subsequent verbal attack on AFSCME) were symptomatic of the strain and do not constitute evidence of bad faith. A breach of the duty will not be found simply because tempers flared.

In addition, the Local president's comments were made at a time when the Union was actively pursuing Zemen's goal through the avenue of negotiations. While the local president may have been mistaken in his expressed assessment that all of her duties were within the scope of clerk/stenographer, the critical factor is that adjustment of the matter was being pursued by the AFSCME staff representative in bargaining. Indeed, although the desired \$5000 increase was not obtained, Zemen benefited

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substantially from AFSCME's bargaining efforts and from the Union's subsequent actions.

AFSCME's good faith in this matter is further illustrated by its action regarding the next issue--subsequent pursuit of the grievance in response to Zemen's continued dissatisfaction.<sup>17</sup>

2. January 1986 Grievance

The grievance that AFSCME initiated or reactivated on January 17, 1986, sought compensation for time that Zemen spent performing work beyond her clerk/stenographer duties. AFSCME attempted to obtain payment for such tasks at the rate of \$8.13 per hour. This was the rate of pay associated with the classification that AFSCME found to be most appropriate for the duties at issue.

Complainant and Charging Party are critical of the Union's investigatory efforts in pursuing this grievance. The record shows, however, that reasonable inquiry was made and a rational position was taken and pursued by AFSCME. Zemen and Complainant contended that the Union should have conducted a more rigorous investigation or should have reached a different conclusion as to the appropriate classification. There is, however, ample evidence of reasoned decision-making by the Union. AFSCME pursued adequate efforts to assess the grievance and made a logical judgment in seeking \$8.13 per hour--the pay scale for the classification of monitoring specialist. The Complainant has argued that the individual performing duties most similar to Zemen's was compensated at \$10.18 per hour, but the record indicates that this employee was misclassified as a rehabilitation assistant. While the individual holding the position of rehabilitation assistant may have performed tasks more similar to Zemen's demolition program functions, the classification and, hence, the pay scale did not correspond to the duties at issue.<sup>18</sup>

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<sup>17</sup>Complainant contends that this action constitutes an admission or acknowledgment by AFSCME that it initially should have processed the grievance in May 1985. Such a conclusion would create a dangerous precedent. A union must have the flexibility to pursue its chosen strategy for resolution of a problem, and it must not be penalized for subsequent efforts to accommodate an employee's desires. To construe additional efforts or a change in strategy as an admission would inhibit unions from exercising their discretion, from pursuing creative, potentially more productive avenues of resolution, or from reassessing initial judgments and chosen causes.

<sup>18</sup>Such close examination of AFSCME's reasoning perhaps is unnecessary. The Union's efforts and decisions had a rational basis; under the standards articulated herein, further inquiry into the reasoning would be unnecessary. The above points are added, however, to further illustrate the reasonableness and good faith effort of the Union.

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Even though Zemen, during the third step of this grievance, lashed out at AFSCME representatives and attacked their integrity, the Union continued to pursue settlement in accordance with their judgment as to the merits of the action. Though Zemen was dissatisfied with the terms of the settlement, the Board gives deference to the Union's decision to accept a resolution that provided adequate compensation for time worked on demolition-related matters. O.R.C. § 4117.11(B)(6) does not guarantee an employee an absolute right to have a grievance taken to arbitration, nor does it prohibit settlement contrary to the precise demands of the employee. As noted by the United States Supreme Court in Foust v. Electrical Workers, 442 U.S. 42 at 51, 101 LRRM 2365 (1979), "union discretion is essential to the proper functioning of the collective bargaining system." Settlements such as the one at issue are a critical component of successful labor-management relations. Only through exercise of its discretion can unions weed out frivolous grievances, seek resolutions through other effective means, achieve settlements that enhance consistency, or maintain the integrity of the collective bargaining agreement.

In this regard, the observations advanced by the U.S. Supreme Court in Vaca are pertinent:

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Vaca v. Sipes, supra, at 191-192.

3. May 1986 Refusal to Pursue Additional Grievance

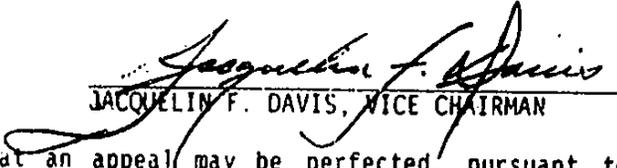
Having adequately addressed and resolved the matter through both negotiations and grievance processing, AFSCME's conduct in refusing to institute yet another grievance was far from arbitrary and was free from bad faith or discriminatory intent. In fact the need for union discretion in grievance processing is demonstrated by these very facts. The Charging Party was attempting to pursue a grievance that would have been wholly duplicative and, at that point, frivolous. The matter had received attention and adjustment from AFSCME and the Employer. The filing of another grievance would have served no purpose and would simply have burdened and abused the grievance system, draining and diverting the Union's and Employer's energy and resources away from live, legitimate issues.

III. CONCLUSION

For the reasons stated, the Board concludes that AFSCME did not, at any time in the case at issue, violate O.R.C. § 4117.11(B)(1) or (6). Accordingly, the Board adopts the Hearing Officer's statement of admissions, stipulations, findings of fact, and conclusions of law 1 through 5; rejects conclusion of law No. 6; and dismisses the complaint.<sup>19</sup>

It is so ordered.

SHEEHAN, Chairman, and DAVIS, Vice Chairman, concur. LATANE, Board Member, dissents.

  
JACQUELIN F. DAVIS, VICE CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and common pleas court in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 16<sup>th</sup> day of OCTOBER, 1989.

  
CYNTHIA L. SPANSKI, CLERK

<sup>19</sup>AFSCME takes exception to the hearing officer's treatment of Ohio Council 8, AFSCME and AFSCME Local 2312 as being equally responsible for the conduct at issue. (Respondent's Exceptions, filed July 18, 1988, p. 15.) The hearing officer made this recommendation after concluding that a violation had occurred in the handling of the May 15, 1985, document. (Hearing Officer's Report, p. 12, footnote 8.) Because the Board has found that no unfair labor practice was committed, the question of joint liability need not be addressed. The Board makes no finding as to the relationship between Ohio Council 8 and Local 2312 or as to one entity's responsibility for the actions of the other. The use of general references to "AFSCME" throughout this opinion rather than specific designations of "Ohio Council 8" or "Local 2312" is for ease of reading and is not to be construed as any indication of a substantive judgment on this issue.

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STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Complainant,

and

Ohio Council 2, American Federation of State, County  
and Municipal Employees, Local 2312,  
Respondent.

CASE NUMBER: 86-ULP-05-0188

DISSENTING OPINION

Latané, Board Member:

I respectfully dissent from the conclusion reached by the majority that Respondent union did not violate O.R.C. § 4117.11(B)(1) and (B)(6) by failing to process employee's May 15, 1985 grievance until January 15, 1986. I agree with Conclusion of Law No. 6 (inadvertently numbered 5), in the hearing officer's Proposed Order, which found the refusal to pursue that grievance to be evidence of arbitrary conduct toward the grievant.

I agree with the majority's approach to defining breach of duty of fair representation as expressed in the majority opinion. However, the facts in this case led me to conclude that the union did breach its duty to fairly represent a bargaining unit member.

The hearing officer's Proposed Order is hereby incorporated in its entirety by reference.

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