

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

205
SEEB OPINION 89-030

In the Matter of
Tony Nicolaci, et al.,
Charging Party,

v.

Fraternal Order of Police, Ohio Labor Council, Inc.,
Charged Party.

CASE NUMBER: 88-ULP-08-0402

DISMISSAL OF UNFAIR LABOR PRACTICE CHARGE
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
August 17, 1989.

Tony Nicolaci (Charging Party) has filed an unfair labor practice charge against the Fraternal Order of Police, Ohio Labor Council, Inc. (Charged Party). The charge alleges that the Charged Party violated Ohio Revised Code Sections 4117.11(B)(1) and (6) by failing to fairly represent the court service officers when negotiating a new contract with the Hamilton County Sheriff.

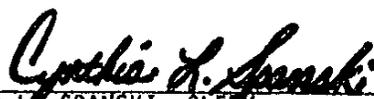
Pursuant to Ohio Revised Code Section 4117.12, the Board conducted an investigation of this charge. For the reasons stated in the attached opinion, incorporated by reference, the Board finds that there is no probable cause to believe that the Charged Party has violated Ohio Revised Code Section 4117.11. Accordingly, the charge is dismissed.

It is so directed.

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


WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party and the representative of each party by certified mail, return receipt requested, on this 16th day of OCTOBER, 1989.


CYNTHIA L. SPANSKI, CLERK

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OPINION

Davis, Vice Chairman:

I. Results Of Investigation¹

On August 10, 1988, Tony Nicolaci (Charging Party) filed an unfair labor practice charge against the Fraternal Order of Police, Ohio Labor Council, Inc. ("Charged Party" or "FOP"), the exclusive representative of a unit of employees of the Hamilton County Sheriff ("Employer"). The unfair labor practice charge indicates that the Charging Party was attempting to file on behalf of "all court service officers 1 and 2" and alleges that the FOP violated Ohio Revised Code ("O.R.C.") §4117.11(B)(1) and (6) in the course of collective bargaining negotiations by agreeing to variations in amounts of, and eligibility for, pay increases for certain classifications. The Charging Party contends that the FOP should have sought equal, across-the-board percentage increases for all employees in the unit. (Unfair Labor Practice Charge filed August 1988, addendum, page 4.)

Pursuant to O.R.C. §4117.12 and Ohio Administrative Code Rule 4117-7-02, the Investigation Section of this agency conducted an inquiry regarding the

¹The information set forth herein is gleaned from the investigation conducted pursuant to O.R.C. §4117.12(B) and from the documents available in the related negotiation case, SERB Case No. 87-MED-09-0855.

charge. Information gathered in the course of the investigation indicates that the FOP and the Employer commenced negotiations in late 1987 for a successor agreement for the bargaining unit consisting of approximately 170 employees, including "Court Service Officer 1, 2, 3, Patrol Clerk, Patrol Officer 1 and 2, Court Service Supervisor 1, and Evidence Technician."² In preparing for negotiations, the FOP chief negotiator worked with and through the direction of the local-level "negotiating committee," which is composed of nine representatives selected by the employees in the unit for which bargaining is conducted.

The parties followed the dispute resolution procedures set forth in O.R.C. §4117.14 and, having failed to reach an agreement by late 1987, entered into the fact-finding process as mandated by O.R.C. §4117.14(C). After several agreed extensions of the time-lines for fact finding, a hearing was held in March and April of 1988. Both parties submitted their proposals to the fact finder. The FOP sought increases that would have provided for equivalent percentage increases for all classifications. The Employer sought increases that were of differing percentages for the different classifications. The FOP attacked the Employer's proposals as being "inadequate." The fact finder recommended adoption of the Employer's wage package.

The fact finder's recommendations were rejected by a proper vote of the FOP membership, so the matter proceeded to conciliation as required by O.R.C. §4117.14(G). At this point, the Charging Party and other court service officers met with their local representative, Guy Kaufman, and expressed concern about the percentage variances. Kaufman agreed to raise the issue with the negotiating board and apparently did so.

On June 6, 1988, the FOP submitted its proposal to the conciliator, again contending that the increase recommended by the fact finder was inadequate. The FOP, however, had modified its final proposal on wages to provide varied percentage increases for the different classifications. The percentage increases proposed for the court service officers were not as great as those of patrol officers. The Employer submitted its proposal to the conciliator, seeking lower graduated increases, but also with varied percentages for the different classifications. The FOP submitted another proposal on June 27, 1988, seeking a slightly different combination of increases. On July 6, 1988, and July 27, 1988, the conciliation hearing was held.

On July 20, 1988, twenty-one court service officers, still concerned about the variations in percentage increases, submitted a letter to the chief negotiator expressing their disagreement with the "wage proposal our negotiating board has made" for the court service officers. In the letter, the officers stated:

² The Board assumes that all employees in the cited unit are deputized in accordance with O.R.C. §311.04, thereby making the composition of the unit proper under the requirements of O.R.C. §4117.06(B)(3) and 4117.01(M). See, *In re Warren County Sheriff*, 85-016 (5-1-85).

The entire issue is the percentage increase submitted by our negotiating board. It is less for us than it is for the Road Patrol and Detectives. It was one thing when the county made such an offer, but for our negotiating board to accept this theory is ludicrous. We are told the reason for the split percentages is because they consider a patrolman's job more dangerous than ours.

The court officers went on in their letter to question how danger can be financially quantified. The court service officers asked that the FOP "resubmit a proposal requesting percentage increase for all of us as you have [for] the road patrol and investigation section."

The FOP did not withdraw its proposal. On August 15, 1988, the conciliator issued his award. The conciliator noted that the Employer's offer was approximately one-half percent below that of the fact finder, and the FOP was about one-half or three-quarters of a percent above the fact finder's. Concluding that the Employer had not shown that it could not afford the FOP's revised demands, the conciliator adopted the FOP's approach.

II. ANALYSIS

As this Board has noted in In re Ohio Council 8, American Federation of State, County and Municipal Employees, Local 2313, SERB 89-029 (10-16-89) ("AFSCME Local 2313"), issued this same date, an exclusive representative is accorded substantial deference in evaluating approaches to its representational duties both at the bargaining table and in the grievance procedure. A violation of O.R.C. §4117.11(B)(6) occurs only when the union's action is based upon arbitrariness, discrimination upon irrelevant considerations, or bad faith.

The facts in AFSCME Local 2313 deal with grievance processing. The instant case raises the other common type of duty of fair representation case: challenge to actions taken in the course of bargaining. Indeed, the charge at hand presents an illustration of the latitude that must be given exclusive representatives in the formulation and pursuit of bargaining postures.

A union, of necessity, represents diverse interests. When conducting bargaining, as noted by the U.S. Supreme Court in Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944), an exclusive representative functions much as a legislative body does. We have held that a union must represent all employees fairly (without arbitrariness, bad faith, or discrimination based upon irrelevant considerations), but we also have recognized the nature of the union's role as negotiator, effectively addressed by the U.S. Supreme Court in yet another early duty of fair representation case:

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented.

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* * *

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 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 its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330 at 338, 31 LRRM 2548 (1953).

In the instant action, the position taken by the FOP was far from arbitrary. Rather, it was the product of legitimate balancing both of interests within the unit and of the FOP's overall goals against the demands of the Employer and the probable focus of the conciliator. There initially were efforts to achieve percentage increases equivalent for all classifications in the unit. When such efforts failed, the FOP turned to a more "saleable" approach of varying increases, with differentials based upon job function and years of service. Both bases are entirely legitimate and are within the wide range of discretion with which exclusive representatives operate. Indeed, the Charging Party's letter to the FOP chief negotiator illustrates the need for such broad discretion. The court service officers ask: "Who is going to determine what the dollar value is put on this degree of danger?" They also question why patrol officers and detectives should be paid the same, when, according to the court service officers, there is less danger in the work of a detective than in that of a patrol officer. These are the types of questions with which an exclusive representative must be given latitude to grapple. They are not easy questions, nor are they subject to simple mathematical formulae or to certain, absolute answers. They are, however, questions reserved to resolution by the exclusive representative in negotiations with the employer. That those who benefit less greatly from the outcome disagree with the resolution does not diminish the deference due the exclusive representative's judgment.

There also is no indication of bad faith or irrelevant discrimination in the actions at issue. In AFSCME Local 2312 we noted that the term "discrimination" must be modified to specify discrimination upon improper (irrelevant or invidious) bases. The need for such limitation becomes apparent in the instant case. Certainly, a form of discrimination occurred, but it was permissible, duty-related discrimination; pay scales were adjusted for different positions, based upon job functions, related risk of danger, seniority, and strategic conciliation tactics as determined by the negotiating committee. This illustrates the point made by the Board in AFSCME Local 2312, supra, at footnote 15, and by the Supreme Court in Ford Motor Co. v. Huffman, supra at 338: some employees inevitably will be treated differently than others, but if the difference is job-related, it is permissible. Only discrimination based upon irrelevant, invidious considerations is actionable.

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For these reasons, it is clear that the investigation has shown no probable cause for the Board to believe that an unfair labor practice has been committed. Accordingly, pursuant to O.R.C. §4117.12(B), the charge is dismissed.

Sheehan, Chairman, and Latané, Board Member, concur.

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