

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEEB OPINION 90-017

In the Matter of
State Employment Relations Board,
Complainant,
v.
Cuyahoga County Sheriff's Department,
Respondent.

CASE NUMBERS: 88-UJP-11-0624
88-UJP-12-0589
89-UJP-01-0020

ORDER
(Opinion attached.)

Before Chairman Sheehan, Board Members Latané and Pottenger: August 30, 1990.

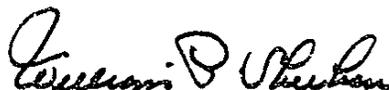
On November 16, 1988, Joseph Kusner and Harry Hill (Charging Parties) filed a joint unfair labor practice charge against the Cuyahoga County Sheriff's Department (Respondent). On December 9, 1988, Joseph Kusner (Charging Party) filed a unfair labor practice charge against the Respondent. On January 17, 1989, Harry Hill and Ronald Gallagher (Charging Parties) filed a joint unfair labor practice charge against the Respondent. Pursuant to Ohio Revised Code (O.R.C.) §4117.12, the Board conducted an investigation and found probable cause to believe that unfair labor practices had been committed. Subsequently, the cases were consolidated for hearing and a complaint was issued alleging that the Respondent had violated O.R.C. §4117.11(A)(1) and (A)(6) by failing to timely process grievances.

The cases were heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and response. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Stipulations, Findings of Fact, Analysis and Discussion, Conclusions of Law and Recommendations of the hearing officer.

The unfair labor practice charges are dismissed.

It is so ordered.

SHEEHAN, Chairman, dissents. POTTENGER and LATANE, Board Members, concur.

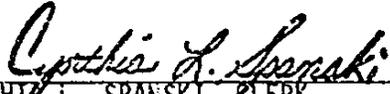

WILLIAM P. SHEEHAN, CHAIRMAN

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Order
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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 28th day of September, 1990.


CYNTHIA L. SPANSKI, CLERK

0509B:jlb

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88-ULP-12-0689
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OPINION

Latané, Board Member:

In this case, charges of repeated failures to timely process grievances were filed by five employees against the Cuyahoga County Sheriff's Department (Employer). (One employee subsequently indicated that he did not wish to pursue the allegation.) The sole issue in the case is whether the Employer violated O.R.C. §4117.11(A)(1) and (A)(6) by establishing a pattern of repeated failures to timely process grievances.

O.R.C. §4117.11(A)(1) states:

It is an unfair labor practice for a public employer, its agents, or representatives to: Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

O.R.C. §4117.11(A)(6) states:

It is an unfair labor practice for a public employer, its agents, or representatives to: ...Establish a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances.

The majority agrees with the Hearing Officer who found that there was a "good faith" effort on the part of the Employer to comply with the contractual grievance/arbitration provisions in the newly negotiated contract between the Employer and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Region 2 (UAW, Union).

In this case of first impression before S.E.R.B., the Hearing Officer determined from the "uncontroverted and believable testimony" that the Employer did not anticipate the volume of grievances that were filed by a new bargaining unit, and that as it became clear the problem was not short term he added staff to deal with the work load.

All four of the grievances in the instant case were processed timely at steps one and two, but were backlogged at step three. Three of the four grievances had a step three meeting within three and one half months of the step two denial, and the fourth had a delay of one year. The Hearing Officer found that the excessive delay in one case did not rise to the level of a O.R.C. §4117.11(A)(1) and (A)(6) violation.

He further noted that although the contract provided for immediate advancement to the next step of the grievance process if there was a failure by the Employer to communicate a decision within the specified time limit, none of the Charging Parties requested such advancement in the four grievances at issue.

The majority adopts the Hearing Officer's Analysis and Discussion, as well as the Stipulations, Findings of Fact and Recommendations, which are all incorporated in this Opinion by reference.

Pottenger, Board Member, concurs.

¹Analysis and Discussion, p. 11.

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DISSENTING OPINION

Sheehan, Chairman:

I respectfully dissent.

The undisputed facts of this case show that the four grievances at issue in these charges were not timely resolved within the meaning of the collective bargaining agreement. Whereas the agreement requires that at Step 3 the Sheriff, or his designee, process a grievance within seven days of its receipt, none of the grievances was processed in that time. In fact, the Hearing Officer found that one grievance was 102 days from Step 2 to Step 3; one was 88 days; one was 39 days; and one was nearly one year. The evidence further established that 90 to 100 grievances were backed up at one time awaiting Third Step meetings.

The Cuyahoga County Sheriff's Department (Sheriff's Office or Respondent) does not deny its failure to timely process the grievances, but rather seeks to justify the failure by asserting that 1) it processed the grievances as quickly as it could; 2) it acted in good faith in processing the grievances; 3) the union had a satisfactory alternative in being able to proceed to

arbitration; and 4) the issue is moot because the Office is now in compliance. In the face of the admitted failure, the issue is whether these justifications prevent a finding that the Sheriff's Office violated O.R.C. §4117.11(A)(6), which states that an employer commits an unfair labor practice when it establishes "a pattern or practice of repeated failures to timely process grievances" Because the language in the statute commands a clear duty of the employer and admits of no exceptions, I would find that the Sheriff's Office committed an unfair labor practice in failing to timely process the grievances at issue here.

The National Labor Relations Act (N.L.R.A.), to which the majority referred, contains no statutory provision similar to the express provisions of O.R.C. §4117.11(A)(6). In the absence of an express provision, the National Labor Relations Board will, as the majority pointed out, find a violation of the N.L.R.A. only where the refusal to process grievances imposes a unilateral change in the process or where the employer acts in bad faith. Unlike the judicially created unfair labor practice under the N.L.R.A., the unfair labor practice under Ohio law is clear and unequivocal: a public employer commits an unfair labor practice by establishing "a pattern or practice of repeated failures to timely process grievances" As stated before, the Sheriff's Office in this case does not deny its repeated failure to timely process grievances, but attempts to justify that failure and avoid the unfair labor practice charge by claiming that it was caught unprepared for the deluge of grievances and did the best it could while waiting to see if the volume of grievances would continue before committing permanent resources to their

resolution. While this strategy may have been a sound business decision and done in good faith, in choosing this response the Sheriff's Office chose to ignore the express terms of the collective bargaining agreement and O.R.C. §4117.11(A)(6). The Sheriff's good faith may be relevant to the remedy imposed, but it does not prevent a finding that the failure to process grievances constituted an unfair labor practice.

During the time the grievances were building up, Mr. William Cook, the Sheriff's designee, had no support staff or support equipment assigned to assist him in contract administration duties, except for sharing occasionally the Sheriff's secretary for typing and receiving authorization for a computer in early 1988 to help track the grievances. It wasn't until October 1988, that the Sheriff named the Warden of the Correction Center to also serve as designee to handle Step 3 meetings.

While one can empathize, and I certainly do, with the state of contract administration affairs in the Sheriff's office during 1987 and 1988, there is simply nothing in those conditions to justify or warrant the Respondent's exemption from its contractual obligation.

Similarly, the Sheriff's Office's assertion that the union had a satisfactory alternative in proceeding to arbitration does nothing to excuse the Sheriff's fault in failing to process the grievances. As a matter of fact, a demand for arbitration would have further exacerbated the backlog condition. Furthermore, if the availability of arbitration were sufficient to justify the failure to process grievances, an employer would have little incentive to process them at all and could simply await arbitration. This

result is contrary to the Ohio legislature's express recognition of the importance of grievance procedures. Section 4117.09(B)(1) states that collective bargaining agreements "shall contain a provision that ... provides for a grievance procedure which may culminate with final and binding arbitration" (Emphasis added.) Clearly, the Ohio legislature placed great emphasis on the availability of a grievance procedure by making it mandatory when arbitration provisions are merely permissive.

Finally, the fact that the Sheriff's Office is now in compliance with O.R.C. §4117.11(A)(6) does not excuse the past unfair labor practice but goes to the remedy required.

The combination of the requirement in O.R.C. §4117.09(B)(1) making grievance procedures mandatory and in O.R.C. §4117.11(A)(6) making it an unfair labor practice to fail to timely process grievances shows that neither good faith nor a reasonable business justification excuses the Sheriff's Office for failing to process grievances. I would find that an unfair labor practice has been committed.

For these reasons, I respectfully dissent.

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