

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Shaker Heights Fire Fighters Association, IAFF Local 516,
Employee Organization,
and
City of Shaker Heights,
Employer

CASE NUMBER: 93-MED-01-0058

OPINION

OWENS, Chairman:

Before us is a motion by the Employer requesting that we disqualify Harry Graham from serving as fact finder in this matter. The request is based upon certain conduct by Graham, including a TV appearance, which occurred after an earlier fact-finding proceeding. That proceeding, in which Graham also served as fact finder, did not involve the same parties¹ but did involve counsel from the same law firm which represents the Employer here.

The motion for disqualification, a matter of first impression, presents the issue of whether a fact finder is privileged to comment publicly upon his published report before it has been accepted or rejected by the parties, and the effect of such public comment on a fact finder's ability to serve as a SERB-appointed neutral in a later proceeding.

After reviewing the circumstances of this case as presented in the motion, exhibits,²

¹Parties to the earlier proceeding were the City of Cleveland and International Brotherhood of Electrical Workers (IBEW), Local No. 39, whose fact-finding proceeded pursuant to appointment made in Case Nos. 91-MED-12-1309 and 91-MED-12-1328.

²Appended to the Employer's motion were the following exhibits:

- Exhibit A. Affidavit of Marc J. Bloch dated March 27, 1993.
- Exhibit 1. Newspaper article of the Cleveland Plain Dealer of February 25, 1993.
- Exhibit 2. Transcript of television news segment concerning Cleveland Public Power negotiations, aired on WJW-TV8's 6 p.m. news program of

brief in support of motion, responses to motion, and administrative files of related cases,³ and after viewing the videotape of Graham's TV appearance at our meeting of April 15, 1993, we deny the motion for the reasons cited below.

I. Background

The Board appointed Harry Graham as fact finder in this matter on March 1, 1993. The parties had selected him from a panel supplied by SERB pursuant to O.R.C. 4117.14(C)(3). On March 8, 1993, Marc Bloch of the law firm Duvin, Cahn and Barnard, filed a notice of appearance with SERB as representative of record for the City of Shaker Heights. The Employer filed the motion for disqualification of the fact finder on March 29, 1993. The Employee Organization objects to the motion to disqualify and states that it believes that the fact finder is capable of rendering an unbiased, impartial decision. At the time of the Board's determination of the motion, fact-finding had not been pursued by the parties.

The motion is based upon certain public comments made by Graham when he served as fact finder in negotiations between the City of Cleveland and IBEW for a contract to cover employees of Cleveland Public Power (CPP). In his report, Graham had recommended percentage wage increases for CPP employees which exceeded those agreed to by a number

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- February 26, 1993.
- Exhibit 2A. Videotape of television broadcast transcribed in Exhibit 2.
- Exhibit 3. Newspaper editorial of the Cleveland Plain Dealer of February 26, 1993.
- Exhibit 4. Letter from Robert Duvin to Harry Graham dated February 26, 1993.
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³By administrative notice, the Board recognizes the recorded actions of the Board and the parties in this case and in related cases [Case Nos. 91-MED-12-1309 and 91-MED-12-1328, City of Cleveland and the International Brotherhood of Electrical Workers (IBEW), Local No. 39]

of other City employee unions.

The recommendation drew criticism from several sources, including the City's attorney Robert Duvin, who is a law partner of the Employer's attorney in the instant case, Marc Bloch. Duvin was quoted in a February 25, 1993 Plain Dealer article as saying: "This man (Harry Graham) does not know what he's talking about. It is incomprehensible, irrational and immoral." In the article, Duvin also predicted that Graham's recommendation would cause chaos in future labor negotiations if approved.

That evening, Graham allowed himself to be interviewed about the report on the TV evening news. Both he and a representative of IBEW Local 39 spoke in defense of the report in a news segment aired by WJW-TV. On the air, Graham stated: "The situation confronting the employees of Cleveland Public Power is not analogous to the situation confronting employees of the City of Cleveland. Hence, a different result was appropriate."

Graham made his TV remarks after he had issued his report but before it had been voted on by the Cleveland City Council. Council later rejected the report, as evidenced by a notice of rejection issued by SERB on March 3, 1993.

II. Issue

Whether the fact finder's public comments in an earlier proceeding involving counsel from the same law firm, warrant disqualification in this case.

III. Analysis A.

The Employer urges that the fact finder be disqualified from serving the parties in these negotiations based upon his actions, including public comment, in the City of Cleveland case.

We share the Employer's concerns about a fact finder's participation in public comment during the fact-finding voting period. Public comment by a fact finder during this time is not consistent with the purpose of Ohio Revised Code Section 4117.14(C)(6) which calls for publication of the fact finder's recommendations and findings of fact once the report is rejected.

Although the statute and rule do not specifically restrict when the fact finder may release the fact-finding report or its contents to the public, we find that a fact finder compromises the statutory dispute settlement process by prematurely discussing the contents of the fact-finding report. Fact finders are directed prospectively to refrain from public comment regarding their reports during the fact-finding voting period. Fact finders who do not adhere in the future to this standard will be subject to disciplinary action including, but not limited to, removal from the SERB Roster of Neutrals.

We recognize that in the CPP matter, the fact finder's report had already become public at the time Harry Graham made his comments. As demonstrated by the newspaper article, the IBEW and City of Cleveland chose to publicly comment on the report during the fact-finding voting period. The general public's actual knowledge of the contents of the report, however, does not relieve the fact finder from adhering to the agency's admonition not to disclose or comment upon the contents of the fact-finding report prior to the expiration of the fact-finding voting period or prior to the rejection of the report. Because news reports can be in error and a fact finder has no control over the manner in which his remarks may be presented in the media, fact finders are admonished not to engage in public comment during this critical time period.

B.

The Employer also argues that disqualification is warranted based upon Graham's

"significant lapse in his compliance with.. applicable standards of ethics."⁴

Although we are sensitive to the need for SERB neutrals to adhere to applicable ethical standards, we do not find that disqualification in this case is compelled by any noncompliance with ethical standards. Fact finders' conduct is subject to the SERB Roster of Neutrals Standards. The standards require in part: "Knowledge of and compliance with the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes..."⁵ Article 6, Section D(l) of the Code states: "No clarification or interpretation of an award is permissible without the consent of the parties."⁶

For the reasons stated earlier, we believe that engaging in public comment is potentially perilous and not appropriate for fact finders during the voting period. When a fact finder responds to questions of one party or of the public, it permits the fact finder to emphasize specific aspects of the report. This too must be considered a form of clarification or interpretation even if no new information is revealed. The overall context of the report is compromised when explanations are limited to specific portions of the report. The emphasis provided by the fact finder, outside of the context of the full report, could influence the pending fact-finding vote of the parties. This is clearly inappropriate and beyond the responsibility of the fact finder.

That the fact finder's action which was not in compliance with the Board's

⁴ Brief in Support of Motion for Disqualification, page 6.

⁵ The Code of Professional Responsibility for Arbitrators of Labor Management Disputes is a code established by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service.

⁶ We distinguish this standard from the Ohio Administrative Code Rule 4117-9-05(L) which does permit a fact finder with or without the consent of the parties to change or adjust a fact-finding report upon approval of the Board.

interpretation of the Code of Responsibility, however, is not, of itself, a basis for disqualification in the present case. As previously stated, the fact finder's action in the prior fact-finding does not directly impact the parties in the present case. A different public employer and employee organization are involved.

The Employer cites State ex rel City of Parma v. SERB, 1987 SERB 4-33 (Ohio App. 5-7-87), as the basis for its conclusion that the Ohio Code of Judicial Conduct applies to fact finders appointed pursuant to O.R.C. §4117.14(C)(3). The court in the cited case did find that a fact finder exercises judicial or quasi-judicial powers in that a fact finder conducts hearings, reviews evidence, and issues recommendations. However, the court made no determination that the Ohio Code of Judicial Conduct applies to fact finders.

The Code, by its terms, applies to: "Anyone, whether or not a lawyer, who is an officer of a judicial system (emphasis added) performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate." This definition does not seem to encompass fact finders, individuals appointed by a quasi-judicial agency to conduct administrative hearings and make advisory recommendations for parties, and the Judicial Code is not referenced in the SERB Roster of Neutrals Standards. Although the Code should perhaps be viewed as aspirational for fact finders, we do not believe that fact finders, who are not part of the judicial system, are covered by it. Even if they were, we do not believe that in this case the fact finder's impartiality might reasonably be questioned, as required for disqualification by Canon 3(C) of the Judicial Code.

However, the fact finder's refusal to disqualify himself under the circumstances of this case is a matter appropriate for review under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Article 2, Sections B(4) and (5) provide: "If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the

arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties."

In this case, the fact finder does not believe and does not perceive that there is a pending circumstance which might reasonably raise a question as to his impartiality in the present case. We agree. Had both parties requested the disqualification of the fact finder, because of his appearance on television during the voting period, a different determination might have resulted.

The Employer's memorandum in support of its motion provided extensive comment and exhibits questioning the decision of the fact finder in a prior case. We find such comments and exhibits to be irrelevant to a fact finder's ability to be impartial in the present case. We note that Article 1, Section A(2) of the Code provides that: "[a]n arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional." Indeed this fact finder may have subjected himself to criticism for his recommendations in the prior fact-finding. However, there is no evidence that his report was not in compliance with his professional responsibility to the parties and to the process.

The fact that the Employer is now represented by a member of the law firm whose members criticized the fact finder for his decision in the prior fact-finding is not dispositive of the issue of disqualification. Fact finders, like judges or members of an administrative board, are always subject to criticism for their determinations. Nonetheless, these same neutrals understand their responsibility to be impartial in future proceedings with their past critics. If the neutral believes that there is a reasonable question of his or her impartiality, that is for the neutral to decide as provided for in the code of professional responsibility.

If an advocate is greatly concerned that strong criticism might prejudice future dealings with the neutral involved, then it is incumbent upon the advocate to limit such criticism. If strong criticism initiated by an advocate and not responded to by the neutral is to be the basis for automatic disqualification of the neutral, then we have created a punitive weapon for an advocate to use in retribution for an unfavorable determination by the neutral. Such an approach would create far more harm to the dispute settlement process than the unlikely potential of a biased recommendation which still would be subject to rejection of the parties.

With regard to the Employer's representative of record, Marc Bloch, the fact finder states in his letter to the Board that he has: "consistently regarded him to be a professional of the highest caliber."⁷ The only response of the fact finder to the criticisms of the members of the law firm representing the Employer is a compliment accorded to a member of the firm who is the representative of record.

The perception of impartiality has not been proven in this case to warrant disqualification of the fact finder.

Pottenger, Vice Chairman and Mason, Board Member, concur.

⁷Letter of Harry Graham, dated April 9, 1993