

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant

and

Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO

Respondent.

CASE NUMBER: 91-ULP-06-0347

OPINION

OWENS, Chairman:

I. Procedural Background and Facts

This case comes before the Board on exceptions from a Hearing Officer's Proposed Order. The underlying unfair labor practice charge was filed by Frances M. Wheeland (Intervenor) against the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (Respondent). The hearing officer found that in the circumstances of this case, the Respondent did not violate Ohio Revised Code (O.R.C.) §4117.11(B)(1) or (B)(6) when it failed to notify the Intervenor of the settlement and the withdrawal of her grievance until sixteen months after it had occurred. We agree with this finding.¹ The hearing officer also found that the Employee Organization's withdrawal of the grievance from arbitration constitutes a violation of O.R.C.

¹ An employee organization's failure to timely notify an employee of the status of her grievance is not by itself a violation of the duty of fair representation. It can be, though, one factor among others indicating bad faith, discrimination or arbitrariness. However, in the circumstances of this case, as discussed below, we find that the Respondent's conduct, when it withdrew Ms. Wheeland's grievance from arbitration, was within the realm of rational and reasonable behavior, and thus, the lack of timely notification is not found to be a separate violation.

§4117.11(B)(1) or (B)(6). We do not agree with this finding. For the reasons stated below, we find that the Respondent did not violate Ohio Revised Code (O.R.C.) §4117.11(B)(1) or (B)(6) when it withdrew the Intervenor's grievance from arbitration.

Frances M. Wheeland has been employed by the Ohio Department of Taxation (Employer) for more than twenty (20) years. In August of 1988, she was promoted to a Tax Commissioner Agent 4 (TCA4) position with an effective starting date of September 4, 1988 (F.F.1). While Ms. Wheeland was still in her 180 days' probationary period as a TCA4, a vacancy in the Tax Commissioner Agent 5 (TCA5) position with a December 8, 1988, application deadline was posted. Ms. Wheeland filed an application for the TCA5 position in December 1988. This application was denied. Ms. Wheeland was informed by her supervisor and her Section Chief that she was not qualified for the position because she was still in her probationary period. (F.F. 2 & 5).

Ohio Administrative Code (O.A.C) Rule 123:1-23-03 provides:

No person shall be deemed eligible for promotion who has not satisfactorily completed the required probationary period as defined in Chapter 123:1-19.

Prior to the first collective bargaining between OCSEA and the State (in effect from July 1, 1986 through June 30, 1989) the Personnel Administrator in the Tax Department issued a memorandum dated June 5, 1985, which stated that probationary employees could bid for promotional opportunities. The record shows various occasions when individuals were promoted pursuant to this June, 1985, memorandum. However, all but one occurred prior to the first bargaining agreement.² The collective bargaining agreement itself had a specific

² The one mentioned which allegedly took place in 1987 was a management position not included in the bargaining unit.

section denying any binding effect to past practice prior to the contract. Section 43.03 of the collective bargaining agreement in effect from July 1, 1986 through June 30, 1989, provides in pertinent part:

"Likewise, after the effective date of this agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this agreement."

This collective bargaining agreement also provides in Section 17.05(A):

The Agency shall first review the bids of the applicants from within the office, county or institution. Interviews may be scheduled at the discretion of the Agency. The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee.

Ms. Wheeland had more state seniority than any other applicant for the TCA5 position.

After Ms. Wheeland's application had been denied, she talked to two (2) union stewards, Mr. Norris and Ms. Rowe, about filing a grievance. This was one of the first grievances Ms. Rowe handled as a union steward. Mr. Norris, also a new union steward, checked with Ms. Rowe and notified Ms. Wheeland that she had a good case based on past practice and her seniority. Ms. Rowe filed the grievance for Ms. Wheeland. The grievance was denied in each step. On March 17, 1989, it was denied at Step 3 in a letter which concluded:

You received a promotion to the position of Tax Commissioner Agent 4 effective September 4, 1988. Therefore, you were still in your probationary period at the time the subject vacancy was both posted

(December 8, 1988 - closing date) and filled (January 1, 1989). As such, you were not a "qualified employee" eligible under Section 17.05(A). (F.F. 6, 7, and 8).

At this point Ms. Wheeland spoke to her chapter president, Evelyn Dudley, about proceeding with the grievance. The grievance was advanced to Step 4 and again was denied. The denial letter stated in relevant part:

Therefore, pursuant to Chapter 123:1-23-03 of the Ohio Administrative Code, you were not eligible to apply for the TCA5 position.

Ms. Wheeland requested that the grievance be taken to arbitration.

The Respondent and the State of Ohio have agreed to an informal "Step Four and a Half" (Step 4 1/2) procedure which is not in the contract but is designed to reduce the huge backlog of cases awaiting arbitration. This step consists of a meeting between an agency management representative, an employee organization paid staff representative, the employee organization chapter president, and an Office of Collective Bargaining representative. These parties may discuss up to forty (40) or fifty (50) grievances a day, and try to resolve as many grievances as possible without arbitration. The grievance may be granted in whole, withdrawn in whole, or some partial remedy or compromise may be worked out. The grievant is usually not involved or even notified of a Step 4 1/2 meeting, and the employee organization staff representative and the chapter president can make the final determination about what should be done with the grievance. Only the employee organization can decide to take a case to arbitration under the terms of the collective bargaining contract. (F.F. 11).

In July 1989, Tim Stauffer, an attorney with the administrative counsel section of the Ohio Department of Taxation, met at a Step 4 1/2 meeting with various people, among them Evelyn Dudley, the chapter president, and Gary Raines, the staff representative of OCSEA and

the key person to deal with the Office of Collective Bargaining (OCB) regarding settling the grievances at the Step 4 1/2 stage. Gary Raines eventually became seriously ill and was on disability leave at the time of the hearing. They discussed numerous grievances at this Step 4 1/2 meeting, including Ms. Wheeland's grievance. At the meeting, the State took the position with the Respondent that the grievance had no merit. This was conveyed to the union at that meeting. Ms. Dudley said that she would investigate the matter to determine whether there were any other employees who were permitted to apply for and had been selected for positions while in their promotional probationary periods. Ms. Dudley also said that if she could not come up with any other employees who were similarly situated, she would withdraw the grievance. There was a follow-up Step 4 1/2 meeting where Ms. Dudley was asked if she found any examples that would support the grievant's position in this matter. The grievance was subsequently withdrawn.(F.F. 18).

II. Procedural issues

This matter raises two important procedural issues regarding the status and liability of those entities which have engaged in conduct related to an unfair labor practice charge but are not named in the charge itself. Specifically, the hearing officer has recommended that we issue a remedial order against the Employer, not a charged party, and that we find that the Employer, because it is not named in the charge, has no standing to introduce evidence on the merits of the case. For the reasons stated below, we have declined to accept these recommendations.

A. Can a Remedial Order Be Issued Against A Party Not Named In A Charge?

As noted, the hearing officer issued a remedial order against the Employer³ when the

³ The hearing officer ordered the Respondent and the Employer to arbitrate the grievance. This is a remedial order against the Employer inasmuch as the contractual deadline for this grievance had expired and the Employer has a right to all the contractual substantive

Employer was not named in the complaint, and no charge had been filed against the Employer. Upon the Employer's motion to intervene, the hearing officer joined the Employer as a party for purposes of determining the remedy.

O.R.C. §4117.12(B)(3) limits the Board's remedial power to those entities named in the complaint. Specifically, the section provides, in pertinent part:

(3) If upon the preponderance of the evidence taken, the board believes that any person named in the complaint has engaged in any unfair labor practice, the board shall state its findings of fact and issue and cause to be served on the person an order requiring that he cease and desist from these unfair labor practices, and take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of Chapter 4117 of the Revised Code.... (Emphasis added).

The hearing officer cited O.R.C. §4117.03(A)(5) in support of having authority for his remedial order. O.R.C. §4117.03(A)(5) states: "(A) Public employees have the right to:...(5)Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment."

The hearing officer acknowledged that this section right does not normally include the right to proceed to final and binding arbitration. However, he reasoned, where the employee organization breaches the duty of fair representation and illegally refuses to arbitrate a meritorious grievance, this section gives the Board authority to compel arbitration of the grievance by ordering both the employer and the union to arbitrate, even though the employer

and procedural protection it had negotiated.

is not named as a respondent in the complaint.

We cannot accept such reasoning. Ohio Revised Code §4117.03(A)(5) does not confer on public employees the absolute right to have their grievances arbitrated. While Chapter 4117 mandates that collective bargaining agreements contain grievance procedures, it does not require that they culminate in arbitration. Arbitration is a creature of contract and as such its existence and procedure depends solely on the negotiated agreement between the parties to the contract, the employer and the employee organization. An employee organization's violation of the duty of fair representation, by an arbitrary refusal to process a grievance pursuant to the contractual arbitration procedure, cannot magically confer on the employees a statutory right to have their grievances arbitrated.

Having said this, we acknowledge that our inability to join an employer as a party under these circumstances can work as a hardship both on the charging party-grievant and the charged union. If a union, after failing to initiate or continue processing a meritorious grievance, is unable to convince the breaching employer to waive time limits for filing a grievance or reinstate a withdrawn grievance, the union may become liable for full damages. This is so even though the employer's breach of contract triggered the controversy and initiated the grievant's loss. In some instances, the grievant's loss cannot be fully remedied without some affirmative action by the employer, which the union is powerless to take.

In other jurisdictions, this dilemma has been resolved through statutory provisions or judicial determinations which allow individuals to file civil actions for breach of labor contracts against both the employer and union whose contract has been breached. Under federal law, pursuant to Section 301 of the LMRA of 1947, 29 U.S.C. 185 (Section 301), both the union and employer can be sued in the same proceeding. The governing principle is, in the language of the U.S. Supreme Court in *Vaca v. Sipes*, 386 U.S. 171(1967), "to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged

to the union. However, any additional damages caused by the union's refusal to process the grievance should not be charged to the employer."

In Michigan and Pennsylvania, although the courts have recognized that the Michigan Employment Relations Commission (MERC) and Pennsylvania Employment Relations Board (PERB), respectively, have exclusive jurisdiction over unfair labor practices in general, they have taken concurrent jurisdiction over cases involving duty of fair representation where breaches of labor contracts are involved, and have used their equity powers to join necessary parties.⁴ Ohio has no statutory provision comparable to the federal 301 action, and our research reveals no precedent in our state courts for an individual proceeding against both the union and employer for breach of a labor contract.⁵ Unfortunate as this may be for grievants and charged unions, this current void in the Ohio remedial scheme cannot be used to confer upon SERB powers which the legislature did not grant. Any inequities in this area must be

⁴ The hearing officer cited a Pennsylvania case, *Fleck v. Penn. Dept. of Aging*, 526 A. 2d 834, 10 NPER-PA-18177 (Pa. Commonwealth Ct., 5-27-87), for the proposition that an employer should be joined as a necessary party for remedial purposes. Although the case accurately reflects the position of the Pennsylvania equity courts on this issue, it is not persuasive authority that an administrative agency, limited by statute in its powers, may for remedial purposes join a party not named in the charge or complaint.

⁵ We disagree with the hearing officer's assertion that "Ohio Courts have already held that SERB has the authority to order the employee organization and the employer to arbitration if SERB finds the employee organization breached its duty of fair representation by its arbitrary, discriminatory or bad faith conduct" (Hearing Officer's Supplemental Proposed Order page 8, emphasis added). The one case cited by the hearing officer for this proposition, *Ramsdell v. Washington Local Bd of Ed*, 1988 SERB 4-44 (CP, Lucas, 12-5-87), held that SERB has the authority to order the employee organization to arbitration. It never mentioned the employer. Moreover, *Ramsdell* cited 4117.12(B)(3) as the authority for this remedial power, and (B)(3) specifically says: "If upon the preponderance of the evidence taken, the board believes that any person named in the complaint has engaged in any unfair labor practice, the board shall serve its findings of fact and issue and cause to be served on the person an order requiring that he cease and desist from these unfair labor practices, and take such affirmative action..." (emphasis added) Thus, once a violation has been proven, the Board has a statutory mandate to take the remedial action necessary against any person named in the complaint. Nothing in the statute authorizes the Board to take remedial action against anyone not named in the complaint.

resolved by legislative change or the courts' assumption of concurrent jurisdiction to more fairly compensate individuals who stand as third-party beneficiaries to labor contracts.

B. Does A Party Not Named In A Charge Have Standing To Introduce Evidence?

Dealing with a second procedural issue, the hearing officer ruled that an employer has no standing to introduce evidence related to the employee organization's alleged unfair labor practice. In support, he cited numerous cases from SERB and other jurisdictions to the effect that an employer has no standing to file an unfair labor practice charge alleging a violation of the duty of fair representation. It does not follow that because an employer has no standing to file a O.R.C. §4117.11(B)(1) or (B)(6) charge it should not have standing to produce evidence regarding these allegations. Clearly, the employer and its agents may be called by either party to testify. Also, traditional discovery tools may be utilized to gain information from the employer.

Moreover, the employer's lack of standing to initiate O.R.C. §4117.11(B)(1) and (B)(6) charges does not prevent its intervention as a party of interest once a charge is filed by someone with standing. Obviously, such intervention is not automatic, but a blanket rule that an employer is forever estopped from introducing evidence in duty of fair representation cases would not be appropriate. For example, the employer might have a legitimate interest in intervening at the stage when the merits of the grievance are determined for the purpose of calculating damages. SERB's merit findings on the grievance might have future implications for similar actions by the employer.

III. The Standard of Proof in Duty of Fair Representation Cases.

In this case, the Employee Organization withdrew a grievance from arbitration without articulating reasons for its action. The hearing officer has proposed that such conduct constitutes a per se violation of O.R.C. §4117.11(B)(6) and (B)(1). We disagree.

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in *In Re AFSCME Local 2312*, SERB 89 029 (10-16-89) ("*AFSCME*") SERB stated the following:

"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...if there are no apparent factors that show legitimate reasons 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 faith or discriminatory intent...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." (Emphasis added).

Under the *AFSCME* test, the first step is to ask whether there is a rational basis for the union's position. If there is, the action is not arbitrary. However, if there are no apparent factors that show legitimate reasons, the second step is to look for evidence of bad faith or discriminatory intent. If there is none, arbitrariness will be found only if the union's conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment.

In 1991, the United States Supreme Court ruled on the standard of proof in duty of fair representation cases in *Air line Pilots Ass'n Intern. v. O'Neill*, 107 S.Ct. 1127 (1991). The U.S. Supreme Court stated: "A union breaches its duty of fair representation if its actions are either arbitrary, discriminatory, or in bad faith. A union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." (Emphasis added, citation omitted).

It is significant that both *AFSCME* and *O'Neill* look to the "conduct" (*AFSCME*) and

the "behavior" (*O'Neill*) of the union to determine arbitrariness and neither requires articulation of the actual reason why the union acted the way it did. Clearly under *AFSCME*, if the union can articulate a reason for deciding not to process a certain grievance, then the first step is satisfied (assuming, of course, that the reason is rational) inasmuch as a rational basis for the union's action has been established.

However, *AFSCME* still allows us to find no violation of the duty of fair representation even if the union does not articulate the actual reason for not processing a grievance. Assuming that no discrimination or bad faith has been shown, a violation would be found under *AFSCME* only if the union's conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment. We should clarify here that while simple negligence is clearly within the bounds of honest mistake or misjudgment, gross negligence is not.

Thus, the *AFSCME* standard does not require articulation of the actual reason for the union's controversial conduct; likewise, it excludes simple negligence from behavior which is in violation of the duty of fair representation, and finds gross negligence to be in violation of the duty of fair representation since gross negligence, unlike simple negligence, is not within the bounds of honest mistake or misjudgment.

In *O'Neill*, the Supreme Court, using a similar standard, also did not require articulation of a specific reason in order to find no violation. The Supreme Court declared that arbitrariness will be found only if the union's behavior is so far outside a wide range of reasonableness as to be irrational. We find the *AFSCME* standard and the very similar *O'Neill* standard to be proper and very practical standards of proof, and we decline to tighten the standard by requiring that in every case a specific reason be articulated.

There is no doubt that in most duty of fair representation cases articulation of the reason for the union's conduct is the preferred if not necessary evidentiary tool to determine that no violation occurred. It cannot be emphasized enough that we do expect unions to be

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able to articulate a rational explanation of their actions or inactions where a question arises regarding the duty of fair representation. Clearly, rational behavior is based on rational reasoning, which in most cases implies the ability to articulate the reasoning.

When a reason is offered we normally defer to the union's discretion. Generally, the policy of the union regarding pursuit of grievances is not for us to review. It is well established that the union should have wide discretion in deciding which grievances to arbitrate, *Vaca v. Sipes*, 386 U.S. 171 (1967), or as the U.S. Supreme Court ruled in *O'Neill*, the relationship of the courts to the unions in this area is like the relationship of the courts to the legislator, i.e., where "question is at least debatable - decision was for congress." The rational behind this policy, that any substantive examination of a union's performance must be highly deferential, is the recognition that wide latitude is essential to unions for the effective performance of their bargaining responsibility. Thus, the union's policy decision regarding which grievances to pursue and which to withdraw are made within its recognized discretion, as long as its decision is not arbitrary, discriminatory or in bad faith.

When no reason is articulated for a union's action or inaction in a particular case, we will carefully scrutinize the union's conduct that accompanied the action or inaction.

However, we are reluctant to find the lack of an articulated reason a per se violation of the duty of fair representation. The case at issue is a good example of why such a per se rule is inappropriate. The case at issue involves a unit and a collective bargaining agreement that allows only thirty (30) days to submit a grievance to arbitration. As a result, the Employee Organization submitted all grievances to arbitration rather than risk missing the contractual deadline, and a huge backlog resulted. Step 4 1/2 was devised by the Employer and the Employee Organization to clear up the backlog of pending arbitrations. There is no doubt that establishing a mechanism to clear up the backlog was beneficial to all. Employees could have their grievances resolved faster and the Employer could cut its backpay liability in meritorious grievances.

Step 4 1/2, a powerful settlement mechanism, required by its nature a policy adjustment by both the Employer and the Employee Organization. Such an adjustment is justified since Step 4 1/2 is a rational and important mechanism to settle grievances and reduce the backlog efficiently.

In the case at issue, after scrutinizing the union's conduct carefully, we find that Ms. Wheeland's grievance was processed in good faith by the union in every stage. It was taken through all the steps, raised at the Step 4 1/2 meeting and discussed at that stage. The grievance was not settled at the first meeting since the State did not find any merit in the grievance, and the union representative agreed to check further on the past practice issue. Ms. Wheeland's grievance was then brought up again in another Step 4/12 meeting and was discussed again at that meeting.

Only after the discussion in the second Step 4 1/2 meeting did the union agree to withdraw the request to arbitrate this specific grievance. Since no bad faith or discrimination of any kind was claimed, we find that in this case, even though the union did not articulate the actual reason for its action, its behavior was reasonable and responsible and clearly is not so far outside a wide range of reasonableness as to be irrational.

Moreover, the past practice issue, so heavily relied on by the Charging Party and some union stewards, would not necessarily carry the day in an arbitration when the facts and the law are closely examined. The contract clause that gives no binding effect to past practice and the lack of any specific incidents in the record regarding similar promotions to unit members in the post-contract era, show that in light of the factual and legal landscape at the time of the union's withdrawal of the grievance, the union's behavior was rational.

Taking all the above into account, this case cannot justify a standard which stands and falls on the articulation of a rational explanation to the withdrawal of the grievance.

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Thus, even though the Employee Organization did not articulate the rational reason for its withdrawal of Ms. Wheeland's grievance, in light of the factual and legal landscape at the time of the union's actions, the union's conduct surrounding the withdrawal of this grievance was reasonable and rational. Consequently, no violation is found.

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

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