

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant

and

Ohio Health Care Employees Union, District 1199,

Respondent.

CASE NUMBER: 91-ULP-05-0338

OPINION

MASON, Board Member:

I.

This case comes before the Board on exceptions from a Hearing Officer's Proposed Order. The underlying unfair labor practice charge was filed by Carol Parent (Intervenor) against Ohio Health Care Employees Union, District 1199 (Respondent). The Board agrees with the hearing officer that the Respondent did not violate Ohio Revised Code (O.R.C.) §4117.11(B)(6) and (B)(1) by its conduct regarding the Intervenor's discharge grievance. However, a few comments are warranted.

II.

The Respondent is the exclusive representative of a bargaining unit of Ohio Department of Mental Health (ODMH) employees. (Stip 3). On or about November 9, 1990, Carol Parent, a unit employee, was removed from state service with ODMH where she was employed as a psychology assistant. (F.F. 1) Ms. Parent learned about her termination from William Keene, the Union's delegate at the facility and chaplain, who prepared Ms. Parent's termination grievance. (F.F. 2-3).

Mr. Keene has been a union delegate since 1986 and has received training in connection with his responsibilities as a union delegate. He investigated the discharge grievance, met with Ms. Parent and collected evidence in support of her case. Ms. Parent's discharge was the first discharge grievance Mr. Keene had ever processed. (F.F. 11, 12).

To determine where to send Ms. Parent's grievance, he examined the collective bargaining agreement and in reviewing Section 7.08 of the agreement concluded that the grievance should be sent directly to the office where ultimately the arbitration would be heard, which is the Office of Collective Bargaining (OCB).

Thus, on November 9, 1990, Mr. Keene sent Ms. Parent's grievance to OCB. (F.F. 4). However, the contract grievance procedure provides that grievances involving discharge are subject to an expedited grievance/arbitration procedure pursuant to which the grievance is filed directly at Step 3. Step 3 states that if the grievant is not satisfied with the Step 2 answer, the grievance shall be filed with the agency head or designee. Step 4 and Step 5 mandate filing with OCB. (F.F. 4-5).

When Mr. Keene's mistake of filing Ms. Parent's grievance with OCB instead of with ODMH was discovered, the Respondent verbally requested that ODMH schedule a Step 3 meeting. The Employer rejected this request on the ground that the grievance was improperly filed and hence untimely. There were various attempts by the Respondent and ODMH to settle the discharge grievance to no avail. On June 1, 1991, an arbitrator determined that Ms. Parent's discharge grievance was untimely filed and denied the grievance for lack of jurisdiction. (F.F. 6-7, 9, 13).

III.

The issue before the Board is whether the Respondent's handling of Ms. Parent's discharge grievance was discriminatory, in bad faith or arbitrary, in violation of the duty of fair representation as stated in O.R.C. §4117.11(B)(6). The hearing officer in his proposed order found no violation. For the reasons stated below we agree with the findings of the hearing officer.

IV.

There is nothing in the record to raise a question of discriminatory attitude or bad faith toward Ms. Parent. Thus the only question before us is whether the union acted in an arbitrary manner in its dealings with Ms. Parent. In In re Ohio Civil Service Employees Association, SERB 93-019 (12-20-93), SERB ruled that both the AFSCME¹ standard and the quite similar O'Neill² standard are proper standards to determine arbitrariness in O.R.C. §4117.11(B)(6) violations.

In AFSCME SERB defined what constitutes arbitrariness in the duty of fair representation context as follows:

"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).

In O'Neill the U.S. Supreme Court stated a very similar standard for arbitrariness as follows:

"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

¹ In re AFSCME, Local 2312, SERB 89-029 (10-16-89).

² Air Line Pilots Ass'n, v. O'Neill, 111 S.Ct.1127 (1991).

range of reasonableness... as to be irrational." (Emphasis added).

Clearly, under both standards simple negligence is not enough to find a violation of the duty of fair representation. AFSCME specifically requires the conduct at issue to exceed honest mistake or misjudgment in order to constitute arbitrary conduct in violation of the statute. Under O'Neill, conduct must be irrational before it is found to be arbitrary, and the union is afforded a "wide range of reasonableness" in serving its membership. The NLRB and the courts in the federal system as well as various state jurisdiction have consistently held that negligent, mistaken or inadvertent conduct does not constitute a violation of the duty of fair representation.³ The grievance and arbitration process is by no means expected to be error-free. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976).

A word of caution is warranted. Neither the AFSCME nor the O'Neill standard requires intention as a prerequisite to the finding of a breach of the duty of fair representation. While simple negligence cannot be the basis for finding a violation, gross negligence can. However, there is no need to define 'gross negligence' for our purpose nor do we need to look to tort law for clarification. The AFSCME and the O'Neill standards speak for themselves. Under AFSCME, when conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment, whether or not it is defined as gross negligence, a finding of breach of the duty of fair representation will be in order. In the same way, under O'Neill, where a conduct is so far outside a wide range of reasonableness as to be irrational, a finding of violation is in order regardless of the legal characterization of the conduct.

³ United Steelworkers v. Rawson, 110 S.Ct. 1904 (1990); Walk v. PIE Nationwide, 958 F.2d 616 (6th Cir. 1991); SEIU Local 87 (Cervetto Bldg. Mtce. Co.), 309 NLRB No. 132 (1992); B.O.G. Council University Professors of Illinois, Local 4100 (Hopewell), 15 NPER IL-23154; ATU (McDede), 13 NPER NJ-22007; State of New York, 13 NPER NY-14698; City of Highland Park (Dept. of Pub. Safety), 13 NPER MI-22024.

See also B.O.G. Council University Professors of Illinois, Local 4100 (Hopewell), 15 NPER IL-23514; AFSCME: Allen Lloyd, 15 NPER IL-23137; Chicago Board of Education, 14 NPER IL-23043; Brick Township Municipal Utilities Authority, 14 NPER NJ-23188; ATU (McDede), 13 NPER NJ-22007; UFT (Elcock), 13 NPER NY-14530; State of New York, 13 NPER NY-14698; City of Highland Park (Dept. of Public Safety), 13 NPER MI-22024; Morristown Municipal Employees Association, 13 NPER NJ-22121; IAFF, Local 2 Chicago Firefighters Union (Hornsby), 12 NPER IL-21112, cited at page 18 of the Hearing Officer's Proposed Order.

In the case at issue, there is no evidence that the Respondent acted in bad faith or in a discriminatory manner toward Ms. Parent. The only question is whether the Respondent's conduct was arbitrary. Applying the principles of the above discussion, it is clear that the union's conduct was not arbitrary at all and involved only an honest mistake.

It is undisputed that Mr. Keene, the union delegate, did not send Ms. Parent's grievance to the proper State office. However, the record is clear that this error was the result of Mr. Keene's honest misinterpretation of the contract. The record shows that Mr. Keene made a good-faith effort to process the grievance on behalf of Ms. Parent. The record also shows that once the mistake was discovered, every effort was made by the union to reinstate the grievance, including insisting on arbitration over the opposition of the Employer. The Arbitrator, though, accepted the Employer's position that the grievance was not properly processed.

In the circumstances of this case, the union's conduct is clearly not beyond the bounds of honest mistake or misjudgment (AFSCME) nor is it so far outside a wide range of reasonableness as to be irrational (O'Neill). Thus, we agree with the hearing officer that the Respondent did not violate O.R.C. §4117.11(B)(6) or (B)(1) when Mr. Keene improperly filed Ms. Parent's grievance.

V.

Although we find that the Respondent in this case did not breach the duty of fair representation and hence a remedy is not in order, a few comments are warranted for future guidance regarding the extent to which a hearing officer need inquire into the merits of a grievance before ordering a union to pay money damages.⁴

⁴As we found in In re Ohio Civil Service Employees Ass'n, SERB 93-019 (12-20-93), SERB has no power to order an employer, not named in the Complaint, to arbitrate a grievance in order to remedy a union's violation of O.R.C. §4117.11(B)(1) and (6). This is not to say that money damages must be paid solely by the union in every instance where a union has breached its duty to pursue a meritorious grievance. The appropriate order in such cases is for the union first to request that the employer waive time limits for filing the grievance or

Before damages can be awarded, the Complainant must establish that if the matter had been properly pursued, the grievance would have had a reasonable likelihood of success on the merits. A breach of a collective bargaining agreement is a necessary prerequisite to a damage award against a union.⁵ Accordingly, an inquiry into the merits of the grievance is critical to the issuance of a damage award. If it is unlikely that the union would have prevailed on the grievance and obtained relief under the contract, then its failure to proceed with the grievance may have caused no money damages.⁶ To issue a damage award without first assessing the strength of the grievance would be to assess speculative and punitive damages against the union. Moreover, without a finding that the grievance would have likely been meritorious, the Board, by issuing a damage award, may be rewarding an employee, who was properly disciplined, for misconduct.⁷ Such a result would be clearly at odds with the remedial aims of the law.

In the case at issue, the hearing officer did address the merits of the grievance before assessing damages. However, he improperly based his finding that the grievance was meritorious solely on the fact that the union actively negotiated with ODMH on Ms. Parent's behalf, and that once informed of the defect in the grievance, the union continued to investigate the grievance, prepare, attend, and advocate on Ms. Parent's behalf at the arbitration hearing. The union's behavior clearly shows that it properly performed its duties to a unit employee. However, this cannot be a basis to a finding that a grievance is meritorious. It is difficult to imagine an arbitrator deciding a case on the basis of the amount

agree to reinstate an improperly withdrawn grievance. If the employer agrees to do so, then the union can simply process the grievance in good faith through the contract grievance process, and the grievant will be left to his contract remedies.

⁵ Hines v. Anchor Motor Freight Inc., 424 U.S. 554, (1976); UPS, Inc. v. Mitchell, 451 U.S. 56, (1981); DeCostello v. Teamsters, 462 U.S. 151 (1983).

⁶ This is not to suggest that no remedy whatsoever is available unless the grievance at issue is likely meritorious. Whenever a union's arbitrary or discriminatory handling of a grievance violates O.R.C. §4117.11(B)(6), a cease and desist order is appropriate, even though money damages may not be warranted because the grievance lacks merit.

⁷ See, Steelworkers v. NLRB 111 LRRM 3125 (7th Cir.) (1982).

of dedication shown by a representative to a client.

Rather, the inquiry into the merits of a grievance is a quasi-arbitral one, in which evidence relevant to the likelihood of a contract violation must be weighed and assessed.

In the case at issue, since we find no violation of O.R.C. §4117.11(B)(6) or (B)(1), the Complaint and the charge are dismissed.

Owens, Chairman and Pottenger, Vice Chairman, concur.