

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant

and

Ohio Association of Public School Employees,

Respondent.

CASE NUMBER: 92-ULP-04-0209

OPINION

POTTENGER, Vice Chairman:

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 Walender (Intervenor) and Katherine Whitney<sup>1</sup> against Ohio Association of Public School Employees (Respondent, OAPSE). The charge alleged that the Respondent had failed to fairly represent the Intervenor in a dispute involving the interpretation of a seniority clause in the collective bargaining agreement between OAPSE and the Perrysburg Local School District (School Board) by allegedly supporting the local union president in the grievance procedure because of her position to the detriment of the Intervenor. For the reasons stated below, we agree with the hearing officer that the Respondent did not violate Ohio Revised Code (O.R.C.) §4117.11(B)(1) or (B)(6) by its conduct with respect to the Intervenor's grievance.

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<sup>1</sup>Whitney admitted she suffered no damage and eventually did not pursue the charge.

II.

The Intervenor and Kathleen Fox, the president of OAPSE Chapter 242, are bus drivers employed by the School Board. The Intervenor had been hired as substitute on March 12, 1984, more than six months before Kathleen Fox, who was hired as substitute on October 8, 1984. However, Fox was the first to enter into a contract as bus driver, on March 4, 1985. The Intervenor received her first contract as a bus driver later in the year, in August 26, 1985. Thus, if seniority is calculated from the date of hire, Walender has more seniority than Fox, but if seniority is calculated from the date a contract is received, Fox has more seniority than Walender.

On January 1, 1991 a new collective bargaining agreement went into effect. This contract, for the first time, awarded kindergarten bus routes by seniority, and its seniority clause read:

"Seniority shall be defined as the total length of service with the Board in a particular job classification. An individual about to be laid off may bump an employee in another classification who has less seniority in said classification." Respondent's Exhibit 1. (Emphasis added).

In the prior collective bargaining agreement, in effect during the years 1988-1990, the seniority clause read:

"Seniority shall be defined as uninterrupted length of continuous service with the Board in a particular job classification computed from the latest date of hire or appointment to their classification. Seniority shall be computed from the first day the employee starts actual work under a contract with the Board of Education."

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Respondent's Exhibit 4. (Emphasis added).

In October, 1991, Darlene Stoll, a bus driver employed by the School Board, filed a grievance claiming that because she had greater seniority, she was entitled to Fox's kindergarten route. Stoll won her grievance and bumped Fox.

On December 11, 1991, Fox filed a grievance claiming she was entitled to Walender's route since Walender had less seniority. The School Board sustained Fox's grievance and assigned her the disputed route. Walender then filed on January 13, 1991, a grievance protesting the School Board's decision in Fox's grievance. It was denied by her supervisor, and this decision was subsequently upheld by the School Board on appeal. The Intervenor was represented satisfactorily, according to her own testimony, throughout the grievance proceedings by OAPSE Local 242 Vice-President Robert Carr. OAPSE, though, took the position that under the collective bargaining agreement Fox has more seniority than Walender and thus Fox should have the disputed route.

III.

The issue before us is whether the Respondent, by the way it represented the Intervenor in processing her grievance, and by supporting Fox's position on the collective bargaining agreement, breached its duty of fair representation in acting arbitrarily, discriminatorily, or in bad faith.

At the outset it should be stated that any preference by an employee organization in supporting one unit member over another for the reason that the preferred one is a union official is clearly an act of discrimination and bad faith in violation of the duty of fair representation. Thus, employee organizations should be on notice that special care is warranted whenever a contractual clause is in dispute between two unit members, one of whom is a union official.

In the case before us, though, there is nothing in the record to support any allegation that the union's interpretation of the collective bargaining agreement regarding seniority, or its conduct in representing Walender, was in any way influenced by the fact that Fox was the local president.

Complainant and Intervenor placed great emphasis on the fact that the last sentence of the seniority clause in the first agreement<sup>2</sup> was excluded from the most recent agreement. However, even without this sentence, the meaning remains unchanged. Under either agreement it can reasonably be concluded that seniority should be calculated from the date a contract is received when an employee is placed in a specific classification. Chuck Roginski, a field representative for OAPSE who helped negotiate the contract, testified without contradiction that the clause was re-worded to deal with lay-off concerns. He said the union wanted to avoid situations where a member receives a promotion after 15 years of service and then loses his job because he has little seniority in the new position. With this new clause he can regain his old position, if he has greater seniority than someone presently in his old position. (Transcript p. 274-276). Roginski also emphasized that seniority does not begin to build until a contract is received with the School Board. (Transcript 275).

Applying the facts to this clause, it is reasonable to conclude that Fox has greater seniority than Walender. Their dates of hire are irrelevant because both were hired as substitutes and thus were not members of the bargaining unit and did not accrue seniority. Fox entered into her first contract as a bus driver March 4, 1985. Walender entered into her first contract as a bus driver August 26, 1985. Therefore, Fox has a greater length of service with the School Board in the classification of bus driver.

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<sup>2</sup>"Seniority shall be computed from the first day the employee starts actual work under a contract with the Board of Education."

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What complicated matters was that the supervisor, Dave Brigand, assured Walender that she would not lose her seniority when she refused the first contract offered to her. He testified that seniority could be computed either from date of hire or from date of first contract because the practice since 1978 had been to compute from date of hire if a driver was offered a route and for some reason declined to accept the offer. (Transcript 192-194). This is why the field trip list (SERB Exhibit 7), and the earlier seniority lists (Respondent Exhibits 3 and 6) show Walender ahead of Fox. Subsequently, on cross examination, Brigand testified that the School Board, with the assistance of its legal counsel and negotiating experts, determined that this prior practice was incorrect. (Transcript 212-214). Additionally, there is nothing in the contract that remotely authorizes this practice.<sup>3</sup>

This is a case that has been muddled by misunderstanding, changes and past practices that were not clearly documented. However, under the seniority clause in either of the two collective bargaining agreements, Fox has to win. Neither mentions date of hire as the proper basis for calculation, and the latest contract specifically calls for total length of service with the School Board in a particular classification.<sup>4</sup> With that as the definition, Fox must prevail.

Thus, there is nothing in the way the Respondent interpreted the seniority clause in the collective bargaining agreements to support any claim of violation of §417.11(B)(6) and (B)(1). On the contrary, the seniority clauses in both collective bargaining agreements support the Respondent's position that Fox has more seniority than Walender regarding kindergarten routes. Also, the only issue raised by the Intervenor regarding the way she was represented by OAPSE was her complaint that Roginski failed to return a few of her phone calls while her grievance was being processed. However, the record shows that the union representative

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<sup>3</sup>The only time date of hire has been used has been in side agreements negotiated privately between a supervisor and an individual employee.

<sup>4</sup>A prerequisite to being in a particular classification is the execution of a contract with the Board of Education that specifies the employee's classification.

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who represented the Intervenor throughout the grievance procedure was not Roginski but Robert Carr, vice-president of OAPSE Local 242, with whose representation the Intervenor was satisfied, according to her own testimony<sup>5</sup>. The record also shows that Roginski did not fail to return Walender's calls and that he actually consulted with Walender and gave her his opinion on the contract seniority clause. Moreover, Roginski had a meeting with the School Board's agents and suggested various dispute resolution mechanisms to resolve the dispute on the seniority matter, and at Fox's grievance hearing he advised the School Board that Walender was taking a position adverse to that of Fox. Thus, again, there is nothing in the record to support a violation of the duty to fair representation.

#### IV.

Finally, a few words should be said about the procedural issue raised by the hearing officer. The hearing officer recommended that the Board develop a standard to allow hearing officers to entertain motions to dismiss made at the close of the Complainant's case-in-chief. Specifically, the hearing officer recommended that the Board adopt the standard for directed verdict set forth in the Ohio Rule of Civil Procedure 5C(A) (Rule 50(A)). We agree that a procedure enabling hearing officers to grant the utilization of motions to dismiss at the close of Complainant's case-in-chief may, when properly used, enhance judicial economy and save time and public resources. However, we believe such a procedure should be used conservatively. Granting a directed verdict could have the opposite effect by resulting in

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<sup>5</sup>The Intervenor, in her exceptions argued that Fox abused her position of president when she did not agree to have Carr present in the meeting of the School Board at which Fox's own grievance was considered. The Intervenor claims that, as a result, there was no one present to argue in opposition to the position taken by Roginski, who represented Fox. (Intervenor's Exceptions p. 8). This argument has no merit. No employee, union official or not, should have to agree to have at his/her grievance meeting a union official who is going to argue before the employer against the grievant. The function of union officials in a grievance meeting with the employer is to argue for the grievant, not against. As a matter of fact, Roginski, who represented Fox in this grievance meeting, did advise the School Board that Walender was taking a position adverse to that of Fox. (F.F. 14).

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costly delays if the Board, desiring to hear all the evidence before making its determination, must remand the case to the hearing officer to fully develop the record. In no case should dismissal be recommended simply on the pleadings or, as allowed by Rule 50(A)(1), on the opening statement of the opponent.

To summarize, motions to dismiss made at the close of the Complainant's case-in-chief may be entertained by the hearing officers pursuant to the standard for directed verdict set forth in Rule 50(A)(4), which states the following:

"When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct verdict for the moving party as to that issue."

Obviously, the grant of a motion for directed verdict by a hearing officer serves only as a recommendation that the Board dismiss the case. The Board may, after reviewing the record, follow its usual course, i.e., to adopt or reject the hearing officer's recommendation, or to remand the case to the hearing officer to more fully develop the record. Also, once a motion for a directed verdict is granted, the hearing officer in the proposed order shall analyze and explain in detail the reasons for granting such motion.

Owens, Chairman, and Mason, Board Member, concur.