

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matters of

State Employment Relations Board,
Complainant,

v.

Springfield Local School District Board Of Education,
Respondent.

CASE NUMBERS: 93-ULP-07-0397
93-ULP-09-0500

and

State Employment Relations Board,
Complainant,

v.

Ohio Association of Public School Employees, Local 530,
Respondent.

CASE NUMBERS: 93-ULP-07-0411
93-ULP-08-0431

OPINION

POHLER, Chairman:

I. BACKGROUND

The Complaint and Notice of Unfair Labor Practice Hearing and Prehearing Order were issued in these cases by the State Employment Relations Board (hereinafter "SERB") on February 15, 1994. These documents listed Gary C. Johnson, Esquire, of the law firm of Johnson, Balazs and Angelo as the representative for the Springfield Local School District Board of Education (hereinafter "School District"). While attempting to schedule a prehearing conference in this matter in late February 1994, Hearing Officer Michael R. Hall contacted Mr. Johnson by telephone to inquire as to the dates of his availability. Mr. Johnson informed Hearing Officer Hall that he would not be the attorney of record in this matter as it would be likely that he would be one of the significant witnesses in these cases for the School District. Mr. Johnson advised Hearing Officer Hall that Michael J. Angelo, Esquire, of the same law firm would be counsel of record in these cases.

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Following that conversation, Hearing Officer Hall spoke with Mr. Angelo and raised with him Disciplinary Rule 5-102(A) of the Ohio Supreme Court's Code of Professional Responsibility relating to the withdrawal as counsel when a lawyer or a member of the lawyer's firm becomes a witness on behalf of the lawyer's client. Mr. Angelo indicated that he could not be sure whether he would need to call Mr. Johnson as a witness until he knew what the testimony of another witness, Marc Beallor, would be if called as a witness adverse to the School District. Hearing Officer Hall suggested to Mr. Angelo that this issue be resolved, if possible, through stipulations of fact, discussions with opposing counsel regarding whether Mr. Johnson's testimony will be necessary, or a deposition as soon as practicable.

On April 4, 1994, the School District filed a motion to take the deposition of Mr. Beallor on April 20, 1994. This motion was granted in a procedural order issued on April 8, 1994. During a conference call involving all parties to this case on April 20, 1994, after Mr. Beallor's deposition had concluded, Mr. Angelo informed Hearing Officer Hall that it would be necessary to call Mr. Johnson as a witness in this case, and that there would likely be credibility issues to be resolved at the hearing between Mr. Beallor's and Mr. Johnson's testimony on issues necessary to be decided in this case.

Based upon these circumstances, Hearing Officer Hall issued an Order to Show Cause on April 22, 1994, which stated in pertinent part: "Accordingly, the law firm of Johnson, Balazs and Angelo is hereby ORDERED TO SHOW CAUSE, if any there be, on or before May 23, 1994, as to why that firm should not be disqualified from representing Respondent in this case."

The Johnson, Balazs and Angelo law firm (hereinafter the "JBA Firm") filed its response to the Order to Show Cause on May 23, 1994. Complainant filed its brief on the disqualification of counsel on June 9, 1994. The Ohio Association of Public School Employees, Local 530 (hereinafter "OAPSE") filed its brief on the same issue on June 13, 1994. The JBA Firm filed its reply brief on July 6, 1994.

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On July 7, 1994, the Hearing Officer's Proposed Order was issued with the following recommendations:

1. The State Employment Relations Board adopt the Facts From The Record In This Case Or Matters Assumed To Be True From The JBA Firm's Response To The Order To Show Cause, and Conclusions of Law set forth above.
2. The State Employment Relations Board issue an Order, pursuant to Ohio Revised Code §4117.02(H)(7) and §4117.12(B)(3), disqualifying the law firm of Johnson, Balazs and Angelo from further participation in these cases as the representative for any party.

On July 20, 1994, exceptions to the Hearing Officer's Proposed Order of disqualification were filed by the JBA Firm. The Complainant's reply to Respondent's exceptions were filed on July 25, 1994. The reply of OAPSE to the exceptions was filed on July 29, 1994.

This matter was initially placed on the Board's agenda for its meeting on August 11, 1994. At that meeting, the Board voted to table this matter until the August 25, 1994 meeting.

II. ANALYSIS

A. WHETHER DISCIPLINARY RULES 5-101 AND 5-102 OF THE CODE OF PROFESSIONAL RESPONSIBILITY APPLY TO LAWYERS APPEARING BEFORE THE STATE EMPLOYMENT RELATIONS BOARD.

The Code of Professional Responsibility (hereinafter "C.P.R.") was adopted by the Ohio Supreme Court effective October 5, 1970.¹ The Preface was not originally a part of the C.P.R., but was added effective July 15, 1974.² The Preface provides in pertinent part:

¹23 Ohio St.2d 1.

²38 Ohio St.2d p. xxv.

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The Canons of this Code are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

...
The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. (Emphasis added.)

Canon 5 of the C.P.R. provides, "A lawyer should exercise independent professional judgment on behalf of a client". The issues at hand revolve around Disciplinary Rule (hereinafter "DR") 5-102(A) of the C.P.R. and the exceptions to this rule found in DR 5-101(B). Both rules are derived from Canon 5. These rules provide in pertinent part:

Disciplinary Rule 5-102 Withdrawal as counsel when the lawyer becomes a witness

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

Disciplinary Rule 5-101 Refusing employment when the interest of the lawyer may impair his independent professional judgment

- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
- ...
(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

SERB is created by Section 4117.02 of the Ohio Revised Code. It makes adjudications which are appealable to common pleas court pursuant to Section 4117.13 of the Revised

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Code in matters involving unfair labor practices, such as the four cases herein. Consequently, lawyers who appear before SERB in these matters are within the legal system and are covered by the Canons of the C.P.R.. Specifically to these pending matters, DR 5-101 and DR 5-102 of the C.P.R. apply to lawyers who appear before SERB in unfair labor practice hearings.

We note that SERB is empowered to establish the standards of persons who practice in these proceedings.³ As an administrative board, SERB has the authority to use either quasi-legislative promulgation of general rules designed to address a general issue or to use a quasi-judicial proceeding when a specific dispute arises as a case before the board. *Hamilton Cty. Bd. of Mental Retardation and Developmental Disabilities v. Professional Guild of Ohio* (1989), 46 Ohio St.3d 147. SERB could use this proceeding as the vehicle for generating such a new standard of practice. However, we are specifically not taking this action herein. Instead, we are merely acknowledging the breadth of the scope of DR 5-101 and 5-102 of the C.P.R.⁴

B. WHETHER UNDER THE FACTS HEREIN, THE CONTINUED REPRESENTATION BY THE JOHNSON, BALAZS & ANGELO LAW FIRM WOULD VIOLATE DISCIPLINARY RULE 5-102 AND, IF SO, WHETHER THE EXCEPTIONS IN DISCIPLINARY RULE 5-101(B) ARE PRESENT.

The Ohio Supreme Court described the process to be followed in determining whether a lawyer's testimony would be allowed and when disqualification of a law firm or lawyer would be necessary. It stated in pertinent part:

When an attorney representing a litigant in a pending case . . . is called to testify in that case, the court shall first determine the admissibility of the attorney's testimony without reference to DR 5-102(A). If the court finds that the testimony is admissible, then that attorney, opposing counsel, or the court *sua sponte*, may make a motion requesting the attorney to withdraw voluntarily or be disqualified by the court from further representation in the case. The court must then consider whether any of the exceptions to DR 5-102 are

³Section 4117.02(H)(7) of the Revised Code.

⁴We recognize that this places lawyers at a disadvantage to nonlawyers in certain representation situations. While this appears to be unfair, we believe it is required by the application of the C.P.R. to these facts.

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applicable and, thus, whether the attorney may testify and continue to provide representation. In making these determinations, the court is not deciding whether a Disciplinary Rule will be violated, but rather preventing a potential violation of the Code of Professional Responsibility.⁵

The hearing officer, board member, or the board itself, in carrying out the responsibilities in Section 4117.02(H)(3) of the Revised Code, can raise and rule on such issues on its own motion when the issue is brought to its attention, and need not wait until a party files a motion to disqualify. The trier of fact has the responsibility to do so if no one else files a motion to disqualify in order to protect the integrity of its proceedings and to prevent a potential violation of the C.P.R.

SERB must disqualify a lawyer or a law firm if it is necessary to do so in order to prevent a breach of the C.P.R. by the lawyer or law firm, especially where failure to do so may result in serious questions regarding due process or the integrity of the proceedings. The issue of disqualification, by its very nature, must be decided on a case-by-case basis as the facts and circumstances will vary.

The facts relating to the issue of whether or not the JBA Firm should be disqualified were not in dispute. The issues in the instant unfair labor practice cases involve negotiations between OAPSE and the School District. Gary Johnson, a partner in the JBA Firm, conducted all negotiations with OAPSE while acting on behalf of the School District.⁶ According to Mr. Angelo, "The testimony of Mr. Johnson is paramount to Springfield's position and is not available from another source." Mr. Johnson's testimony will go to substantial, controverted and relevant issues to be resolved in this case and will require the hearing officer to make credibility determinations. Since it has no other witness who could testify to the facts from personal knowledge, Mr. Johnson is a necessary witness for the School District in these consolidated cases.

⁵*Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, Syllabus No. 2.

⁶Affidavit of Dr. Tucker L. Self, Paragraph 3.

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Given the above set of facts, which also constitutes the most probable situation in SERB unfair labor practice proceedings where the lawyer-witness situation arises (i.e., the lawyer acting as chief negotiator in collective bargaining negotiations which subsequently become the subject of an unfair labor practice proceeding before SERB in which the lawyer or law firm also acts as representative for a party to the proceeding), the only basis offered by the JBA Firm for avoiding disqualification as a result of DR 5-102-(A) is the hardship exception under DR 5-101(B)(4).

The courts in states like Ohio, having a code of conduct based upon the American Bar Association's Code of Professional Responsibility, generally hold that long-standing relationships with the client, involvement in litigation from the onset, or financial hardship to the client alone are insufficient to invoke the substantial hardship exception to disqualification.⁷ In those situations where disqualification of the law firm was not required, the courts were apparently motivated by such factors as the use of disqualification as a trial tactic by an opposing party, including delay in raising the issue until just before trial in spite of knowing of the problem for a long time in advance, the unanticipated need for the attorney's testimony until the trial, the fact that the proceedings had been going on for years before another party raised the issue; and the bankrupt situation of the clients. None of these factors are present in these cases.

Mr. Angelo's affidavit reflects that the client School District hired the firm in 1993. The instant unfair labor practice cases were filed with SERB during the period of July-September 1993. The JBA Firm anticipated the need for Mr. Johnson's testimony as early as November 12, 1993, when Mr. Angelo filed a notice of appearance as counsel to replace

⁷*General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir. 1982); *International Woodworkers of America, AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259 (4th Cir. 1981); *Freeman v. Vicchiarelli*, 827 F. Supp. 300 (D.N.J. 1993); *Jackson v. Russell*, 498 N.E.2d 22 (Ind. App. 1986); *U.S. ex rel. Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486 (S.D.N.Y. 1976); *Munk v. Goldome Nat'l Corp.*, 697 F. Supp. 784 (S.D.N.Y. 1988); *Wickes v. Ward*, 706 F. Supp. 290 (S.D.N.Y. 1989); *North Shore Neurosurgical Group, P.C. v. Leivy*, 72 App. Div.2d 598, 421 N.Y.S.2d 100 (2d. Dept. 1979); *Hoerger v. Bd. of Educ. of Great Neck Union Free School Dist.*, 129 App. Div.2d 659, 514 N.Y.S.2d 402 (2d. Dept. 1987).

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Mr. Johnson. This occurred shortly after the Board found probable cause in these cases on November 8, 1993, and well before the issuance of the Complaint on February 15, 1994.

It cannot be said that the motivation in this instance was a party's use of a disqualification motion as a trial tactic, since it was Hearing Officer Hali who initially raised the issue in the first place. Likewise, the need for Mr. Johnson's testimony was neither a complete surprise nor an unforeseeable circumstance given the allegations in the unfair labor practice charges. The set of circumstances, without more, does not establish a "substantial hardship," but only an inconvenience to the client.⁶

C. WHETHER A SUBSTANTIAL CONTROVERSY EXISTS WITH RESPECT TO THE APPLICATION OR INTERPRETATION OF CHAPTER 4117. OF THE REVISED CODE AND WHETHER THIS MATTER IS OF PUBLIC OR GREAT GENERAL INTEREST REQUIRING THIS MATTER TO BE CERTIFIED TO THE COURT OF APPEALS PURSUANT TO SECTION 4117.02(L) OF THE REVISED CODE.

Section 4117.02 of the Revised Code provides in pertinent part:

(G) . . . The board may, by one or more of its employees, . . . conduct in any part of this state any proceeding, hearing, investigation, inquiry, or election necessary to the performance of its functions

(H) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(8) Adopt, amend, and rescind rules and procedures and exercise other powers appropriate to carry out this chapter.

(L) Whenever the board determines that a substantial controversy exists with respect to the application or

⁶This conclusion does not mean that lawyers cannot be negotiators in collective bargaining, but it does mean that disqualification from a subsequent case related to the collective bargaining is one of the occasional hazards of lawyers or law firms who regularly serve their clients as negotiators. As for appearances by non-lawyer negotiator-advocates before SERB, the courts have not yet ruled on whether practice before SERB is the practice of law, and SERB has not yet had occasion to resolve a disqualification issue in those circumstances.

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interpretation of this chapter and the matter is of public or great general interest, the board shall certify its final order directly to the court of appeals having jurisdiction over the area in which the principal office of the public employee directly affected by the application or interpretation is located. . . .

Rule 4117-1-11 of the Administrative Code provides in pertinent part:

(A) Individuals conducting hearings other than fact-finding or conciliation hearings shall have the authority to take the following actions:

- (9) To exclude any person for improper conduct; and
- (10) To take any other action necessary and authorized under Chapter 4117. of the Revised Code or Chapters 4117-1 to 4117-25 of the Administrative Code.

Where a lawyer or law firm would violate the C.P.R., SERB, through one of its employees, e.g., a hearing officer, may disqualify the lawyer or law firm as a party's representative when necessary in order to avoid improper conduct pursuant to Rule 4117-1-11(A)(9) of the Administrative Code. This administrative rule carries out the powers of SERB set forth in Section 4117.02 of the Revised Code. We find that a substantial controversy exists regarding the application or interpretation of this section which serves as the focal point for this pending action.

We also find that issues of representation, especially relating to the disqualification of a party's representative, are inherently a matter of public or great general interest. We note that two other matters with issues involving the disqualification or withdrawal of counsel were presented for action by SERB at approximately the same time this matter came before us.⁹ This is not a subject which falls within SERB's areas of expertise. It is best resolved by being reviewed by the court of appeals.

⁹*SERB v. City of Cleveland*, Case No. 93-ULP-07-0368; *SERB v. Westlake City Hall Employees Association*, Case Nos. 92-ULP-10-0572 & 92-ULP-10-0573 and *SERB v. City of Westlake*, Case Nos. 92-ULP-10-0571 & 92-ULP-10-0574.

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III. CONCLUSION

Although SERB has the authority to establish the standards of persons who practice before it pursuant to Section 4117.02(H)(7) of the Revised Code, we are not exercising that authority at this time in this matter.

Based upon our review of the facts and law in these matters, we find that Disciplinary Rules 5-101 and 5-102 of the Ohio Supreme Court's Code of Professional Responsibility apply to lawyers appearing before SERB, that the continued representation of the Springfield Local School District Board of Education by law firm of Johnson, Balazs & Angelo in the cases herein would violate DR 5-102 of the C.P.R., that the disqualification of the Johnson, Balazs and Angelo law firm pursuant to DR 5-102(A) of the C.P.R. does not constitute a hardship under DR 5-101(B)(4) of the C.P.R. under the facts and circumstances of this case, and that a substantial controversy exists with respect to the application or interpretation of Chapter 4117. of the Revised Code and the matter is of public or great general interest.

POTTENGER, Vice Chairman concurs; MASON, Board Member, dissents with opinion.

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DISSENTING OPINION

MASON, Board Member:

I am unable to join with the majority in their decision and believe that the law firm of Johnson, Balazs and Angelo (hereinafter "JBA Law Firm") should not be disqualified and prevented from representing the Springfield Local School District Board of Education (hereinafter "School District"). However, there are some points raised by my colleagues with which I do concur. I agree that SERB, to protect the integrity of its proceedings, has the authority to disqualify an advocate or law firm for a conflict of interest that would undermine fairness and due process. Cuyahoga County Sheriff's Department, SERB 85-021 (5/15/85). I do not agree, however, that the standards used by courts to regulate their proceedings or those standards governing the practice of law by attorneys should be automatically or

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summarily applied to SERB proceedings.

In the present matter, disqualification of this entire law firm representing the School District has been deemed appropriate because a member of that law firm will serve as a witness. The majority's decision to disqualify counsel is premised solely on Disciplinary Rule 5-102(A) of the Ohio Supreme Court's Code of Professional Responsibility which requires a lawyer and his firm to withdraw as counsel in "contemplated or pending litigation" if the lawyer "ought to be called as a witness on behalf of his client."

SERB is governed by Chapter 4117 of the Ohio Revised Code, not the Code of Professional Responsibility. Pursuant to O.R.C. § 4117.02(H)(7), SERB has the authority to establish the standards for persons practicing before it and, therefore, the Board's decision to adopt a particular standard is completely discretionary and not mandatory, contrary to the apparent position that has been adopted by the majority in this matter.

Permitting the JBA Law Firm to continue in its representation of the School District in SERB's proceedings would not necessarily be a breach of Disciplinary Rule 5-102 because that rule appears to apply to more formal courtroom "litigation" (i.e. a "trial") as opposed to the proceedings conducted at SERB. As part of its role as a state administrative agency, SERB conducts "quasi" judicial hearings. The practice of law before a court is restricted to attorneys (with the noted exception of the individual taking on his own representation), here, however, no such restriction exists. Specifically, Ohio Administrative Code 4117-1-12 provides that:

Any party shall have the right to appear in person, by counsel, or by any other representative who is knowledgeable about Chapter 4117 of the Revised Code and the rules of the board, to present his or her case by oral, documentary, or other evidence, and to conduct such examination as may be required for a full and true disclosure of the facts.....(Emphasis added.)

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Given that both attorneys and non-attorneys are permitted to practice before SERB, any standard that we choose to adopt pursuant to O.R.C. § 4117.02(H)(7) should have equal application. This, however, cannot be the case if the Code of Professional Responsibility is applied to lawyers appearing before SERB for the simple reason that non-attorneys are not bound by this Code. Such disparate treatment is inherently unfair.

Although perhaps in most situations the logic of prohibiting an attorney from appearing as both an advocate and witness in the same proceeding is evident, it is foreseeable that a strict *per se* rule prohibiting such at this agency may invite disingenuous filings. Therefore, the Board must avoid the arbitrary application of rules promulgated to govern only one segment of the practitioners that come before it and whose application could bring about undue and unnecessary hardship. Rather than always following a strict application of technical rules, SERB proceedings would be better served by assessing the rationale behind such rules and applying them across the board when they best serve justice. Arbitrarily enforcing technical rules may encourage legal maneuvering and tactical filings which will inevitably delay our proceedings and clog our system with distracting claims of procedural violations.

In this particular instance, automatic disqualification of an entire law firm solely on the basis that a member of that firm will testify is both unfair and unnecessary and furthers no legitimate interest. The rationale behind Disciplinary Rule 5-102 is set forth in Ethical Consideration 5-9 which explains why the role of advocate and witness are incompatible. This ethical consideration states:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are

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inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Although I agree that an advocate in a SERB proceeding should not in most instances be a witness in that same proceeding, I fail to see the logic in this particular situation. Here, no conflict of interest or incompatibility of roles exist. The attorney that will be called as a witness in this case will not serve in a dual capacity as both advocate and witness. Instead, another member of his law firm will assume the role of advocate. This being so, the rationale of Ethical Consideration 5-9 is not applicable here and there is simply no logical basis for disqualification of the entire law firm. In my opinion, SERB proceedings would neither be undermined or tainted by allowing this law firm to continue in its capacity as the School District's counsel.

Finally, it is argued that the School District's counsel should be disqualified because the Law Firm has failed to establish a "substantial hardship" exception to Rule 5-102(A) of the Code of Professional Responsibility. In my opinion, this standard places the onus of proving hardship, whatever the definition, on the wrong party and facilitates tactical filings and legal maneuvering. In order to prevent this, SERB should evaluate motions to disqualify counsel on a case-by-case basis and more importantly, the burden of proving hardship should be shifted to the party filing the motion. Approaching the matter in this way would enable SERB to better determine whether a legitimate conflict of interest exists that might impede the fairness of our proceedings, or whether the party seeking disqualification has done so for reasons outside those that should be recognized.