

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,
Complainant,

and

Cleveland Building and Construction Trades Council,
Intervenor

v.

City of Cleveland,
Respondent.

CASE NUMBER: 93-ULP-07-0368

OPINION

POHLER, Chairman:

I. BACKGROUND

The factual issue in dispute in this matter is whether the parties expressly agreed to extend the terms of the 1990-93 collective bargaining agreement. On March 15, 1993, a meeting took place to discuss negotiations for the successor contract. Representing the Respondent at this meeting were Dan Hauenstein, a former employee of Respondent City of Cleveland, and Marc J. Bloch, a lawyer with the law firm of Duvin, Cahn, Barnard & Messerman ("hereinafter DCB&M"). The Cleveland Building and Construction Trades Council, Intervenor/Charging Party, contends that the parties agreed at this meeting to extend the terms of the 1990-93 contract if negotiations for the successor contract were not completed by April 30, 1993. Respondent contends there was no such agreement.¹

The Complaint and Notice of Unfair Labor Practice Hearing and Prehearing Order were issued in this case by the State Employment Relations Board (hereinafter "SERB") on April 7, 1994. The Prehearing Conference was held on April 27, 1994. At the prehearing conference,

¹Cleveland Building and Construction Trades Council's Brief in Support of Motion to Disqualify Respondent's Counsel, pp. 3-4.

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Complainant SERB, represented by the Ohio Attorney General's office, and the Charging Party moved to disqualify DCB&M from representing Respondent in this proceeding because a member of the law firm was being called to testify as a witness for Respondent on a material issue of fact in dispute.

On April 29, 1994, an Order to Show Cause Hearing was set for May 26, 1994. The reason for the hearing was described as follows:

During a prehearing conference held in the above-captioned matter on April 27, 1994, the issue of Disciplinary Rule 5-102(A) of the Ohio Supreme Court's Code of Professional Responsibility relating to Respondent's Counsel at said hearing. This issue having been raised by the Intervenor and Complainant, must now be resolved before proceeding to the merits of this case.

On May 23, 1994, a Consent Motion for Cancellation of Hearing and for Submission of the Issue on the Briefs was consented to by the parties and filed by Respondent's counsel. The Motion was granted by the hearing officer on May 27, 1994. Briefs in support of disqualification were filed by Complainant and Charging Party. Respondent filed a brief in opposition to disqualification. Subsequent to the submission of the briefs, this matter was brought directly for consideration at the SERB meeting on August 25, 1994.

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, 1970.² The Preface was not originally a part of the C.P.R., but was added effective July 15, 1974.³ The Preface provides in pertinent part:

²23 Ohio St.2d 1.

³38 Ohio St.2d p. xxv.

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

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.⁴ 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.⁵

Respondent asserts that if SERB is going to apply a code of professional responsibility, it should be the Model Code. Ohio's C.P.R. is in effect at the present time and it, not the Model Code is the basis for our action herein. If SERB establishes the standards of persons who practice in these proceedings at a later time, pursuant to Section 4117.02(H)(7) of the Revised Code, then the Model Code may be a guide at that time.

B. WHETHER UNDER THE FACTS HEREIN, THE CONTINUED REPRESENTATION BY THE DUVIN, CAHN, BARNARD & MESSERMAN 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:

⁴Section 4117.02(H)(7) of the Revised Code.

⁵We 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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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 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.⁶

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 DCB&M firm should be disqualified were not in dispute. The issues in this unfair labor practice case involve a negotiation meeting between Respondent and Charging Party. Marc J. Bloch, a member of the DCB&M firm, was one of two individuals representing Respondent at the March 15, 1993 meeting where the purported extension of the 1990-93 agreement was reached. Mr. Bloch's testimony will go directly to substantial, controverted and relevant issues to be resolved in this case and will require the hearing officer to make credibility determinations.

⁶*Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, Syllabus No. 2.

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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 DCB&M 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.

The instant unfair labor practice case was filed with SERB during in July 1993. SERB found probable cause that an unfair labor practice had occurred on January 6, 1994. The Complaint was issued on April 7, 1994. According to Respondent, only shortly before the

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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April 27, 1994 prehearing conference did Respondent learn that there would be an issue as to the alleged extension of the collective bargaining agreement. Thus, only at that time did Respondent become aware of the need for the possible testimony of Mr. Bloch. By this time, Respondent had expended time and funds in having the DCB&M firm represent it before SERB in this matter.⁹

The basis for the unfair labor practice charge, in Appendix A of the charge, states:

... The existing collective bargaining agreement expired by its terms on May 31, 1993, but the parties agreed to extend it through July 31, 1993. ...

...
Not only is the City obligated to continue to abide by the terms of the collective bargaining agreement because the parties agreed to extend its terms,
....

Based upon the language within the charge itself, Respondent reasonably had notice of the issue concerning the alleged extension of the contract well before the prehearing conference. The need for Mr. Bloch's testimony was neither a complete surprise nor an unforeseeable circumstance given the allegations in the unfair labor practice charges. In addition, Respondent has another witness, Dan Hauenstein its former employee, who could testify to the facts from personal knowledge. It is also asserted that a motivation in this instance was Charging Party's use of a disqualification motion as a trial tactic; however, this is also tied in with Respondent's contention of surprise regarding this issue of the alleged contract extension. This set of circumstances, without more, does not establish a "substantial hardship," but only an inconvenience to the client.⁹

⁹Respondent's Brief in Opposition to Motions to Disqualify Counsel, p. 2.

⁹This 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.

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 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 employer 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:

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(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.¹⁰ 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.

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 City of Cleveland by the law firm of Duvin, Cahn, Barnard & Messerman in the cases herein would violate DR 5-102 of the C.P.R., that the disqualification of the Duvin, Cahn, Barnard & Messerman law firm pursuant to DR 5-102(A) of the C.P.R. does not constitute a hardship under DR 5-

¹⁰*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; *SERB v. Springfield Local School District Board of Education*, Case Nos. 93-ULP-07-0397 and 93-ULP-09-0500 and *SERB v. Ohio Association of Public School Employees, Local 530*, Case Nos. 93-ULP-07-0411 and 93-ULP-08-0431, consolidated.

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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 Motions to Disqualify Respondent's Counsel should be denied. However, there are some points in this matter with which I do concur with my colleagues. 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 summarily applied to SERB proceedings.

In the present matter, disqualification of an entire law firm representing the Respondent is urged because a member of Respondent's law firm plans to testify as a witness on an issue of fact that is in dispute, specifically, whether the parties expressly agreed to continue the terms of their collective bargaining agreement until a new agreement was reached. The Motions for Disqualification filed by Complainant and Intervenor are 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 adopted by the majority in this matter. Here, permitting the City of Cleveland's counsel to continue its representation 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. While the practice of law before a court is restricted to attorneys (with the noted exception of the individual taking on his own representation), here, 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.)

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. As pointed out by the Respondent's counsel, "...if a party chooses a non-attorney to represent him, that non-attorney can appear both as an advocate and a witness. An attorney, however, would arguably not be permitted to do so. Such a differing treatment

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violates the party's rights to equal protection, based on whom he chose as his representative."¹ 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 regarding a single factual issue in dispute 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 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.

¹ Brief in Opposition to Motions to Disqualify Counsel; pg. 8.

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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 may 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 in this case and there is simply no logical basis for disqualifying 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 Respondent's counsel.

Finally, the parties seeking disqualification of Respondent's counsel in this case contend that their motions to disqualify counsel should be granted because the Respondent is unable to show that a "substantial hardship" would result if the rule were enforced. I disagree. 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 exist 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.