

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,
Complainant,

and

Ohio Civil Service Employees Association, Local 11,
Respondent.

CASE NUMBER: 92-ULP-01-0010

OPINION

MASON, Board Member:

This case comes before the State Employment Relations Board ("SERB" or "Board") on exceptions to a Hearing Officer's Proposed Order issued on March 1, 1995. For the reasons stated below, we find that the Ohio Civil Service Employees Association, Local 11 ("OCSEA") committed an unfair labor practice in violation of O.R.C. § 4117.11(B)(6) by failing to process the termination grievance of Terence L. Kizer, Sr. in a proper and timely manner. We also find that the grievance at issue was not likely to be meritorious.

I. BACKGROUND

Terence L. Kizer, Sr. filed an unfair labor practice charge with SERB on January 8, 1992, alleging that OCSEA had failed to process a grievance concerning his removal as a Youth Leader by the State of Ohio, Department of Youth Services ("DYS") on September 21, 1990. By a directive issued on June 4, 1992, the Board found probable cause to believe that OCSEA had committed an unfair labor practice in violation of O.R.C. §§ 4117.11(B)(1) and (6) and directed this matter to hearing. On March 1, 1995, the Hearing Officer's Proposed Order was issued, finding that OCSEA had violated O.R.C. §§ 4117.11(B)(1) and (6) and that Mr. Kizer's termination grievance was not likely to be meritorious. OCSEA filed exceptions to the proposed order, and the Complainant filed a response to the exceptions.

II. DISCUSSION

A. OCSEA Violated O.R.C. § 4117.11(B)(6)

O.R.C. § 4117.11(B)(6) provides:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

(6) Fail to fairly represent all public employees in a bargaining unit[.]

The first issue in this case is whether the employee organization, its agents, or representatives acted arbitrarily, discriminatorily, or in bad faith and, thus, failed to fairly represent Mr. Kizer in violation of O.R.C. § 4117.11(B)(6). There is no evidence in the record that OCSEA acted in bad faith or in a discriminatory manner toward Mr. Kizer. Thus, the only issue is whether OCSEA's conduct was arbitrary. In *In re Ohio Civil Service Employees Assn./AFSCME, Local 11*, SERB 93-019 (12-20-93), SERB discussed its standard for finding a violation under O.R.C. § 4117.11(B)(6). SERB stated that the standards of *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), (hereinafter "AFSCME") and *Air Line Pilots Assn., Int'l. v. O'Neill*, 449 U.S. 65, 111 S. Ct. 1127, 136 L.R.R.M. 2721 (1991) (hereinafter "O'Neill"), are both proper standards to determine arbitrariness in O.R.C. § 4117.11(B)(6) violations. In *AFSCME, supra* at 3-203, 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 reasons 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 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 range of reasonableness . . . as to be irrational.* (emphasis added).

Clearly, under both standards simple negligence is insufficient to find a violation of the duty of fair representation, and under both standards the conduct at issue must exceed honest mistake or misjudgment in order to constitute arbitrary conduct in violation of the statute. The grievance and arbitration process is by no means expected to be error-free. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 L.R.R.M. 2481 (1976). Also in *In re Ohio Health Care Employees Union, Dist 1199*, SERB 93-020 (12-20-93) (hereinafter "*District 1199*"), the Board pointed out that while simple negligence cannot be the basis for finding a violation, gross negligence can.

Applying the above principles, we find that OCSEA's conduct was arbitrary and, hence, in violation of O.R.C. § 4117.11(B)(6). The record in this case is very extensive, full of detailed facts and many credibility judgments. What follows is a summary of this large record. After a pre-disciplinary conference in which Mr. Kizer was represented by OCSEA, Mr. Kizer was terminated effective September 21, 1990. On the same day, September 21, 1990, Mr. Kizer told Ms. Mackey, an OCSEA Union Steward, that he wanted a grievance filed on his termination. Ms. Mackey said she would represent Mr. Kizer on his grievance. However, Ms. Mackey never filed a timely grievance. Moreover, her extensive efforts to conceal her failure to timely file the grievance is unacceptable in the fair representation arena.

The employee organization never made a determination that a grievance on Mr. Kizer's termination, if the grievance had been filed, lacked merit. Moreover, there is nothing in the record to show that there was any rational reason for OCSEA not to process such a grievance. The standard procedure for filing grievances called for the assignment of a number to each grievance when it is filed. The alleged grievance had no number; Ms. Mackey could not explain the absence of a grievance number. Ms. Mackey insisted that she did file a grievance

on the effective date of Mr. Kizer's termination. However, she simultaneously claimed that she followed Mr. Kizer's instructions to wait until he discussed the issue with a lawyer before filing the grievance. She also could not explain how the grievance she had filed reached neither the employer nor the union officials who *a/ways* receive copies of each grievance filed with the employer; how the copy of the alleged grievance, that was found just before the hearing in this case in Mr. Kizer's personnel file without a grievance number, got there; why she never followed up on the grievance; why she sent an alleged copy of the allegedly filed grievance a second time when Mr. Kizer inquired about his original grievance; and why she destroyed all the documents regarding Mr. Kizer's grievance less than a year after the alleged grievance was filed but before the grievance had been resolved (at approximately the same time that OCSEA itself was investigating the Kizer case). Thus, her testimony regarding these events is inherently contradictory.

When a grievance involving termination is not properly processed and there is no rational basis for the action, when the union representative is an experienced person who knows the procedures, the deadlines, how to ask for extensions of time, and the like, and when the representative's actions are irrational and contradictory, this conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment. Thus, under the *AFSCME* standard, Ms. Mackey's conduct constituted arbitrary behavior and, hence, was in violation of O.R.C. § 4117.11(B)(6). Ms. Mackey's actions were arbitrary as well under the *O'Neill* standard since, in the light of the factual and legal landscape at the time of her actions, her behavior is so far outside the wide range of reasonableness as to be irrational.

B. *OCSEA Did Not Violate O.R.C. § 4117.11(B)(1)*

O.R.C. § 4117.11(B)(1) provides in relevant part:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

• • •
(1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code[.]

The theory behind the finding of an O.R.C. § 4117.11(B)(1) violation is that if Ms. Mackey did not want to represent Mr. Kizer, she owed it to him to either tell him to file his own grievance or to arrange for another union official to handle it. She took neither course of action, prejudicing Mr. Kizer by not filing a timely grievance over his termination. Thus, under this theory, OCSEA violated O.R.C. § 4117.11(B)(1) because Ms. Mackey's actions prevented Mr. Kizer from pursuing his own grievance under O.R.C. § 4117.03(A)(5).

Neither the record nor the law supports this theory. First, this theory assumes that Ms. Mackey did not want to represent Mr. Kizer when he asked her and she agreed to represent him. There is no evidence in the record to support such an assumption. Second, for an O.R.C. § 4117.11(B)(1) violation to occur, the record must reflect evidence of restraint or coercion. None is present here. The statutory language in O.R.C. § 4117.11(B)(1) is different from the parallel section O.R.C. § 4117.11(A)(1).¹ To prove a violation of the former, evidence of restraint or coercion must be present; to prove a violation of the latter, evidence of interference will suffice. Thus, not every O.R.C. § 4117.11(B)(6) violation automatically entails an O.R.C. § 4117.11(B)(1) violation. There may be occasions where the facts give rise to both violations. However, this is not the case here.

C. Remedy

Since we find that an O.R.C. § 4117.11(B)(6) violation occurred, the next issue to determine for remedial purposes is whether Mr. Kizer's termination grievance, had it been processed properly, would have likely been meritorious. In *District 1199*, the Board held that where improper handling of a grievance is the basis of an O.R.C. § 4117.11(B)(6) charge, the

¹O.R.C. § 4117.11(A)(1) provides in part:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) *Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code* (emphasis added).

merit of that grievance is not relevant to the finding of a violation; the grievance's merit is only relevant to the remedy after a violation is found.

OCSEA raised a concern that under the foregoing policy, employee organizations must process meritless grievances to avoid violations of O.R.C. § 4117.11(B)(6). This concern is unwarranted. It is well established that an employee organization has wide discretion in deciding whether to process a grievance based on its judgment as to the merit of the grievance. *Vaca v. Sipes*, 386 U.S. 171, 64 L.R.R.M. 2369 (1967). Such a decision depends on the employee organization's interpretation of the collective bargaining agreement it negotiated, signed, and has a statutory duty to administer. This discretion is necessary to enable the employee organization to properly perform its statutory duties and consistently administer the collective bargaining agreement to all unit members, to represent all bargaining unit employees fairly, and to present good and consistent cases before arbitrators. Hence, where an employee organization in interpreting the collective bargaining agreement makes a rational judgment in good faith that a certain grievance has no merit and, based on this judgment call, decides not to process the grievance, no O.R.C. § 4117.11(B)(6) violation has occurred.²

Where the failure to process a grievance was not based on a decision that the grievance lacks merit, but instead resulted from bad faith, discriminatory conduct or arbitrary behavior, a violation will be found regardless of the merit of the grievance. Thus, employee organizations have the discretion to decide not to pursue a grievance on the basis that it lacks merit. However, when no decision on the merit is made by an employee organization, a finding of arbitrariness, bad faith or discriminatory behavior will not be redeemed by a later finding by SERB that the grievance was not likely to be meritorious. In such a case, a violation will be found and the merit of the grievance, or the lack of merit, will become a factor only in the fashioning of a remedy. No damage award will be issued without a finding that the grievance was likely to be meritorious since to act otherwise will reward a properly

²See, e.g., *In re Ohio Civil Service Employees Assn/AFSCME, Local 11, supra*; *In re Ohio Health Care Employees Union, Dist 1199, supra*; and *In re OAPSE, SERB 93-021 (12-21-93)*.

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disciplined employee for misconduct, as stated in *District 1199*, or an individual who had no contractual right to the remedy sought.

In the case at issue, OCSEA acknowledged that it never made a judgment that the grievance lacked merit. Nowhere is it even argued that the merit of the grievance was ever discussed, let alone that it had been determined to be lacking. The resolution of this issue is determined to a great extent on factual analysis and credibility determinations rather than on legal analysis. After reviewing the record along with the hearing officer's substantial credibility determinations and the analysis of various witnesses' testimony, including some contradictory testimony, we conclude that Mr. Kizer's grievance was not likely to be meritorious. As a result, the appropriate remedy in this case is the issuance of a notice to employees to be posted for sixty (60) days.

III. CONCLUSION

For the reasons above, we find the Ohio Civil Service Employees Association, Local 11 violated O.R.C. § 4117.11(B)(6) by failing to process the termination grievance of Terence L. Kizer, Sr. in a proper and timely manner. We also find that OCSEA did not restrain or coerce Mr. Kizer in his statutory rights and, thus, did not violate O.R.C. § 4117.11(B)(1). Further we find that the termination grievance was not likely to be meritorious. Therefore, the remedy shall be the posting of a notice to employees issued by the Board, to be posted for sixty (60) days in all work locations of the State of Ohio, Department of Youth Services, where OCSEA customarily posts notices to members of the bargaining unit.

Pohler, Chairman, and Pottenger, Vice Chairman, concur.