

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,
Complainant,

v.

Ohio Nurses Association,
Respondent Employee Organization,

and

University of Cincinnati Hospital,
Respondent Employer.

**CASE NUMBERS: 93-ULP-07-0347
 93-ULP-07-0348**

ORDER

Before Chairman Pohler, Vice Chairman Pottenger, and Board Member Mason:
August 29, 1996.

On July 1, 1993, Marianne Patton ("Charging Party") filed Unfair Labor Practice Charges against the University of Cincinnati Hospital ("Employer"), Case No. 93-ULP-07-0347, and one against the Ohio Nurses Association ("Employee Organization"), Case No. 93-ULP-07-0348. By separate Directives issued September 13, 1994, the Board found probable cause in both cases and directed these matters to hearing. By directive issued January 23, 1995, SERB consolidated these cases for hearing. On January 25, 1995, SERB issued a Complaint, alleging that the Employer violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(8), and that the Employee Organization violated O.R.C. §§ 4117.11(B)(1), (B)(2), and (B)(6). On June 15, 1995, Complainant filed a Motion to Amend Complaint and Notice of Hearing. The motion to amend was granted by Hearing Officer's Procedural Order issued June 19, 1995, and the Amended Complaint issued on June 20, 1995.

A hearing was conducted on June 27, 1995, and concluded on July 5, 1995. A Hearing Officer's Proposed Order was issued on September 29, 1995, addressing the issue of the timeliness of the charge. Exceptions were filed by the Charging Party and Complainant. Responses were filed by the Employer and the Employee Organization. The Employer also filed a motion to strike an attachment from the Charging Party's exceptions.

On December 14, 1995, the Board deferred ruling on the Hearing Officer's Proposed Order issued on September 29, 1996, and remanded this matter to the Hearings Section for further consideration on the remaining issues and on the merits. On April 22, 1996, the Hearing Officer's Proposed Order was issued. The Complainant filed exceptions to the Hearing Officer's Proposed Order on May 14, 1996. On June 3, 1996, the Employer and the

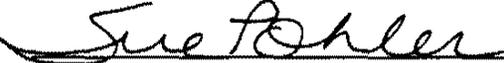
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Employee Organization filed separate responses to the exceptions. The Employer and the Employee Organization also filed separate cross-exceptions to the Hearing Officer's Proposed Order on June 3, 1996. On June 13, 1996, the Complainant filed a response to the cross-exceptions of the Employer and the Employee Organization to the Hearing Officer's Proposed Order. On June 13, 1996, the Employee Organization also filed a response to the Employer's cross-exceptions.

The Board has reviewed the record, the Hearing Officer's Proposed Orders, the exceptions, cross-exceptions, and the responses to the exceptions and cross-exceptions. Conclusion of Law No. 4 is hereby amended to read: "The Hoxworth nurses who had a January 20, 1991 seniority date have standing to bring the instant unfair labor practice charge."; adopts the Stipulations, Findings of Fact, and Conclusions of Law Nos. 1-4 and 7-8, as amended, in the Hearing Officer's Proposed Order. The complaint is dismissed, and the charge is dismissed with prejudice.

It is so ordered.

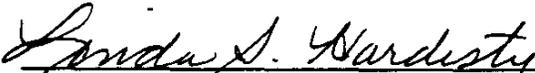
POHLER, Chairman; POTTENGER, Vice Chairman; and MASON, Board Member, concur.


SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen (15) days after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party on this

27th day of September, 1996.


LINDA S. HARDESTY, LEGAL ASSISTANT

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OPINION

POTTENGER, Vice Chairman:

These unfair labor practice cases come before the State Employment Relations Board ("SERB" or "Complainant") on exceptions filed to the Hearing Officer's Proposed Order issued on April 22, 1996. The Ohio Nurses Association ("ONA") and the University of Cincinnati Hospital ("Employer" or "Hospital") negotiated a 1991-1993 collective bargaining agreement that accorded nurses working at the Hospital's Holmes Division ("Holmes") seniority dating back to January 20, 1991, the date the parties privately agreed to accrete them into the existing bargaining unit, and not their date of hire with the Hospital. For the reasons below, we find that the ONA did not commit unfair labor practices in violation of O.R.C. §§ 4117.11(B)(1), (B)(2) or (B)(6), and that the Employer did not commit unfair labor practices in violation of O.R.C. §§ 4117.11(A)(1) or (A)(8), when this provision was left unchanged in the succeeding 1993-1995 collective bargaining agreement.

I. BACKGROUND

The ONA entered into its first collective bargaining agreement with the Employer in 1973. Since nurses represented by the ONA and employed by the Hospital comprised a

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bargaining unit in existence prior to April 1, 1984, they constitute a deemed-certified bargaining unit pursuant to § 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367.

In 1986 the ONA was certified by SERB to represent the nurses at the Hoxworth Blood Center ("Hoxworth"), a blood bank physically connected to the Hospital. The 1987-1988 collective bargaining agreement between the ONA and the Employer provided that the Hoxworth nurses would accrue seniority from their date of hire. Neither the ONA nor the Employer believed that allowing the Hoxworth nurses the possibility of using the seniority provision to take jobs at the Hospital would create a concern or have much impact upon existing bargaining unit members.

In late 1989, nurses employed at Holmes discussed whether to join the existing bargaining unit; job security was a primary motivation. The ONA sent the Holmes nurses organizing materials and invited them to a local unit meeting in January 1990 to explain how the Holmes nurses could join the ONA-represented bargaining unit. The ONA clarified that they could not represent the Holmes nurses until they had been brought into the bargaining unit by contract. Several nurses from Holmes attended the January 1990 unit meeting. Job security issues were discussed, but neither date-of-hire seniority nor the Hoxworth experience were discussed at that time. At no time during this meeting did any ONA representative promise or guarantee that the Holmes nurses would be able to obtain date-of-hire seniority if they were represented by the ONA. After this meeting the ONA notified the Hospital that organizing efforts for the Holmes nurses had begun.

During early 1990, the Holmes nurses reiterated their concerns about seniority and job security issues. An ONA representative discussed possible seniority dates that might be obtained for the Holmes nurses. The Holmes nurses understood that they would not receive date-of-hire seniority in the 1991-1993 collective bargaining agreement and that the ONA was not guaranteeing that the nurses would receive date-of-hire seniority in the 1993-1995 contract. The Holmes nurses remained confident, however, that they could receive date-of-hire seniority with the 1993-1995 contract because they hoped to achieve the same result as the Hoxworth nurses.

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The ONA negotiated with the Employer for the 1991-1993 contract between late 1989 and November 1990. One of the issues raised by the ONA during negotiations was the recognition of previously unrepresented nurses, including the Holmes nurses. The ONA and the Employer agreed that both the Holmes nurses and certain Barrett Center ("Barrett") nurses should be added to the unit under the contract because they performed bargaining unit work and shared a community of interest with the nurses at the Hospital. The parties reached consensus on the date of contract ratification as to the Holmes nurses' seniority date. As a result, all nurses at Holmes and Barrett were brought into the bargaining unit with a January 20, 1991 seniority date. The parties did not file anything with SERB to amend or clarify the bargaining unit description.

Between March 1991 and November 1992, the ONA engaged the Employer in negotiations for the 1993-1995 contract. The Holmes nurses contacted the ONA again to emphasize their expectation that the seniority issue be represented in the current round of contract negotiations. The ONA responded that there were always many issues for bargaining; only those issues of greatest concern to the majority would be examined. In early 1992, a nurse from Holmes was elected as a representative on the ONA's bargaining team.

The ONA put the issue of date-of-hire seniority for Holmes nurses on the negotiation issue list, but the data it collected showed that most bargaining unit members did not want seniority tampered with in any way. The ONA's negotiation team, which included the representative from Holmes, met on several occasions to formulate their bargaining proposals; they discussed the differences between what had been done with Hoxworth and the pending Holmes proposal, both in terms of hospital restructuring and the impact upon the existing bargaining unit. Ultimately, however, based upon the survey results and internal discussions regarding the impact on the bargaining unit and a need for consistency, the team decided not to press for date-of-hire seniority for the Holmes nurses. On January 20, 1993, the ONA's negotiation team informed the Employer that it was dropping seniority from the issue list. During this period, the movement of work units and/or services from Holmes into another of the Employer's facilities continued.

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The Holmes nurses were allowed to vote in the ratification election for the 1993-1995 contract. Several of the Holmes nurses voted against the proposed contract because they did not receive date-of-hire seniority. These nurses comprise the charging parties in the instant cases. Despite this minority vote, the contract was ratified.

In 1995, the Employer underwent a realignment that resulted in layoffs. None of the Holmes nurses who received the January 20, 1991 seniority date had been laid off as part of the 1995 realignment. During the realignment, several Holmes nurses exercised contractual rights that would not have been available to them if they were not members of the bargaining unit.

II. DISCUSSION

A. Standing

The Employer argues that none of the Holmes nurses have standing to challenge the January 20, 1991 seniority date because none have ever been within the deemed-certified bargaining unit. According to the Hospital, since the nurses could not lawfully have been placed in the deemed-certified unit, SERB cannot now legitimize their inclusion by conferring standing upon them and allowing them to challenge a seniority date that came about only as a direct result of their incorrect inclusion in the deemed-certified unit. The Complainant and the Charging Parties contend that the Holmes' nurses have always been covered by the bargaining unit description, even though, until 1991, the ONA did not purport to represent them and contract coverage was not formally extended to them. The Complainant and the Charging Parties analogize this situation to one where the Hospital hires more nurses to increase its staff-patient ratios. They also argue that no formal action should be required since no formal action would be necessary by SERB to add the newly hired nurses to the existing bargaining unit.

Prior to the Ohio Supreme Court's ruling in *Ohio Council 8, AFSCME v. City of Cincinnati*, 64 Ohio St.3d 677, 1994 SERB 4-37 (1994) (hereinafter "*Cincinnati*"), a petition for unit clarification or amendment of certification could have been filed pursuant to Ohio

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Administrative Code Rule 4117-5-01(F). No such petition was filed by these parties for the Holmes nurses.¹ Citing *Cincinnati* and *In re City of Gallipolis*, SERB 94-005 (3-3-94), the Employer argues that the ONA and the Hospital could not have acted, as they did in January 1991, to alter the existing deemed-certified bargaining unit and that SERB cannot lawfully add the previously unrepresented Holmes nurses to the deemed-certified unit. The Complainant argues that in *Cincinnati* the Ohio Supreme Court did not intend to address the concept of standing as it applies to an injured public employee's right to pursue an unfair labor practice charge. Moreover, the Complainant and the Charging Parties argue that *Cincinnati* is not relevant because there has been no alteration or adjustment of a deemed-certified unit; instead, new employees, not new classifications, have been added to the existing unit.

In *State ex rel. Brecksville Edn. Assn. OEA/NEA v. State Emp. Relations Bd.*, 74 Ohio St.3d 665, 1996 SERB 4-1 (1996) [hereinafter "*Brecksville*"], the Ohio Supreme Court clarified its previous ruling in *Cincinnati* and held that SERB does have jurisdiction to consider a petition filed jointly by an employer and an exclusive bargaining representative that requests an amendment to the composition of a deemed-certified bargaining unit. While SERB may make changes to the composition of deemed-certified units, the deemed-certified status of these units will not be lost as a result. Applying this to the present case, since both the ONA and the Employer were in agreement to include the Holmes nurses in the bargaining unit, SERB would have had jurisdiction to consider a joint petition, if one had been filed.

A party with standing is one who has a "real interest in the subject matter * * * not merely an interest in the action itself, *i.e.*, one who is directly benefitted or injured by the outcome of the case." *West Clermont Education Assn. v. West Clermont Local Bd. of Education*, 67 Ohio App.2d 160, 162 (Ct. App., Clermont, 1980). To determine whether a charging party has standing, SERB will look for an active dispute to be resolved rather than a hypothetical issue and will ensure that the charging party possesses a direct interest, relevant knowledge of alleged harm, and a right to be protected. *In re City of Canton*, SERB 90-006 (2-16-90).

¹Finding of Fact ("F.F.") No. 17.

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In the present case, the charge was filed timely and, since the seniority dates are an ongoing issue, an active dispute clearly exists. The charging parties have a direct interest in the charge because it is their seniority dates that are being contested. The remaining issue is whether they have a right to be protected.

As long as the public employee meets the general requirements for standing referenced above, the employee has standing to file an unfair labor practice charge alleging a public employer violated O.R.C. § 4117.11(A). Likewise, a public employee meeting those general requirements for standing whose position is not included in a bargaining unit has standing to file an unfair labor practice charge alleging an employee organization's actions adversely affect the employee in violation of O.R.C. § 4117.11(B). See, e.g., *In re Ohio Council 8, AFSCME*, SERB 95-021 (12-29-95). The Ohio Supreme Court's decisions in *Cincinnati* and *Brecksville* should not be construed so broadly as to deny public employees the opportunity to be heard in situations such as this one. The ONA and the Employer entered into a private agreement to include the Holmes nurses in the deemed-certified bargaining unit, and the Holmes nurses have exercised rights exclusive to both the 1991-1993 and 1993-1995 contracts. Thus, the Holmes nurses with a January 20, 1991 seniority date have standing to challenge the results of the Respondents' private agreement to include them in the bargaining unit.²

B. The ONA Did Not Violate O.R.C. § 4117.11(B)(6)

At the heart of these two cases is the issue of the duty of fair representation. O.R.C. § 4117.11(B)(6) provides:

²In *In re State of Ohio, Office of Collective Bargaining*, SERB 91-008 (9-19-91) and *In re City of Gallipolis*, SERB 94-005 (3-3-94), SERB specifically stated that it will not recognize private agreements involving changes in bargaining units if the changes are not authorized by SERB. Thus, if a change to a bargaining unit is not presented to SERB for approval, the parties to the private agreement will be acting at their own peril if they rely on the change. This policy statement applies both to SERB-certified and deemed-certified bargaining units.

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(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[.]

In *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), SERB adopted the standard that an employee organization breaches its duty of fair representation by conduct that is arbitrary, discriminatory, or in bad faith. In determining whether a union's action is "arbitrary," SERB will look to the union's reason for its action or inaction; specifically, it will assess whether there is a rational basis for the union's position. *Id.* In determining whether a union's action is "discriminatory," SERB will examine whether the act of discrimination is based on irrelevant and invidious considerations. *Id.* In determining "bad faith," the SERB will examine whether the union acted with hostility or malicious dishonesty. *Id.*

There was no violation of this section by the ONA. First, the Holmes nurses were not part of this deemed-certified bargaining unit on April 1, 1984. The Holmes nurses were added to the bargaining unit through a private agreement between the Respondents and not through SERB's statutory procedures. Consequently, since SERB does not recognize private additions of employees into bargaining units, we do not recognize the ONA as the exclusive representative of the Holmes nurses in this deemed-certified unit. The duty of fair representation under O.R.C. § 4117.11(B)(6) is the duty of an exclusive representative to employees in the bargaining unit it represents. Thus, we cannot find that the ONA had a statutory duty of fair representation to the Holmes nurses.

Second, even if the ONA had a duty of fair representation, there is no violation under the facts of this case. The only substantive allegation in the Amended Complaint is that the ONA and the Hospital violated O.R.C. Chapter 4117 by agreeing to include in the 1993-1995 contract a provision affording the Holmes nurses seniority rights that were different from and less desirable than those that were afforded all other nurses who were working within the bargaining unit at the time the Holmes nurses became a part of that unit. The record and the law do not support finding a violation in this case.

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The record shows that on the date the Holmes nurses became part of the unit, almost all unit nurses had seniority based upon the date they entered (or reentered, if there was a break in service) the bargaining unit. This is the identical basis upon which Holmes nurses were given their January 20, 1991 seniority date. Thus, the Holmes nurses received the "norm" for seniority within the bargaining unit. The Barrett nurses, as well as all other nurses who had moved from non-unit positions into ONA unit positions, also received "date-of-entry" seniority. Other nurses hired directly into the bargaining unit are also attributed date-of-entry seniority, although this happens to correspond to their hire date.

There were only two exceptions to this norm, the Hoxworth nurses and those nurses who were employed when the original contract was entered into in 1973.³ Both of these exceptions have a rational basis. As to the Hoxworth nurses, the record delineates both numerous differences in nursing skills and responsibilities among the Hoxworth, Holmes, and other Hospital nurses and numerous differences in the climate that prevailed at the Hospital between the time the Hoxworth nurses came into the unit and the time the Holmes nurses came into the unit (i.e., the Employer engaged in transferring work units from Holmes to other Hospital facilities and downsizing only during the latter period). As to the nurses employed in 1973, the record shows that they were given date-of-hire seniority to prevent the specific problem of having too many nurses with the same contractual seniority date.⁴ As the U.S. Supreme Court recognized in *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 136 L.R.R.M. 2721 (1991), different factual landscapes can legitimately support different union actions.

³Significantly, the record shows absolutely no disparity in treatment between the Hoxworth and the Holmes nurses as to wages. Moreover, it is undisputed that all unit nurses, including those at Holmes, Barrett, Hoxworth and all other Hospital divisions, were required to have between five (5) and ten (10) years of continuous service in the bargaining unit to receive the two (2) highest salary steps found in the 1993-1995 contract.

⁴This is the same reason that a provision was negotiated allowing the Holmes nurses to have date-of-hire seniority as long as they remained at Holmes or in the event that their division was transferred intact to other facilities of the Employer.

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It is well-settled law that seniority rights are neither inherent nor constitutional; instead, these rights are created either by statute or by contract. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 L.R.R.M. 2548 (1953); *Trailmobile Co. v. Whirls*, 331 U.S. 40, 19 L.R.R.M. 2531 (1947); *NLRB v. Wheland Co.*, 271 F.2d 122, 45 L.R.R.M. 2061 (6th Cir. 1959). "Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, *supra* at 338, 31 L.R.R.M. at 2551.

Nothing in O.R.C. Chapter 4117 creates seniority rights or requires that seniority be incorporated into a contract. Further, there is nothing inherently arbitrary, discriminatory, or in bad faith about using date-of-entry, instead of date-of-hire, to determine seniority. In addition, it is universally accepted that seniority rosters need not be limited to strict date-of-hire seniority. The adoption of an alternative system that works to one group's disadvantage does not per se establish the type of arbitrary or discriminatory intent, or bad faith, necessary to show that a union has breached its duty of fair representation. *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853, 88 L.R.R.M. 2609 (8th Cir. 1975).

By acting to protect its existing bargaining unit members, the ONA did not act arbitrarily, discriminatorily, or in bad faith. The Holmes nurses had no contractual seniority rights at the Hospital. The ONA merely acted to protect the seniority rights it had previously negotiated for existing members of its unit. Such an approach has been upheld as proper and legitimate both in the private sector and in the public sector. *NLRB v. Whiting Milk Corp.*, 342 F.2d 8, 58 L.R.R.M. 2471 (1st Cir. 1965); *FOP, Illinois Labor Council (Dettore et al.)*, 8 PERI ¶ 2033 (IL SLRB 6-30-92).⁵

In *Schick v. NLRB*, 409 F.2d 395, 70 L.R.R.M. 3249 (7th Cir. 1969), the Seventh Circuit Court of Appeals wrote that it is a long recognized statutory right for a union to

⁵In the companion case on related charges, *County of LaSalle (LaSalle County Sheriff)*, 8 PERI ¶ 2034 (IL SLRB 6-30-92), the charges against the employer were also dismissed.

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bargain with an employer to protect its integrity by such methods as placing new members at the bottom of the seniority list. It is also a well-established principle that an employee organization can make "contracts which may have unfavorable effects on some of the [employees] * * * represented." *Steele v. Louisville & Nashville Railroad Co., et al.*, 323 U.S. 192, 203; *NEA, IEA, North Riverside Education Ass'n (Callahan)*, 10 PERI ¶ 1062 (IL ELRB 3-29-94). The duty to represent equally and in good faith the interests of the whole group merely means that differences in treatment must relate to "relevant" considerations.

In *Ratkosky v. United Transportation Union*, 843 F.2d 869, 127 L.R.R.M. 3219 (6th Cir. 1988), the Sixth Circuit Court of Appeals stated that there are a variety of legitimate options to establish seniority systems in collective bargaining agreements. The courts are careful not to substitute their judgments for those of the authorized employee organization. Moreover, the fact that a seniority system in a collective bargaining agreement favors one group more than another does not constitute a per se breach of the union's duty to fair representation. The Court pointed out that an essential element necessary to raise a limitation over a union's discretion in bargaining is a bad faith motive or an intent to act hostilely or discriminatorily against a portion of the union's membership. The Court ruled that the mere fact that a minority group within the union is adversely affected by the actions or inactions of the union does not establish that the union has acted with hostile or discriminatory intent.

There is no evidence in the case at issue that the ONA's decision not to renegotiate the seniority system was done in bad faith or with a hostile or discriminatory intent toward the Charging Parties. The evidence reveals that the ONA twice surveyed bargaining unit members to ascertain the wishes of the bargaining unit; that the ONA's bargaining team internally and heatedly discussed various seniority options, including the proposal to give the Holmes nurses date-of-hire seniority; and that the consensus not to renegotiate bargaining unit seniority was founded upon the rational basis of retaining a commonly used seniority system, which promoted consistency within the bargaining unit and advanced the legitimate interests of a majority of bargaining unit members.

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Finally, the Complainant alleged: (1) that the ONA intentionally misled the Holmes nurses and (2) that the ONA bargaining committee "secretly robbed" the Holmes nurses of date-of-hire seniority without any clear direction from their bargaining unit membership. Neither of these allegations are supported by the record. The Complainant's own witnesses testified that they did not expect to receive date-of-hire seniority when they were placed in the bargaining unit. Certain Holmes nurses apparently did expect to achieve what the Hoxworth nurses had achieved, but as the Complainant's witnesses and the ONA's witnesses uniformly testified, no ONA representative ever guaranteed or promised that result. As a matter of fact, ONA leadership advised the Holmes nurses to choose a delegate for the ONA's bargaining team to promote the Holmes nurses' interests in the seniority issue. The record clearly reflects a serious attempt by the ONA to find a solution to resolve the Holmes nurses' seniority issue without hurting other members of the bargaining unit. The result was dictated by the democratic process. Thus, the ONA's efforts are far from being arbitrary, discriminatory, or in bad faith; hence, the ONA did not violate the duty of fair representation.

The record shows, at its worst, that certain Holmes nurses developed an expectation that they would be treated like the Hoxworth nurses. The ONA, however, made no assurances.⁶ The mere creation of a hope or an expectation by the relation of an example of something that might be achieved through negotiations does not amount to the type of intentional, invidious, affirmative misstatement that courts have generally found necessary to give rise to a breach of the duty of fair representation. *Swatts v. United Steelworkers of America*, 808 F.2d 1221, 124 L.R.R.M. 2165 (7th Cir. 1986).

C. The ONA Did Not Violate O.R.C. §§ 4117.11(B)(1) or (B)(2)

A violation of O.R.C. § 4117.11(B)(2) occurs only when an employee organization causes or attempts to cause an employer to engage in an unfair labor practice. The Complainant argues that the ONA, by failing to renegotiate the seniority provision for the 1993-1995 contract, caused the Employer to violate the Holmes nurses' rights. Since the

⁶F.F. No. 13.

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seniority provisions applicable to the Holmes nurses are lawful, as found above, there is no basis to find that an O.R.C. § 4117.11(B)(2) violation arises out of the retention of the existing, seniority provisions in the 1993-1995 contract.

A violation of O.R.C. § 4117.11(B)(1) requires union conduct that would "restrain or coerce employees in the exercise of rights" guaranteed by O.R.C. Chapter 4117. There is no guaranteed employee right at issue here. O.R.C. Chapter 4117 does not guarantee the right to date-of-hire seniority.

Every O.R.C. § 4117.11(B) violation does not carry with it a derivative violation of § 4117.11(B)(1). *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93), at n.14. In this case, the Complainant's basis for alleging the O.R.C. § 4117.11(B)(1) violation appears to be the same basis that it has argued for the O.R.C. § 4117.11(B)(6) violation, i.e., that the ONA "arbitrarily decided to maintain" the seniority provision. Having found nothing arbitrary, discriminatory, or in bad faith about the ONA's decision not to renegotiate the seniority provision, and having no other alleged basis for a separate violation, no O.R.C. § 4117.11(B)(1) violation can be found.

D. The Employer Did Not Violate O.R.C. §§ 4117.11(A)(1) or (A)(8)

The Complainant contends that the Employer's actions surrounding the inclusion of the seniority clause at issue, in the 1993-1995 collective bargaining agreement, violated O.R.C. §§ 4117.11(A)(1) and (A)(8). This contention lacks merit.

First, the record does not show that the Holmes nurses' seniority issue was on the table during the 1993-1995 contract negotiations. Hence, there is nothing in the record to show that the Hospital took any action concerning the seniority provisions at issue during negotiations for the 1993-1995 contract. In any event, as discussed above, the ONA acted properly and legitimately when it originally included and later retained unit seniority for the Holmes nurses. Thus, even if the Hospital was part of this legitimate action, it could not have caused or attempted to cause an employee organization to violate O.R.C. § 4117.11(B).

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The seniority treatment of the Holmes nurses in the 1991-1993 and 1993-1995 contracts is a legitimate product of the collective bargaining process. With ONA representation the Holmes nurses did not obtain date-of-hire seniority in the 1991-1993 and 1993-1995 contracts, but they did obtain significant contractual job security and salary rights that they would not have obtained had they not been represented by the ONA and covered by the 1991-1993 and 1993-1995 contracts.⁷ As often quoted: "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman, supra* at 338, 31 L.R.R.M. at 2551. While some Holmes nurses may not have been completely satisfied, neither the ONA nor the Hospital violated the Holmes nurses' statutory rights.

III. CONCLUSION

For the reasons above, we find that the Ohio Nurses Association did not violate O.R.C §§ 4117.11(B)(1), (B)(2), or (B)(6) by negotiating the seniority provision for the Holmes nurses for the 1991-1993 agreement and by not changing it in the 1993-1995 agreement. Further we find that the University of Cincinnati Hospital did not violate O.R.C. §§ 4117.11(A)(1) or (A)(8) when it negotiated the above-mentioned agreements with the ONA.

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

⁷For example, while nurses accepting jobs in the ONA bargaining unit could have been placed at the lowest entry-level salary, the Holmes nurses were placed in existing contractual steps in accordance with their current rate of pay, which gave most of them a raise. In addition, instead of being laid off when Holmes was downsized and nursing work was moved from Holmes to another division in the Hospital with ONA bargaining unit members, none of the Holmes nurses were laid off.

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Complainant,

v.

Ohio Nurses Association,
Respondent Employee Organization,

and

University of Cincinnati Hospital,
Respondent Employer.

**CASE NUMBERS: 93-ULP-07-0347
 93-ULP-07-0348**

CORRECTED ORDER

Before Chairman Pohler, Vice Chairman Pottenger, and Board Member Mason:
August 29, 1996.

On July 1, 1993, Marianne Patton ("Charging Party") filed Unfair Labor Practice Charges against the University of Cincinnati Hospital ("Employer"), Case No. 93-ULP-07-0347, and one against the Ohio Nurses Association ("Employee Organization"), Case No. 93-ULP-07-0348. By separate Directives issued September 13, 1994, the Board found probable cause in both cases and directed these matters to hearing. By directive issued January 23, 1995, SERB consolidated these cases for hearing. On January 25, 1995, SERB issued a Complaint, alleging that the Employer violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(8), and that the Employee Organization violated O.R.C. §§ 4117.11(B)(1), (B)(2), and (B)(6). On June 15, 1995, Complainant filed a Motion to Amend Complaint and Notice of Hearing. The motion to amend was granted by Hearing Officer's Procedural Order issued June 19, 1995, and the Amended Complaint issued on June 20, 1995.

A hearing was conducted on June 27, 1995, and concluded on July 5, 1995. A Hearing Officer's Proposed Order was issued on September 29, 1995, addressing the issue of the timeliness of the charge. Exceptions were filed by the Charging Party and Complainant. Responses were filed by the Employer and the Employee Organization. The Employer also filed a motion to strike an attachment from the Charging Party's exceptions.

On December 14, 1995, the Board deferred ruling on the Hearing Officer's Proposed Order issued on September 29, 1995, and remanded this matter to the Hearings Section for further consideration on the remaining issues and on the merits. On April 22, 1996, the Hearing Officer's Proposed Order was issued. The Complainant filed exceptions to the Hearing Officer's Proposed Order on May 14, 1996. On June 3, 1996, the Employer and the

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Employee Organization filed separate responses to the exceptions. The Employer and the Employee Organization also filed separate cross-exceptions to the Hearing Officer's Proposed Order on June 3, 1996. On June 13, 1996, the Complainant filed a response to the cross-exceptions of the Employer and the Employee Organization to the Hearing Officer's Proposed Order. On June 13, 1996, the Employee Organization also filed a response to the Employer's cross-exceptions.

The Board has reviewed the record, the Hearing Officer's Proposed Orders, the exceptions, cross-exceptions, and the responses to the exceptions and cross-exceptions. Conclusion of Law No. 4 is hereby amended to read: "The Holmes nurses who had a January 20, 1991 seniority date have standing to bring the instant unfair labor practice charge."; adopts the Stipulations, Findings of Fact, and Conclusions of Law Nos. 1-4 and 7-8, as amended, in the Hearing Officer's Proposed Order. The complaint is dismissed, and the charge is dismissed with prejudice.

It is so ordered.

POHLER, Chairman; POTTENGER, Vice Chairman; and MASON, Board Member, concur.

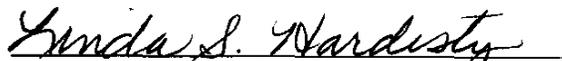


SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen (15) days after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party on this

30th day of September, 1996.



LINDA S. HARDESTY, LEGAL ASSISTANT

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,
Complainant,

v.

Ohio Nurses Association,
Respondent Employee Organization,

and

University of Cincinnati Hospital,
Respondent Employer.

**CASE NUMBERS: 93-ULP-07-0347
93-ULP-07-0348**

OPINION

POTTENGER, Vice Chairman:

These unfair labor practice cases come before the State Employment Relations Board ("SERB" or "Complainant") on exceptions filed to the Hearing Officer's Proposed Order issued on April 22, 1996. The Ohio Nurses Association ("ONA") and the University of Cincinnati Hospital ("Employer" or "Hospital") negotiated a 1991-1993 collective bargaining agreement that accorded nurses working at the Hospital's Holmes Division ("Holmes") seniority dating back to January 20, 1991, the date the parties privately agreed to accrete them into the existing bargaining unit, and not their date of hire with the Hospital. For the reasons below, we find that the ONA did not commit unfair labor practices in violation of O.R.C. §§ 4117.11(B)(1), (B)(2) or (B)(6), and that the Employer did not commit unfair labor practices in violation of O.R.C. §§ 4117.11(A)(1) or (A)(8), when this provision was left unchanged in the succeeding 1993-1995 collective bargaining agreement.

I. BACKGROUND

The ONA entered into its first collective bargaining agreement with the Employer in 1973. Since nurses represented by the ONA and employed by the Hospital comprised a

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bargaining unit in existence prior to April 1, 1984, they constitute a deemed-certified bargaining unit pursuant to § 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367.

In 1986 the ONA was certified by SERB to represent the nurses at the Hoxworth Blood Center ("Hoxworth"), a blood bank physically connected to the Hospital. The 1987-1988 collective bargaining agreement between the ONA and the Employer provided that the Hoxworth nurses would accrue seniority from their date of hire. Neither the ONA nor the Employer believed that allowing the Hoxworth nurses the possibility of using the seniority provision to take jobs at the Hospital would create a concern or have much impact upon existing bargaining unit members.

In late 1989, nurses employed at Holmes discussed whether to join the existing bargaining unit; job security was a primary motivation. The ONA sent the Holmes nurses organizing materials and invited them to a local unit meeting in January 1990 to explain how the Holmes nurses could join the ONA-represented bargaining unit. The ONA clarified that they could not represent the Holmes nurses until they had been brought into the bargaining unit by contract. Several nurses from Holmes attended the January 1990 unit meeting. Job security issues were discussed, but neither date-of-hire seniority nor the Hoxworth experience were discussed at that time. At no time during this meeting did any ONA representative promise or guarantee that the Holmes nurses would be able to obtain date-of-hire seniority if they were represented by the ONA. After this meeting the ONA notified the Hospital that organizing efforts for the Holmes nurses had begun.

During early 1990, the Holmes nurses reiterated their concerns about seniority and job security issues. An ONA representative discussed possible seniority dates that might be obtained for the Holmes nurses. The Holmes nurses understood that they would not receive date-of-hire seniority in the 1991-1993 collective bargaining agreement and that the ONA was not guaranteeing that the nurses would receive date-of-hire seniority in the 1993-1995 contract. The Holmes nurses remained confident, however, that they could receive date-of-hire seniority with the 1993-1995 contract because they hoped to achieve the same result as the Hoxworth nurses.

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The ONA negotiated with the Employer for the 1991-1993 contract between late 1989 and November 1990. One of the issues raised by the ONA during negotiations was the recognition of previously unrepresented nurses, including the Holmes nurses. The ONA and the Employer agreed that both the Holmes nurses and certain Barrett Center ("Barrett") nurses should be added to the unit under the contract because they performed bargaining unit work and shared a community of interest with the nurses at the Hospital. The parties reached consensus on the date of contract ratification as to the Holmes nurses' seniority date. As a result, all nurses at Holmes and Barrett were brought into the bargaining unit with a January 20, 1991 seniority date. The parties did not file anything with SERB to amend or clarify the bargaining unit description.

Between March 1991 and November 1992, the ONA engaged the Employer in negotiations for the 1993-1995 contract. The Holmes nurses contacted the ONA again to emphasize their expectation that the seniority issue be represented in the current round of contract negotiations. The ONA responded that there were always many issues for bargaining; only those issues of greatest concern to the majority would be examined. In early 1992, a nurse from Holmes was elected as a representative on the ONA's bargaining team.

The ONA put the issue of date-of-hire seniority for Holmes nurses on the negotiation issue list, but the data it collected showed that most bargaining unit members did not want seniority tampered with in any way. The ONA's negotiation team, which included the representative from Holmes, met on several occasions to formulate their bargaining proposals; they discussed the differences between what had been done with Hoxworth and the pending Holmes proposal, both in terms of hospital restructuring and the impact upon the existing bargaining unit. Ultimately, however, based upon the survey results and internal discussions regarding the impact on the bargaining unit and a need for consistency, the team decided not to press for date-of-hire seniority for the Holmes nurses. On January 20, 1993, the ONA's negotiation team informed the Employer that it was dropping seniority from the issue list. During this period, the movement of work units and/or services from Holmes into another of the Employer's facilities continued.

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The Holmes nurses were allowed to vote in the ratification election for the 1993-1995 contract. Several of the Holmes nurses voted against the proposed contract because they did not receive date-of-hire seniority. These nurses comprise the charging parties in the instant cases. Despite this minority vote, the contract was ratified.

In 1995, the Employer underwent a realignment that resulted in layoffs. None of the Holmes nurses who received the January 20, 1991 seniority date had been laid off as part of the 1995 realignment. During the realignment, several Holmes nurses exercised contractual rights that would not have been available to them if they were not members of the bargaining unit.

II. DISCUSSION

A. Standing

The Employer argues that none of the Holmes nurses have standing to challenge the January 20, 1991 seniority date because none have ever been within the deemed-certified bargaining unit. According to the Hospital, since the nurses could not lawfully have been placed in the deemed-certified unit, SERB cannot now legitimize their inclusion by conferring standing upon them and allowing them to challenge a seniority date that came about only as a direct result of their incorrect inclusion in the deemed-certified unit. The Complainant and the Charging Parties contend that the Holmes' nurses have always been covered by the bargaining unit description, even though, until 1991, the ONA did not purport to represent them and contract coverage was not formally extended to them. The Complainant and the Charging Parties analogize this situation to one where the Hospital hires more nurses to increase its staff-patient ratios. They also argue that no formal action should be required since no formal action would be necessary by SERB to add the newly hired nurses to the existing bargaining unit.

Prior to the Ohio Supreme Court's ruling in *Ohio Council 8, AFSCME v. City of Cincinnati*, 64 Ohio St.3d 677, 1994 SERB 4-37 (1994) (hereinafter "*Cincinnati*"), a petition for unit clarification or amendment of certification could have been filed pursuant to Ohio

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Administrative Code Rule 4117-5-01(F). No such petition was filed by these parties for the Holmes nurses.¹ Citing *Cincinnati* and *In re City of Gallipolis*, SERB 94-005 (3-3-94), the Employer argues that the ONA and the Hospital could not have acted, as they did in January 1991, to alter the existing deemed-certified bargaining unit and that SERB cannot lawfully add the previously unrepresented Holmes nurses to the deemed-certified unit. The Complainant argues that in *Cincinnati* the Ohio Supreme Court did not intend to address the concept of standing as it applies to an injured public employee's right to pursue an unfair labor practice charge. Moreover, the Complainant and the Charging Parties argue that *Cincinnati* is not relevant because there has been no alteration or adjustment of a deemed-certified unit; instead, new employees, not new classifications, have been added to the existing unit.

In *State ex rel. Brecksville Edn. Assn. OEA/NEA v. State Emp. Relations Bd.*, 74 Ohio St.3d 665, 1996 SERB 4-1 (1996) [hereinafter "*Brecksville*"], the Ohio Supreme Court clarified its previous ruling in *Cincinnati* and held that SERB does have jurisdiction to consider a petition filed jointly by an employer and an exclusive bargaining representative that requests an amendment to the composition of a deemed-certified bargaining unit. While SERB may make changes to the composition of deemed-certified units, the deemed-certified status of these units will not be lost as a result. Applying this to the present case, since both the ONA and the Employer were in agreement to include the Holmes nurses in the bargaining unit, SERB would have had jurisdiction to consider a joint petition, if one had been filed.

A party with standing is one who has a "real interest in the subject matter * * * not merely an interest in the action itself, *i.e.*, one who is directly benefitted or injured by the outcome of the case." *West Clermont Education Assn. v. West Clermont Local Bd. of Education*, 67 Ohio App.2d 160, 162 (Ct. App., Clermont, 1980). To determine whether a charging party has standing, SERB will look for an active dispute to be resolved rather than a hypothetical issue and will ensure that the charging party possesses a direct interest, relevant knowledge of alleged harm, and a right to be protected. *In re City of Canton*, SERB 90-006 (2-16-90).

¹Finding of Fact ("F.F.") No. 17.

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In the present case, the charge was filed timely and, since the seniority dates are an ongoing issue, an active dispute clearly exists. The charging parties have a direct interest in the charge because it is their seniority dates that are being contested. The remaining issue is whether they have a right to be protected.

As long as the public employee meets the general requirements for standing referenced above, the employee has standing to file an unfair labor practice charge alleging a public employer violated O.R.C. § 4117.11(A). Likewise, a public employee meeting those general requirements for standing whose position is not included in a bargaining unit has standing to file an unfair labor practice charge alleging an employee organization's actions adversely affect the employee in violation of O.R.C. § 4117.11(B). See, e.g., *In re Ohio Council 8, AFSCME*, SERB 95-021 (12-29-95). The Ohio Supreme Court's decisions in *Cincinnati* and *Brecksville* should not be construed so broadly as to deny public employees the opportunity to be heard in situations such as this one. The ONA and the Employer entered into a private agreement to include the Holmes nurses in the deemed-certified bargaining unit, and the Holmes nurses have exercised rights exclusive to both the 1991-1993 and 1993-1995 contracts. Thus, the Holmes nurses with a January 20, 1991 seniority date have standing to challenge the results of the Respondents' private agreement to include them in the bargaining unit.²

B. The ONA Did Not Violate O.R.C. § 4117.11(B)(6)

At the heart of these two cases is the issue of the duty of fair representation. O.R.C. § 4117.11(B)(6) provides:

²In *In re State of Ohio, Office of Collective Bargaining*, SERB 91-008 (9-19-91) and *In re City of Gallipolis*, SERB 94-005 (3-3-94), SERB specifically stated that it will not recognize private agreements involving changes in bargaining units if the changes are not authorized by SERB. Thus, if a change to a bargaining unit is not presented to SERB for approval, the parties to the private agreement will be acting at their own peril if they rely on the change. This policy statement applies both to SERB-certified and deemed-certified bargaining units.

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(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[.]

In *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), SERB adopted the standard that an employee organization breaches its duty of fair representation by conduct that is arbitrary, discriminatory, or in bad faith. In determining whether a union's action is "arbitrary," SERB will look to the union's reason for its action or inaction; specifically, it will assess whether there is a rational basis for the union's position. *Id.* In determining whether a union's action is "discriminatory," SERB will examine whether the act of discrimination is based on irrelevant and invidious considerations. *Id.* In determining "bad faith," the SERB will examine whether the union acted with hostility or malicious dishonesty. *Id.*

There was no violation of this section by the ONA. First, the Holmes nurses were not part of this deemed-certified bargaining unit on April 1, 1984. The Holmes nurses were added to the bargaining unit through a private agreement between the Respondents and not through SERB's statutory procedures. Consequently, since SERB does not recognize private additions of employees into bargaining units, we do not recognize the ONA as the exclusive representative of the Holmes nurses in this deemed-certified unit. The duty of fair representation under O.R.C. § 4117.11(B)(6) is the duty of an exclusive representative to employees in the bargaining unit it represents. Thus, we cannot find that the ONA had a statutory duty of fair representation to the Holmes nurses.

Second, even if the ONA had a duty of fair representation, there is no violation under the facts of this case. The only substantive allegation in the Amended Complaint is that the ONA and the Hospital violated O.R.C. Chapter 4117 by agreeing to include in the 1993-1995 contract a provision affording the Holmes nurses seniority rights that were different from and less desirable than those that were afforded all other nurses who were working within the bargaining unit at the time the Holmes nurses became a part of that unit. The record and the law do not support finding a violation in this case.

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The record shows that on the date the Holmes nurses became part of the unit, almost all unit nurses had seniority based upon the date they entered (or reentered, if there was a break in service) the bargaining unit. This is the identical basis upon which Holmes nurses were given their January 20, 1991 seniority date. Thus, the Holmes nurses received the "norm" for seniority within the bargaining unit. The Barrett nurses, as well as all other nurses who had moved from non-unit positions into ONA unit positions, also received "date-of-entry" seniority. Other nurses hired directly into the bargaining unit are also attributed date-of-entry seniority, although this happens to correspond to their hire date.

There were only two exceptions to this norm, the Hoxworth nurses and those nurses who were employed when the original contract was entered into in 1973.³ Both of these exceptions have a rational basis. As to the Hoxworth nurses, the record delineates both numerous differences in nursing skills and responsibilities among the Hoxworth, Holmes, and other Hospital nurses and numerous differences in the climate that prevailed at the Hospital between the time the Hoxworth nurses came into the unit and the time the Holmes nurses came into the unit (i.e., the Employer engaged in transferring work units from Holmes to other Hospital facilities and downsizing only during the latter period). As to the nurses employed in 1973, the record shows that they were given date-of-hire seniority to prevent the specific problem of having too many nurses with the same contractual seniority date.⁴ As the U.S. Supreme Court recognized in *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 136 L.R.R.M. 2721 (1991), different factual landscapes can legitimately support different union actions.

³Significantly, the record shows absolutely no disparity in treatment between the Hoxworth and the Holmes nurses as to wages. Moreover, it is undisputed that all unit nurses, including those at Holmes, Barrett, Hoxworth and all other Hospital divisions, were required to have between five (5) and ten (10) years of continuous service in the bargaining unit to receive the two (2) highest salary steps found in the 1993-1995 contract.

⁴This is the same reason that a provision was negotiated allowing the Holmes nurses to have date-of-hire seniority as long as they remained at Holmes or in the event that their division was transferred intact to other facilities of the Employer.

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It is well-settled law that seniority rights are neither inherent nor constitutional; instead, these rights are created either by statute or by contract. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 L.R.R.M. 2548 (1953); *Trailmobile Co. v. Whirls*, 331 U.S. 40, 19 L.R.R.M. 2531 (1947); *NLRB v. Wheland Co.*, 271 F.2d 122, 45 L.R.R.M. 2061 (6th Cir. 1959). "Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, *supra* at 338, 31 L.R.R.M. at 2551.

Nothing in O.R.C. Chapter 4117 creates seniority rights or requires that seniority be incorporated into a contract. Further, there is nothing inherently arbitrary, discriminatory, or in bad faith about using date-of-entry, instead of date-of-hire, to determine seniority. In addition, it is universally accepted that seniority rosters need not be limited to strict date-of-hire seniority. The adoption of an alternative system that works to one group's disadvantage does not per se establish the type of arbitrary or discriminatory intent, or bad faith, necessary to show that a union has breached its duty of fair representation. *Augsburger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853, 88 L.R.R.M. 2609 (8th Cir. 1975).

By acting to protect its existing bargaining unit members, the ONA did not act arbitrarily, discriminatorily, or in bad faith. The Holmes nurses had no contractual seniority rights at the Hospital. The ONA merely acted to protect the seniority rights it had previously negotiated for existing members of its unit. Such an approach has been upheld as proper and legitimate both in the private sector and in the public sector. *NLRB v. Whiting Milk Corp.*, 342 F.2d 8, 58 L.R.R.M. 2471 (1st Cir. 1965); *FOP, Illinois Labor Council (Dettore et al.)*, 8 PERI ¶ 2033 (IL SLRB 6-30-92).⁵

In *Schick v. NLRB*, 409 F.2d 395, 70 L.R.R.M. 3249 (7th Cir. 1969), the Seventh Circuit Court of Appeals wrote that it is a long recognized statutory right for a union to

⁵In the companion case on related charges, *County of LaSalle (LaSalle County Sheriff)*, 8 PERI ¶ 2034 (IL SLRB 6-30-92), the charges against the employer were also dismissed.

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bargain with an employer to protect its integrity by such methods as placing new members at the bottom of the seniority list. It is also a well-established principle that an employee organization can make "contracts which may have unfavorable effects on some of the [employees] * * * represented." *Steele v. Louisville & Nashville Railroad Co., et al.*, 323 U.S. 192, 203; *NEA, IEA, North Riverside Education Ass'n (Callahan)*, 10 PERI ¶ 1062 (IL ELRB 3-29-94). The duty to represent equally and in good faith the interests of the whole group merely means that differences in treatment must relate to "relevant" considerations.

In *Ratkosky v. United Transportation Union*, 843 F.2d 869, 127 L.R.R.M. 3219 (6th Cir. 1988), the Sixth Circuit Court of Appeals stated that there are a variety of legitimate options to establish seniority systems in collective bargaining agreements. The courts are careful not to substitute their judgments for those of the authorized employee organization. Moreover, the fact that a seniority system in a collective bargaining agreement favors one group more than another does not constitute a per se breach of the union's duty to fair representation. The Court pointed out that an essential element necessary to raise a limitation over a union's discretion in bargaining is a bad faith motive or an intent to act hostilely or discriminatorily against a portion of the union's membership. The Court ruled that the mere fact that a minority group within the union is adversely affected by the actions or inactions of the union does not establish that the union has acted with hostile or discriminatory intent.

There is no evidence in the case at issue that the ONA's decision not to renegotiate the seniority system was done in bad faith or with a hostile or discriminatory intent toward the Charging Parties. The evidence reveals that the ONA twice surveyed bargaining unit members to ascertain the wishes of the bargaining unit; that the ONA's bargaining team internally and heatedly discussed various seniority options, including the proposal to give the Holmes nurses date-of-hire seniority; and that the consensus not to renegotiate bargaining unit seniority was founded upon the rational basis of retaining a commonly used seniority system, which promoted consistency within the bargaining unit and advanced the legitimate interests of a majority of bargaining unit members.

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Finally, the Complainant alleged: (1) that the ONA intentionally misled the Holmes nurses and (2) that the ONA bargaining committee "secretly robbed" the Holmes nurses of date-of-hire seniority without any clear direction from their bargaining unit membership. Neither of these allegations are supported by the record. The Complainant's own witnesses testified that they did not expect to receive date-of-hire seniority when they were placed in the bargaining unit. Certain Holmes nurses apparently did expect to achieve what the Hoxworth nurses had achieved, but as the Complainant's witnesses and the ONA's witnesses uniformly testified, no ONA representative ever guaranteed or promised that result. As a matter of fact, ONA leadership advised the Holmes nurses to choose a delegate for the ONA's bargaining team to promote the Holmes nurses' interests in the seniority issue. The record clearly reflects a serious attempt by the ONA to find a solution to resolve the Holmes nurses' seniority issue without hurting other members of the bargaining unit. The result was dictated by the democratic process. Thus, the ONA's efforts are far from being arbitrary, discriminatory, or in bad faith; hence, the ONA did not violate the duty of fair representation.

The record shows, at its worst, that certain Holmes nurses developed an expectation that they would be treated like the Hoxworth nurses. The ONA, however, made no assurances.⁶ The mere creation of a hope or an expectation by the relation of an example of something that might be achieved through negotiations does not amount to the type of intentional, invidious, affirmative misstatement that courts have generally found necessary to give rise to a breach of the duty of fair representation. *Swatts v. United Steelworkers of America*, 808 F.2d 1221, 124 L.R.R.M. 2165 (7th Cir. 1986).

C. The ONA Did Not Violate O.R.C. §§ 4117.11(B)(1) or (B)(2)

A violation of O.R.C. § 4117.11(B)(2) occurs only when an employee organization causes or attempts to cause an employer to engage in an unfair labor practice. The Complainant argues that the ONA, by failing to renegotiate the seniority provision for the 1993-1995 contract, caused the Employer to violate the Holmes nurses' rights. Since the

⁶F.F. No. 13.

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seniority provisions applicable to the Holmes nurses are lawful, as found above, there is no basis to find that an O.R.C. § 4117.11(B)(2) violation arises out of the retention of the existing, seniority provisions in the 1993-1995 contract.

A violation of O.R.C. § 4117.11(B)(1) requires union conduct that would "restrain or coerce employees in the exercise of rights" guaranteed by O.R.C. Chapter 4117. There is no guaranteed employee right at issue here. O.R.C. Chapter 4117 does not guarantee the right to date-of-hire seniority.

Every O.R.C. § 4117.11(B) violation does not carry with it a derivative violation of § 4117.11(B)(1). *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93), at n.14. In this case, the Complainant's basis for alleging the O.R.C. § 4117.11(B)(1) violation appears to be the same basis that it has argued for the O.R.C. § 4117.11(B)(6) violation, i.e., that the ONA "arbitrarily decided to maintain" the seniority provision. Having found nothing arbitrary, discriminatory, or in bad faith about the ONA's decision not to renegotiate the seniority provision, and having no other alleged basis for a separate violation, no O.R.C. § 4117.11(B)(1) violation can be found.

D. The Employer Did Not Violate O.R.C. §§ 4117.11(A)(1) or (A)(8)

The Complainant contends that the Employer's actions surrounding the inclusion of the seniority clause at issue, in the 1993-1995 collective bargaining agreement, violated O.R.C. §§ 4117.11(A)(1) and (A)(8). This contention lacks merit.

First, the record does not show that the Holmes nurses' seniority issue was on the table during the 1993-1995 contract negotiations. Hence, there is nothing in the record to show that the Hospital took any action concerning the seniority provisions at issue during negotiations for the 1993-1995 contract. In any event, as discussed above, the ONA acted properly and legitimately when it originally included and later retained unit seniority for the Holmes nurses. Thus, even if the Hospital was part of this legitimate action, it could not have caused or attempted to cause an employee organization to violate O.R.C. § 4117.11(B).

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The seniority treatment of the Holmes nurses in the 1991-1993 and 1993-1995 contracts is a legitimate product of the collective bargaining process. With ONA representation the Holmes nurses did not obtain date-of-hire seniority in the 1991-1993 and 1993-1995 contracts, but they did obtain significant contractual job security and salary rights that they would not have obtained had they not been represented by the ONA and covered by the 1991-1993 and 1993-1995 contracts.⁷ As often quoted: "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman, supra* at 338, 31 L.R.R.M. at 2551. While some Holmes nurses may not have been completely satisfied, neither the ONA nor the Hospital violated the Holmes nurses' statutory rights.

III. CONCLUSION

For the reasons above, we find that the Ohio Nurses Association did not violate O.R.C. §§ 4117.11(B)(1), (B)(2), or (B)(6) by negotiating the seniority provision for the Holmes nurses for the 1991-1993 agreement and by not changing it in the 1993-1995 agreement. Further we find that the University of Cincinnati Hospital did not violate O.R.C. §§ 4117.11(A)(1) or (A)(8) when it negotiated the above-mentioned agreements with the ONA.

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

⁷For example, while nurses accepting jobs in the ONA bargaining unit could have been placed at the lowest entry-level salary, the Holmes nurses were placed in existing contractual steps in accordance with their current rate of pay, which gave most of them a raise. In addition, instead of being laid off when Holmes was downsized and nursing work was moved from Holmes to another division in the Hospital with ONA bargaining unit members, none of the Holmes nurses were laid off.