

98-010

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Civil Service Employees Association, AFSCME Local 11, Chapter 2525,

Respondent.

Case No. 97-ULP-04-0181

OPINION

GILLMOR, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the issuance of the Hearing Officer's Proposed Order on January 14, 1998, and the filing of exceptions and a response to the exceptions. For the reasons below, we find that the Ohio Civil Service Employees Association, AFSCME Local 11, Chapter 2525 ("OCSEA" or "Union") did not violate Ohio Revised Code ("O.R.C.") § 4117.11(B)(6).

I. BACKGROUND¹

Sandra A. Cook ("Charging Party") has been employed as a Public Inquiries Assistant by the State of Ohio, Industrial Commission, located in the William Greene Building at 30 West Spring Street, Columbus. In a letter dated July 2, 1996, the Industrial Commission notified Ms. Cook that she was suspended for 15 days, effective

¹Findings of Fact Nos. 4-20.

from July 4 through July 24, 1996. OCSEA timely filed a grievance on behalf of Ms. Cook on July 12, 1996, concerning the fifteen-day suspension. The grievance was properly filed at Step 3 in accordance with the parties' collective bargaining agreement. In a letter dated August 1, 1996, the Industrial Commission, through its Assistant Manager of Human Resources, denied Ms. Cook's grievance.

At that point, the regular practice of the OCSEA local chapter was to process suspension or removal grievances to Step 4 of the grievance procedure. Chief Steward Jim Hisle completed the paperwork necessary to advance Ms. Cook's grievance to Step 4 on September 3, 1996. Mr. Hisle prepared a certified mail card with his home address on the return receipt. As he was about to proceed across the street to the Post Office to mail Ms. Cook's appeal, Mr. Hisle discovered he lacked the money to pay for the certified mail. He approached the OCSEA local chapter president who advised him to give the appeal to the chapter secretary, William Rose, for mailing, which Mr. Hisle did with instructions to mail it certified and obtain a receipt.

In 1996, Mr. Rose became chapter secretary for the OCSEA local after the previous secretary resigned. Mr. Rose had no experience in the processing of grievances. He usually had no knowledge of what he was mailing and would not obtain receipts or request reimbursement unless the amount was out of the ordinary.

The list of mediations scheduled for September 1996 was received by OCSEA Staff Representative Barbara Follmann in late July or early August of 1996; the list of mediations scheduled for December 1996 was received by Ms. Follmann in early November 1996. Ms. Cook's name was not on either list. In February 1997, when Follmann received the list of Step 4 mediation hearings scheduled for March 1997, she checked it against her files of pending grievances and noticed that Ms. Cook's

grievance was not scheduled for mediation. She inquired of Mr. Hisle and the Industrial Commission's Assistant Manager of Human Resources regarding the status of the grievance and learned that the State of Ohio's Office of Collective Bargaining ("OCB") had no record of having received the Step 4 appeal. Ms. Follmann asked whether OCB nevertheless would consider processing the grievance, and Industrial Commission's Assistant Manager of Human Resources responded in the negative. In March 1997, OCSEA met with Ms. Cook and advised her that her grievance was no longer open because it apparently had never been received by OCB.

II. DISCUSSION

O.R.C. § 4117.11(B)(6) provides as follows:

(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[.]

To determine whether O.R.C. § 4117.11(B)(6) has been violated, in *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89) ("*AFSCME*"), we adopted the standard set forth in *Vaca v. Sipes*, 386 U.S. 171, 207, 64 L.R.R.M. 2369, 2376 (1967) ("*Vaca*"). In *Vaca*, the United States Supreme Court declared: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court's decision addressed the union's decision not to pursue a grievance to arbitration. The Court also held that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion. Under the test we described in *AFSCME*, we must look first to whether there is a rational basis for the union's position. If there is a rational basis, then the action taken is not arbitrary; if there are no apparent factors that

show legitimate reasons, we then look for evidence of bad faith or discriminatory intent.

If there is no evidence of bad faith or discriminatory intent, we then look to see if the union's conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment to determine arbitrariness.

Our experience with the application of the *AFSCME* test indicates that the test needs to be modified, especially if we are to conform to *Vaca*. First, *AFSCME* appears to place an unbalanced emphasis on the component of arbitrariness. Arbitrariness is characterized as the "now-ubiquitous duty-of-fair-representation linchpin."² When applying the *AFSCME* test, we would look at bad faith and discriminatory intent only *after* looking at the "linchpin" of arbitrariness. Under a reading of *AFSCME*, although not necessarily the Board's intention there, if a stated reason for how a union deals with an issue is deemed rational, the conduct is not arbitrary and any inquiry as to whether there has been a breach of the duty of fair representation ends; there is no inquiry as to whether the stated rational reason is merely a pretext for unlawful discrimination or whether the union's conduct is a bad faith application of the stated rational reason.³ Issues of bad faith and discrimination are only considered under this reading of *AFSCME* in the apparent absence of a rational basis and then only to determine arbitrariness. Therefore, we hereby modify *AFSCME* and hold that arbitrariness,

²*AFSCME*, *supra* at 3-202.

³When applying the *AFSCME* test in *In re Ohio Civil Service Employees Assn/AFSCME, Local 11*, SERB 93-019, at p. 3-116 (12-20-93), the Board stated:

Under the *AFSCME* test, the first step is to ask whether there is a rational basis for the union's position. If there is, the action is not arbitrary. However, if there are no apparent factors that show legitimate reasons, the second step is to look for evidence of bad faith or discriminatory intent. If there is none, arbitrariness will be found only if the union's conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment.

discrimination, and bad faith are distinct components of the same duty and should be reviewed on an equal basis, just as the U.S. Supreme Court viewed them in *Vaca*.

Second, in *In re Ohio Civil Service Employees Assn/AFSCME, Local 11*, SERB 93-019, at 3-116 (12-20-93), we noted that the *AFSCME* standard does not require the union to articulate the actual reason for its controversial conduct, but we did express the following: "There is no doubt that in most duty of fair representation cases articulation of the reason for the union's conduct is the preferred if not necessary evidentiary tool to determine that no violation occurred." After reviewing the U.S. Supreme Court's analysis in *Airline Pilots Assn. v. O'Neill*, 499 U.S. 65, 136 L.R.R.M. 2721 (1991), we did not tighten the *AFSCME* standard by requiring that a specific reason be articulated. If a union is not required to articulate the reasons behind its acts, then the *AFSCME* test places an unfair and unreasonable burden on a Charging Party to show probable cause of a violation of the duty of fair representation when filing an unfair labor practice charge and on a Charging Party and the Complainant in prosecuting the complaint after a finding of probable cause. As more fully developed below, a union's failure to state the reasons behind its actions may result in an un rebutted presumption of arbitrariness.

Third, and most important, under the *AFSCME* test, if we did not find that conduct was arbitrary, discriminatory, or in bad faith, then we would look to see if the union's conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment. The *AFSCME* test did not allow for the gray area between honest mistake and egregious conduct. As more fully developed below, we modify the definition of "arbitrary" conduct to include a failure to take a basic and required step without justification or viable excuse.

When an unfair labor practice is charged because a union has allegedly violated its duty of fair representation, we will look to see if the union's actions are arbitrary, discriminatory, or in bad faith. If we find any of these components, there is a breach of

the duty. The Complainant has the burden of proving that the union did not fairly represent its bargaining-unit members. As to the component of arbitrariness, when the Complainant meets its burden of proof, a breach of the duty of fair representation will be found if the union cannot rebut the findings by providing justification or viable excuse for its conduct; if the justification or excuse constitutes simple negligence, we will find that the conduct is not arbitrary.

In the case before us, the unfair labor practice charge does not allege that OCSEA discriminated against Ms. Cook, or that it acted in bad faith, during the processing of her grievance. The complaint also does not allege discrimination or bad faith by OCSEA. The remaining question before us, then, is whether OCSEA's actions were arbitrary.

The U.S. Sixth Circuit Court of Appeals recently addressed what the term "arbitrary" means in *Vencl v. Int'l Union of Operating Engineers*, 137 F.3d 420, 426, 157 L.R.R.M. 2530 (6th Cir. 1998):

The [National Labor Relations Act] imposes a duty of fair representation upon unions. *Storey v. Local 327, Int'l Brotherhood of Teamsters*, 759 F.2d 517, 518 (6th Cir. 1985). A union breaches that duty by acting arbitrarily. *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1209 (6th Cir. 1981) ("*Ruzicka II*"). A union acts arbitrarily by failing to take a basic and required step. *Id.* at 1211. Timely filing is both basic and required. In *Ruzicka II*, the union failed to file a timely grievance. The court noted that "absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation." *Id.* (additional citation omitted). As an example of a viable excuse, the court held that the union's untimely filing could be excused if a prior course of dealing reasonably indicated that the employer would accept a late filing. *Id.*

We hereby adopt this analysis into our process of determining whether a union's

conduct is "arbitrary" and the process outlined within it. There are certain basic and required steps a union must take when fulfilling its duty of fair representation; the specific steps will vary depending upon the nature of the representation being provided; a non-exhaustive list of these representation functions includes filing a grievance, processing a grievance, deciding whether to take a grievance to arbitration, participating in labor-management committee meetings, negotiating with an employer regarding wages, hours, terms and conditions of employment, and conducting a contract ratification meeting. Failure to take a basic and required step while performing any of these representation functions creates a rebuttable presumption of arbitrariness. When looking at this issue, we must look at all of the circumstances involved, including, but not limited to, what steps were basic and required, how severe the mistake or misjudgment was, what the consequences of the union's acts were, and what the union's reasons for its acts were.

The initial burden is on the Charging Party and the Complainant to show that the union acted arbitrarily, and therefore did not fairly represent the Charging Party, by showing that the union failed to take a basic and required step. Once that burden has been met, the union must come forth with its justification or viable excuse for its actions or inactions. Under the facts of this case, we cannot find that OCSEA acted arbitrarily.

From the record, it cannot be determined whether OCSEA failed to take the basic and required step of mailing the grievance appeal. Mr. Hisle testified that he completed the paperwork and was on his way to the post office until he realized that he lacked the money to pay for the certified mail. Mr. Rose testified that he would mail items on behalf of the local approximately two to three times a week, that some of the mail would be certified, that it was the sender's responsibility to complete the necessary paperwork, and that he would have no knowledge of the contents of what he was mailing. The parties have stipulated that OCB had no record indicating that it had received the appeal. But what remains unclear is whether OCSEA ever mailed the

appeal. This question was not asked at the hearing. Without an answer to this question, along with the witness' credibility, we cannot determine whether OCSEA acted at all, much less acted arbitrarily. Thus, the Complainant has not met its burden in providing evidence necessary to show that an unfair labor practice occurred.

By our holding, we are modifying *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), concerning how to determine whether the duty of fair representation has been breached and what constitutes arbitrary conduct by a union, and reversing *In re Ohio Civil Service Employees Assn/AFSCME, Local 11*, SERB 93-019 (12-20-93), concerning whether the union must articulate the actual reason for the conduct that is in controversy. Any other SERB precedent based upon these cases that is now in conflict with the holding herein is expressly overruled.

III. CONCLUSION

For the reasons above, we find that the Ohio Civil Service Employees Association, AFSCME Local 11, Chapter 2525 did not violate Ohio Revised Code § 4117.11(B)(6) through its handling of Sandra A. Cook's grievance. The Complainant did not meet its burden in establishing that the statute was violated. Therefore, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

Pohler, Chairman, concurs; Mason, Board Member, concurs in a separate opinion.