

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

American Federation of State, County and Municipal Employees, Ohio Council 8
and Local 1768,

Respondent.

Case No. 98-ULP-06-0304

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
June 17, 1999.

On June 3, 1998, the Hamilton County Department of Human Services ("Charging Party") filed an unfair labor practice charge against American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768 ("Respondent"). On September 3, 1998, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that the Respondent had committed an unfair labor practice in violation of Ohio Revised Code Section 4117.11(B)(3) by attempting to cause the Charging Party to modify a negotiated agreement on employee wages through the grievance process. The Complaint and Notice of Hearing were issued on September 30, 1998.

A hearing was held on November 30, 1998. On January 28, 1999, the Administrative Law Judge's Proposed Order was issued, recommending that the Board find a violation of Ohio Revised Code Section 4117.11(B)(3). On February 26, 1999, the Respondent filed its exceptions to the proposed order. On March 11, 1999, the Complainant and the Charging Party filed their responses to the exceptions.

After reviewing the record and all filings, the Board adopts the Findings of Fact and Conclusions of Law in the Proposed Order. The Respondent, American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768, is hereby ordered to:

A. Cease and desist from:

Refusing to bargain collectively by attempting to use the grievance procedure to change the negotiated agreements of the Hamilton County Department of Human Services and the American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768, and from otherwise violated Ohio Revised Code Section 4117.11(B)(3).

B. Take the following affirmative action:

- (1) Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768 shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) in all of the usual and normal posting locations where the bargaining-unit employees of the Hamilton County Department of Human Services, who are represented by the American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768, work; and
- (2) Notify the State Employment Relations Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so directed.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



SUE POHLER, CHAIRMAN

Order
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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 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 by certified mail, return receipt requested, on this 24th day of June, 1999.


LINDA S. HARDESTY, CERTIFIED LEGAL ASSISTANT



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the State Employment Relations Board and abide by the following:

American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768 is hereby ordered to:

A. Cease and desist from:

Refusing to bargain collectively by attempting to use the grievance procedure to change the negotiated agreements of the Hamilton County Department of Human Services and the American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768, and from otherwise violated Ohio Revised Code Section 4117.11(B)(3).

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SERB v. American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768, Case No. 98-UPL-06-0304

BY

DATE

TITLE

This Notice must remain posted for sixty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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OPINION

GILLMOR, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board (“SERB” or “Complainant”) upon the filing of exceptions and responses to exceptions to the Administrative Law Judge’s Proposed Order issued on January 28, 1999. For the reasons below, we find that the American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768 violated Ohio Revised Code (“O.R.C.”) § 4117.11(B)(3) by engaging in bad-faith bargaining when it attempted to modify a negotiated agreement on wages through the grievance process.

I. BACKGROUND

The American Federation of State, County and Municipal Employees, Ohio Council 8 and Local 1768 (“AFSCME”) is the exclusive representative for a bargaining unit of employees, including Children’s Services Workers, of the Hamilton County Department of Human Services (“Agency”). The Agency employs approximately 240 workers in the Children’s Services Worker classification.

AFSCME and the Agency are parties to a collective bargaining agreement effective March 5, 1997, to March 4, 2000 ("Agreement"). Article 6 of the Agreement contains the grievance procedure that culminates in final and binding arbitration. Article 6, section 6.1 provides as follows:

The term 'grievance' shall mean an allegation by a bargaining unit employee that there has been a breach, misinterpretation, or improper application of this Agreement. It is not intended that the grievance procedure be used to effect changes in the Articles of this Agreement or those matters which are controlled by the provisions of Federal and/or State laws.

Article 6, section 6.5 of the Agreement provides: "It is the mutual desire of the Employer and the Union to provide for the prompt adjustment of grievances in a fair and reasonable manner. * * * Every reasonable effort shall be made by the Employer and the Union to effect the resolution of grievances at the earliest step possible."

One of the issues addressed during negotiations for the Agreement was the pay scale for Children's Services Workers. Historically, the Agency has experienced a 30-40 percent turnover of employees in this classification. To better retain these employees, the Agency discussed with AFSCME whether a career development track providing for increased wages for advanced credentials could be developed for incumbent workers in this classification. During negotiations, the Agency and AFSCME signed a memorandum of understanding on February 11, 1997, to develop and adopt a tier system ("Tier System") for Children's Services Workers after the contract negotiations concluded.

The development of the Tier System was referred to the Labor/Management Committee, which in turn created an action group comprised of union and management members. The action group developed the criteria for the Tier System. Thereafter, a Tier System booklet was developed. The Tier System booklet describes the Tier System proposed and reviewed by AFSCME and the Agency at a Labor/Management Steering

Committee meeting held on November 12, 1997, and at a special meeting held on November 18, 1997. AFSCME and the Agency agreed upon a final proposal, which was adopted by the Agency's Executive Staff on November 20, 1997.

In determining tier levels under the Tier System, different selection criteria apply for new hires and for those Children's Services Workers who are presently employed and progressing through the Tier System. The criteria used by the Panel to approve or deny applications for tier levels are set forth in the Tier System booklet. Tier levels correspond with pay ranges 9, 10, 11, and 12 in the Agreement. An incumbent Children's Services Worker can file an application with a joint labor-management panel ("Panel") for a pay increase to a higher tier. If the application is denied, an employee may file an appeal with his or her Section Chief within three business days.

Elizabeth Strotman and Shannon Caddell-Elliott are employed by the Agency in the classification of Children's Services Worker. In December 1997, Ms. Strotman and Ms. Caddell-Elliott filed applications with the Panel for tier level C (pay range 11). On February 3, 1998, the Panel denied both applications for higher tier levels.

On April 19, 1998, the Agency ran an advertisement in the CINCINNATI ENQUIRER for Children's Services positions, including in the advertisement "[a]bove average starting salary range (28,724-41,766yr.[sic])." The salary range listed in the advertisement is that of tier levels C and D (pay ranges 11 and 12).

After reading the April 19, 1998, advertisement, Ms. Strotman and Ms. Caddell-Elliott met with Barbara Williams, the Vice President of AFSCME Local 1768 and the Chief Steward. Ms. Williams also served on the Labor/Management Committee and was a member of the action group that developed the Tier System. Ms. Strotman and Ms. Caddell-Elliott told Chief Steward Williams that they were concerned because they had

the qualifications listed in the advertisement, but they were not being paid the advertised salary range. Ms. Williams, aware that the employees' applications for a higher tier level had been denied by the Panel, advised them to re-apply for a higher wage level under the Tier System and to find out if the Agency had actually hired an employee under the circumstances described in the advertisement. She also advised them that they had the option of filing a grievance.

About a week later, Ms. Strotman and Ms. Caddell-Elliott met again with Chief Steward Williams and told her that the advertisement had not appeared in the subsequent week's newspaper. The employees were concerned that the time to file a grievance was running out. Ms. Williams then spoke with an AFSCME staff representative, who told her that, according to the duty of fair representation, "if the grievants wanted to file this grievance and if they insisted upon filing this grievance, we had to file."

On April 28, 1998, a grievance signed by Ms. Strotman, Ms. Caddell-Elliott, and Chief Steward Williams (the "grievance") was filed with a line supervisor in the Children's Services Division who was not a member of the Agency's negotiating team, the Labor/Management Committee, or the action group that developed the Tier System. Ms. Williams typed the grievance form with input from Ms. Strotman and Ms. Caddell-Elliott. Ms. Williams also placed a copy of the grievance in the mailbox of the Agency's Labor Relations Manager. The grievance complained that "[c]urrent HCDHS employees with the same qualifications are denied [the advertised] salary range." Accordingly, the grievance demanded that the "[s]alary range of current HCDHS employees be brought in line with [the] salary range offered in [the] Cincinnati Enquirer to newly-hired employees with the same qualifications using posted criteria."

When he received the grievance, the Labor Relations Manager was perplexed because he had been involved as an action group member in creating the Tier System,

and he did not understand why the grievance had been filed. He contacted and met with Chief Steward Williams about the grievance. He showed Ms. Williams a copy of the tier packet and pointed out to her that it contained two separate sets of criteria, one for internal applicants and one for new hires. The Labor Relations Manager also pointed out that Ms. Strotman and Ms. Caddell-Elliott had applied for higher tier levels, that their applications had been denied, and that, to the best of his knowledge, they had not appealed the denials. He then asked Ms. Williams if she was sure she wanted to file the grievance. Ms. Williams responded that it was unfair for new people to come in and receive a higher rate of pay than someone with similar qualifications already in the department, and that they wanted to move forward with the grievance. On May 4, 1998, the Agency denied the grievance. Thereafter, Ms. Strotman and Ms. Caddell-Elliott informed Chief Steward Williams that they wanted to drop the grievance. The grievance was not processed further.

II. DISCUSSION

A. The Union Violated O.R.C. § 4117.11(B)(3)

O.R.C. § 4117.11 provides in relevant part as follows:

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

* * *

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative of public employees in a bargaining unit [.]

The only issue is whether the facts establish that AFSCME has refused to bargain collectively with the Agency. O.R.C. § 4117.01(G) defines the term as follows:

“To bargain collectively” means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its

employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. * * *

In *In re SERB v. OAPSE, Local 530*, SERB 96-011, at 3-93 (6-28-96), the obligation to bargain collectively was described as follows:

The collective bargaining process provides parties with the right to designate their own representatives in the negotiation process and, thus, to be able to control the strategies and tactics they employ in the negotiation process. Bypassing the exclusive representative, whether the authorized representative of an employee organization or the designated representative of a public employer, undermines the statutory scheme, interferes with the planned process of negotiations, creates chaos in an otherwise orderly, if difficult, process and, hence, constitutes an act in contravention of the obligation to bargain in good faith.

In *In re Dist 1199/HCSSU/SEIU, AFL-CIO*, SERB 96-004, at 3-41 (4-8-96) ("*District 1199*"), SERB considered an allegation of bad-faith bargaining in violation of O.R.C. § 4117.11(B)(3) and stated:

A collective bargaining agreement, while intended to bring stability and predictability to those agreed matters for its duration, may be modified by mutual agreement of the parties. (citation omitted). * * * While changed circumstances may prompt either party to a contract to request to reopen bargaining on subject matter in a collective bargaining agreement, negotiations — whether mid-term or at expiration, one issue or an entire contract — must always be conducted in good faith.

The Complainant and the Agency allege that AFSCME violated O.R.C. § 4117.11(B)(3) by using the grievance process to attempt to modify terms of a previously negotiated agreement on employee wages. Good-faith bargaining is determined on a case-by-case basis under the totality of the circumstances, and requires, among other

things, a notice to negotiate or a request to bargain, the parties' agreement as to the time and place to conduct the negotiations, and ground rules regarding the procedures to follow. *Id.* The content and timing of the parties' actions are relevant factors in determining whether O.R.C. § 4117.11(B)(3) has been violated. *In re OAPSE/AFSCME Local 4*, SERB 97-014, at 3-91 (10-10-97).

By its own terms, the grievance demanded that the Agency take the following action: "Salary range of current HCDHS employees be brought in line with salary range offered in Cincinnati Enquirer to newly hired employees with same qualifications using posted criteria."¹ It is undisputed that the "offer" to which the grievance referred is the advertisement and that the "current" and "newly hired" employees to which the grievance referred are those currently employed in the classification of Children's Services Worker and those newly hired into this classification. It is also undisputed that AFSCME submitted this demand through the grievance procedure, rather than giving notice to the Agency that AFSCME wished to re-open negotiations over employee wages — a mandatory topic of bargaining.

In *District 1199*, the union violated O.R.C. § 4117.11(B)(3) when a union official suggested higher wages to county commissioners at a weekly public meeting. The union official, a county nursing-home employee and bargaining-team member, told the county commissioners that the home was understaffed and that a 50-cent raise would attract more employees. This activity constituted an attempt to bargain without (1) an advance notice or request; (2) an agreement on time, place, and ground rules; or (3) waiting for the employer to choose a negotiator.

In this case, only five months after the parties had negotiated and agreed upon the Tier System as the mechanism to set compensation for new and current Children's

¹Finding of Fact No. 18.

Services Workers, AFSCME in effect made a request for higher wages for current Children's Services Workers. It attempted to change the Tier System through the grievance/arbitration process. As in *District 1199*, AFSCME asked for a specific increase in wages, i.e., it asked the Agency to grant the same salary level to current Children's Services Workers based upon the same criteria the Agency uses to determine salary ranges for outside applicants, *notwithstanding its recent agreement to apply different criteria to each of those two groups*.

AFSCME filed the grievance with a line supervisor who played no part in the negotiations process, the Labor/Management Committee, or the action group that developed the Tier System. But the supervisor could have granted the grievance, thereby binding the Agency to a salary scale for which it had specifically not bargained with AFSCME. As in *District 1199*, whether AFSCME was or could have been successful in this attempt is irrelevant to whether it committed an unfair labor practice. By making this attempt through the grievance process, AFSCME conducted bargaining without a notice or request to bargain, without an agreement about time and place, without waiting for the Agency to choose its negotiator, and without an agreement on ground rules in place. Accordingly, under the totality of the circumstances, AFSCME was guilty of bad-faith bargaining in violation of O.R.C. § 4117.11(B)(3) by attempting to circumvent bargaining with the Agency through misuse of the grievance/arbitration process.

B. Utilization of a Grievance Procedure as an Unfair Labor Practice

While SERB has not previously addressed the question of whether an attempt to use the grievance process to change the terms of a previously negotiated collective bargaining agreement constitutes an unfair labor practice, such a holding is consistent with the policies underlying the Public Employees' Collective Bargaining Act as well as applicable case law of the National Labor Relations Board ("NLRB").

In *Chicago Truck Drivers*, 279 NLRB 904, 122 L.R.R.M. 1100 (1986), the NLRB dealt with a similar attempt by a union to compel a midterm modification of a collective bargaining agreement through the grievance/arbitration process. The employer and the union had different collective bargaining agreements covering separate units of employees. Each unit also had a separate seniority list. The union filed grievances in which it took the position that the three seniority lists should be combined into one, thereby allowing transfers with full seniority rights among the employees in the separate units. The employer took the position that the matter was not grievable, but rather was a subject for contract negotiations at the appropriate time. The NLRB agreed with the employer and held that using the compulsion of the grievance/arbitration procedure to achieve an end that is properly resolved at the bargaining table constitutes bad-faith bargaining.

AFSCME contends that the employees, not AFSCME, filed the grievance and that AFSCME did not actively participate in the processing of the grievance. The facts revealed that the employees sought out Chief Steward Williams and requested her assistance with their issue. As Chief Steward, Ms. Williams not only typed, signed, and delivered the grievance, but also advised the employees of their options, contacted an AFSCME staff representative about AFSCME's obligations in regard to the grievance, and advocated AFSCME's position on the grievance in a conversation with the Agency's Labor Relations Manager. Ms. Williams explained at hearing that as Chief Steward, it is her full-time job to represent the bargaining-unit employees and serve as their advocate, giving them the best advice she can and working with them to decide how best to handle a problem. Thus, this argument is not persuasive.

AFSCME also argues that the O.R.C. § 4117.11(B)(3) charge should be dismissed because it was compelled to file the grievance in order to avoid a duty of fair representation charge by the employees. It asserts that the employees have an absolute right to have their demands addressed through the grievance procedure. Chief Steward Williams asserted at hearing that no matter how frivolous a grievance may be, she must sign and

process it if the employee demands it. The duty of fair representation is set forth in O.R.C. § 4117.11:

(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[.]”

An employee organization is permitted a wide range of discretion in carrying out its collective bargaining and contract administration responsibilities. 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. *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98) (“Cook”). In *Vaca v. Sipes*, 386 U.S. 171, 194 (1967) (“Vaca”), the U.S. Supreme Court stated: “In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances.” In *In re Ohio Civil Service Employees Assn Local 11*, SERB 95-020 (11-8-95), while finding a violation of O.R.C. § 4117.11(B)(6), the significance of the union’s *not* having examined the merits of a particular grievance before its failure to take action to process it was underscored. Neither O.R.C. Chapter 4117 nor SERB precedent compels an employee organization to file grievances that have no merit.

A union’s failure to take a basic and required step, such as the timely filing of a grievance, “creates a rebuttable presumption of arbitrariness.” *Cook, supra* at 3-58. See also *Vencl v. Int’l Union of Operating Engineers*, 137 F.3d 420, 157 L.R.R.M. 2530 (6th Cir. 1998). Indeed, when a union does not file a grievance, a breach of the duty of fair representation will not be found if the union provides justification or viable excuse for its action or inaction. In examining the justification, we will look at the union’s reasons for its action or inaction as well as the consequences of such action or inaction.

A presumption of arbitrary behavior would be rebutted successfully by an employee organization having exercised good judgment in not filing an unmeritorious grievance. The grievance in this case was intended to effect changes in the Tier System, which is undisputedly a part of the Agreement. Under the Agreement, a grievance is defined as “an allegation by a bargaining unit employee that there has been a breach, misinterpretation, or improper application of this Agreement. *It is not intended that the grievance procedure be used to effect changes in the Articles of this Agreement or those matters which are controlled by the provisions of Federal and/or State laws.*” (emphasis added.) AFSCME should have exercised its judgment and refrained from filing a grievance that expressly is outside this mutually agreed-upon definition and, thus, is unmeritorious. A charge that AFSCME had not complied with its duty of fair representation could not be sustained from such a justifiable decision.

AFSCME also argues that the basis for the grievance was that new hires were being placed above the minimum for a given tier level in contradiction to language set forth in the Tier System booklet. This argument is also not supported by the record. First, the facts reveal that the Tier System agreed to by the Agency and AFSCME provides for different selection criteria for current employees and new applicants for Children's Services Worker positions. Second, the grievance simply cannot be read as one concerned with preserving the integrity of the Tier System. The grievance does not cite the Tier System, or any part of it, as being violated by the Agency. The Tier System is not even cited in the section of the grievance form reserved for a recitation of contract articles and sections violated. Rather, the plain language of the grievance reveals that it is calling for an alteration of the Tier System—both as to salary range and as to criteria used to determine a salary range. Moreover, the grievance sought an increase for current employees, rather than a decrease for external applicants, and a change in the criteria to be used for current employees.

AFSCME also complains that SERB's handling of this case does not further the purposes of O.R.C. Chapter 4117 because SERB did not direct this case to the unfair labor

practice mediation process at the time that probable cause was found. In establishing this mediation process, SERB has always reserved the right to *not* mediate certain cases. But mediation opportunities are extended to the parties while the investigation is pending. The mediation and the investigation proceed on separate tracks with no sharing of information by the mediator. Further, we note that the offer to mediate this case during investigation was rejected by the same party that is now complaining about the case not being mediated at hearing.

III. CONCLUSION

For the reasons above, we conclude that the attempt by the American Federation of State, Municipal and County Employees, Ohio Council 8 and Local 1768 to modify the wage schedule negotiated with the Hamilton County Department of Human Services through the grievance process constitutes bad-faith bargaining in violation of Ohio Revised Code § 4117.11(B)(3).

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