

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO,

Respondent.

CASE NO. 97-ULP-09-0501

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
April 22, 1999.

On September 17, 1997, Charline Collier ("Charging Party") filed an unfair labor practice charge against the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO ("OCSEA" or "Respondent") alleging that OCSEA had violated Ohio Revised Code ("O.R.C.") § 4117.11(B)(6). On February 19, 1998, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause was present to believe that OCSEA committed an unfair labor practice authorized the issuance of a complaint, and referred the matter to hearing. On March 2, 1998, a complaint was issued alleging that the Respondent had violated O.R.C. § 4117.11(B)(6) by failing to advance the Charging Party's grievance.

A hearing was conducted on April 22, 1998. On June 30, 1998, the Hearing Officer's Proposed Order was issued. On July 23, 1998, the Complainant and the Respondent filed exceptions to the proposed order. On July 31, 1998, the Complainant filed its response to the Respondent's exceptions. On August 5, 1998, the Respondent filed its response to the Complainant's exceptions.

After a review of the Hearing Officer's Proposed Order, the exceptions, responses to exceptions, and the record before us, the Board, pursuant to the attached Opinion, incorporated by reference, amends Finding of Fact No. 20 to replace "Mr. Keith" with "Mr. King" and adopts the Findings of Fact, as amended, and Conclusions of Law in the Hearing Officer's Proposed Order.

The Respondent is hereby ordered to:

- A. Cease and desist from failing to fairly represent all public employees in a bargaining unit and from otherwise violating O.R.C. § 4117.11(B)(6)
- 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 Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO 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 Board of Engineers and Surveyors, who are represented by the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, 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 ordered.

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

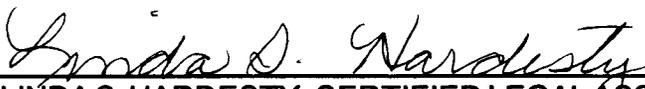


SUE POHLER, CHAIRMAN

Order
Case No. 97-ULP-09-0501
April 22, 1999
Page 3 of 3

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 Board's order.

I certify that this document was filed and a copy served upon each party by certified U.S. Mail, return receipt requested, on this 21st day of May, 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:

The Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO is hereby ordered to:

- A. Cease and desist from failing to fairly represent all public employees in a bargaining unit and from otherwise violating O.R.C. § 4117.11(B)(6)
- 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 Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO 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 Board of Engineers and Surveyors, who are represented by the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, 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.

**Ohio Civil Service Employees Association,
AFSCME, Local 11, AFL-CIO
Case No. 97-ULP-09-0501**

BY _____

DATE _____

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERB 2012 This Notice must remain posted for 60 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.

**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, AFL-CIO,

Respondent.

Case No. 97-ULP-09-0501

OPINION

VERICH, Board Member:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon exceptions filed to a Hearing Officer's Proposed Order issued on June 30, 1998. For the reasons below, we find that the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO violated Ohio Revised Code ("O.R.C.") § 4117.11(B)(6) when it failed to advance Ms. Charline Collier's grievance after indicating that it would advance the grievance.

I. BACKGROUND

The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("Union"), is the exclusive bargaining representative for a unit of the Board of Engineers and Surveyors ("Engineers") employees. Mr. Keith King is a Union Chapter Steward and, at all pertinent times, an agent or representative of the Union.

Charline Collier is employed by the Engineers as an Office Assistant II. She is a "public employee" as defined by O.R.C. § 4117.01(C). She is also a member of the bargaining unit represented by the Union.

On April 7, 1997, the Engineers posted the position of Account Clerk II. The deadline for filing an application for this position was Friday, April 18, 1997. After the Account Clerk II position was posted, Ms. Collier obtained a copy of a previously completed job application from her file in the office of Mark Jones, the Executive Secretary for the Engineers. Ms. Collier made a copy of that old application and used it to complete her application for the Account Clerk II position. She changed the date on the first page of the copied application and changed the second page to include her employment at the Engineers. The application Ms. Collier allegedly filed was not notarized.

Ms. Collier placed her Account Clerk II application in an "in-box" on Executive Secretary Jones' desk on April 18, 1997. Mr. Jones was not at work on April 18, 1997; he returned to work on April 21, 1997. Everyone in the Engineers' office had access to Mr. Jones' office during the work day.

On April 23, 1997, Dwight Phelps informed Ms. Collier that he had been awarded the Account Clerk II position. Executive Secretary Jones confirmed to Ms. Collier that the Account Clerk II position had been filled. When she asked Mr. Jones why she had not been given an interview for the Account Clerk II position, Mr. Jones responded that he had never received Ms. Collier's application for the position.

On April 24, 1997, Ms. Collier contacted her union steward, Mr. King, about the awarding of the Account Clerk II position to Mr. Phelps. Ms. Collier gave Mr. King a copy of a Civil Service application for that position signed by Ms. Collier and dated April 18, 1997, on the first page. This application also listed "Lazarus," not the Engineers, as her present job. The last page of the application was notarized on July 12, 1993.

On May 6, 1997, Union Steward King filed a Step 1 grievance on behalf of Ms. Collier regarding the Engineers' failure to award her the Account Clerk II position. Mr. King and Ms. Collier both signed the grievance. On May 7, 1997, the Engineers denied the Step 1 grievance. Under the parties' Collective Bargaining Agreement, the deadline for filing a Step 2 grievance was five calendar days from the receipt of a Step 1 response or the date such answer was due, whichever was earlier.

On May 8, 1997, Carol Henson, another employee, suggested to Ms. Collier that they examine the paper shredder, located in the Engineers' Conference Room, in an effort to locate Ms. Collier's application for the Account Clerk II position. Everyone in the Engineers' office had access to that conference room. Ms. Henson and Ms. Collier found, near the bottom of the paper shredder, shredded material that appeared to be Ms. Collier's application. That same day, Ms. Collier gave Union Steward King a few pieces of the shredded material taped to a piece of paper, and at another time that day, gave him the majority of the shreds in a large manilla envelope.

On May 12, 1997, Union Steward King and Executive Secretary Jones met and verbally agreed to postpone the scheduling of Ms. Collier's Step 2 grievance hearing until Mr. Jones returned from a two-week vacation. Mr. King had handled other grievances where deadlines have been extended in writing. Mr. King informed Ms. Collier that he had obtained a verbal extension regarding her grievance. The deadline for filing the Step 2 grievance was on or about May 12, 1997.

On May 13, 1997, Ms. Collier sent a memo to Union Steward King documenting a conversation she had with Executive Secretary Jones on May 12, 1997, regarding the Account Clerk II position. Ms. Collier notified Mr. King when Mr. Jones returned from his vacation. Mr. King then made a trip to Mr. Jones' office to schedule the Step 2 grievance

hearing. Mr. Jones was not available, and Mr. King did not leave a message. Mr. King next attempted to contact Mr. Jones by telephone, but was unsuccessful. They attempted to reach each other by telephone two or three more times, but were unsuccessful. In mid-June 1997, Mr. King still believed that he would be able to file a Step 2 grievance because of his verbal agreement with Mr. Jones on the day Mr. Jones left on vacation.

After the Step 1 grievance was filed and until the end of July 1997, Ms. Collier initiated weekly contacts with Union Steward King, via discussions in the elevator, telephone calls, and visits to Mr. King's office, regarding her grievance. Mr. King assured her that the process was slow and that she needed to be patient. In late July or August 1997, Ms. Collier asked Mr. King if the shredded material had been forwarded to another Union official. Mr. King responded that the material had been forwarded. Ms. Collier asked Mr. King for the telephone number of the Union President or someone associated with the Union, but Mr. King did not give her anyone's telephone number.

Beginning in the middle of July 1997, Union Steward King no longer attempted to contact Executive Secretary Jones regarding Ms. Collier's grievance. He was "quite busy," and Ms. Collier's case "fell through the cracks." Toward the end of July 1997, he "forgot" about Ms. Collier's grievance. He never informed Ms. Collier that he "forgot" her grievance. In August 1997, Mr. King realized that his verbal agreement with Mr. Jones to extend the filing of Ms. Collier's Step 2 grievance was probably no longer valid. He had used a verbal extension of a couple of weeks in the past. Mr. King did not relay any of this information to Ms. Collier. Mr. King did not seek the assistance of a Union employee on this matter because he was the "only steward in the building" and his "plate was so full."

In mid-to-late August 1997, Ms. Collier received a telephone call from Brenda Goheen, a Union Staff Representative. Based on her conversation with Ms. Collier,

Ms. Goheen called Union Steward King and asked about Ms. Collier's grievance. Mr. King told her that he had filed a grievance but that Executive Secretary Jones had not yet set a date for the Step 2 grievance hearing. Based on her conversation with Mr. King, Ms. Goheen called Mr. Jones and asked to schedule a date for a Step 3 hearing on Ms. Collier's grievance. Mr. Jones told her that he did not have a grievance that was filed at the Step 3 level, so he would not set a date. Ms. Goheen then called Ms. Collier and informed her that Mr. Jones refused to hold a hearing. Ms. Goheen told her that Mr. Jones had told Ms. Goheen that the deadline for Ms. Collier's grievance had passed, that it was over, that nothing had been filed, and that it was too late to do anything.

In late August 1997, Ms. Collier and Staff Representative Goheen met to discuss Ms. Collier's grievance. As a result of this meeting, Ms. Collier learned that the deadline for filing the Step 2 grievance had not been formally extended. At that time, Ms. Goheen wondered why Ms. Collier would use an old application for the Account Clerk II position, and not a new one that would include her current job experience with the Engineers.

After Ms. Collier learned that the deadline for filing a Step 2 grievance had passed, she saw Union Steward King on the elevator. She asked Mr. King how he could have let this lapse happen as many times as she had talked to him about it. Mr. King responded that his own job was being upgraded, his director had been fired, and that he had been busy. Mr. King said that Ms. Collier had "bugged" or "bothered" him "to death on this." On or about September 29, 1997, Ms. Collier sent a certified letter to Mr. King requesting that he return all information he had concerning her grievance. He did not respond to this request by October 10, 1997, the date specified in the letter.

Article 17 of the collective bargaining agreement provided that a promotion will be awarded on the basis of seniority if the applicant meets the minimum qualifications for the

position. Ms. Collier met the minimal qualifications for the position of Account Clerk II at the time the position was posted. If Mr. Jones had received Ms. Collier's application, he would have interviewed her for the Account Clerk II position. If Ms. Collier had filed a valid application for the position of Account Clerk II, pursuant to Article 17 of the Collective Bargaining Agreement, she would have been offered the position of Account Clerk II.

At the hearing, Union Staff Representative Goheen testified that Mr. King failed to process Ms. Collier's grievance in a timely fashion. Also at the hearing, no witnesses corroborated Ms. Collier's claim that she timely filed an application for the Account Clerk II position. Ms. Collier presented no copies of the application she allegedly put in Executive Secretary Jones' "in-box." Ms. Henson recalled that the material recovered from the shredder in the Engineers' office was shredded horizontally and that Ms. Collier placed the shredded material into a manilla envelope. The material Ms. Collier alleged was her shredded application, which she placed in Mr. Jones' "in-box," was shredded vertically.

II. DISCUSSION

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

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[.]

When an unfair labor practice is charged because a union has allegedly violated its duty of fair representation, we must determine whether the union's actions are arbitrary, discriminatory, or in bad faith. *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98)

("OCSEA/AFSCME"); *Vaca v. Sipes*, 386 U.S. 171, 64 L.R.R.M. 2369 (1967). If we find any of these components, a breach of the duty has occurred. The Complainant has the burden of proving that the union did not fairly represent its bargaining-unit members.

Arbitrariness, discrimination, and bad faith are distinct components of the same duty and should be reviewed on an equal basis. *OCSEA/AFSCME, supra*. In the case before us, the unfair labor practice charge does not allege that the Union discriminated against Ms. Collier, or that it acted in bad faith, during the processing of her grievance. The complaint also does not allege discrimination or bad faith by the Union. The remaining question before us, then, is whether the Union acted arbitrarily.

A union acts arbitrarily by failing to take a basic and required step. *OCSEA/AFSCME, supra*; *Venci v. Int'l Union of Operating Engineers*, 137 F.3d 420, 157 L.R.R.M. 2530 (6th Cir. 1998). The basic and required steps a union must take when fulfilling its duty of fair representation will vary depending upon the nature of the representation. *OCSEA/AFSCME, supra*. One of these representation functions is the processing of a grievance. *Id.* Failure to take a basic and required step while performing any of these representation functions creates a rebuttable presumption of arbitrariness. *Id.* Once that burden has been met, the Union must come forth with its justification or viable excuse for its actions or inactions. *Id.*

Under the facts of this case, the Union acted arbitrarily when it failed to take the basic and required step of advancing Ms. Collier's grievance to Step 2 after indicating that it would advance the grievance. Union Steward King met with Executive Secretary Jones on or about May 12, 1997 (the approximate last day for timely filing the grievance at Step 2). They both verbally agreed to postpone scheduling the grievance hearing until Mr. Jones returned from his two-week vacation. Upon learning that Mr. Jones had

returned from his vacation, Mr. King went to Mr. Jones' office to schedule the Step 2 grievance meeting. Mr. Jones was not available, and Mr. King did not leave a message. They attempted to reach each other by telephone two or three more times, but were unsuccessful. By the middle of July 1997, Mr. King quit trying to contact Mr. Jones.¹ The record contains no evidence that Mr. King ever personally discussed this matter with Mr. Jones or that Mr. King sent Mr. Jones a letter or fax requesting a new hearing date. Thus, the Complainant met its burden in providing evidence necessary to show that an unfair labor practice occurred.

Union Steward King was unable to offer adequate justification for his acts. He stated that he had been "quite busy"; Ms. Collier's case "fell through the cracks"; and, near the end of July 1997, he just "forgot" her grievance, in spite of the fact she had repeatedly contacted him about her grievance to the point that he described her actions as "bugging" or "bothering him to death." Mr. King had experience in handling extensions of time for advancing grievances to the next step. His preferred method was written extensions of time, but he had used a verbal extension of a couple of weeks in the past. Even though his past verbal extensions were limited to a couple of weeks, it was not until more than sixty days after the agreed-to extension, when other Union representatives were asking him about Ms. Collier's grievance, that he felt his May 1997 extension was probably no longer valid. Even a Union Staff Representative, familiar with the process, testified that Mr. King did not process Ms. Collier's grievance in a timely fashion.²

Union Steward King never informed Ms. Collier, throughout this entire period of time, that he "forgot" about her grievance because it "fell through the cracks." He never

¹Finding of Fact (F.F.) Nos. 19, 21, and 28.

²F.F. Nos. 19, 22, 24, 27, 28, and 30.

told her he thought his May 1997 verbal extension had expired, even after he had determined it was probably lost in July 1997. The first time Ms. Collier knew that her grievance had any problem was when Staff Representative Goheen so informed her in mid-to-late August 1997. Mr. King only told Ms. Collier that the process was slow and she needed to be patient.³ When a Union steward fails to properly and timely advance an employee's grievance to the next step, conceals that fact from the employee, and abandons pursuit of a remedy for the employee, as was done here, we are compelled to find that the Union committed an unfair labor practice in violation of O.R.C. § 4117.11(B)(6).

B. Remedy

Upon finding that the Union violated O.R.C. § 4117.11(B)(6), we must determine the appropriate remedy. Where improper handling of a grievance is the basis of an O.R.C. § 4117.11(B)(6) charge, the merit of that grievance is not relevant to the finding of a violation; the grievance's merit is only relevant for purposes of determining a remedy after a violation is found. *In re Ohio Health Care Employees Union, Dist. 1199*, SERB 93-020 (12-20-93); *In re Ohio Civil Service Employees Association*, SERB 93-019 (12-20-93).⁴ Consequently, the next question is whether Ms. Collier's grievance, had it been processed properly, would have likely been meritorious.

If Ms. Collier had timely filed a valid application for the position of Account Clerk II, she would have been given an interview by Mr. Jones. Based upon the relevant factors pertaining to the only other applicant for the job and the parties' collective bargaining

³F.F. Nos. 22, 23, 25, 26, and 28.

⁴We note that the National Labor Relations Board has now adopted a similar approach. See *Iron Workers Local 377*, 326 NLRB No. 54 (8-26-98).

agreement, she would have been offered the position. Ms. Collier's problem is that she cannot provide sufficient, credible evidence that she in fact did file her application. She did not present a copy of the application that she allegedly filed. No one saw Ms. Collier deposit her application in Mr. Jones' "in-box" by April 18, 1997, the deadline for applications.⁵

Ms. Collier's entire claim on the "timeliness" issue rested on her testimony that she found her shredded application on or about May 8, 1997, some fifteen days after being notified that she did not receive the position. The credibility issue turned between the testimony of Ms. Collier and Mr. Jones regarding the timely filing of the application. Mr. Jones testified he did not interview Ms. Collier because he did not receive an application from her. He was out of the office on April 18, 1997, and did not return until April 21, 1997. Mr. Jones' testimony was undisputed at hearing. No competent, credible evidence was presented to contradict his testimony.⁶

The most troubling aspect of Ms. Collier's testimony is her claim that the application she placed in Mr. Jones' "in-box" was shredded *vertically*, while her own witness, Ms. Henson, who helped discover the shredded material, testified it was shredded *horizontally*.⁷ The testimony of Mr. Jones on this issue is more credible than that of Ms. Collier. In addition, the shredder machine in the Engineers' Conference Room could be accessed by any employee. Thus, even if Ms. Collier could prove that her application was shredded, she could not prove when it was shredded or by whom. We find that if the matter had been properly pursued, the grievance would not have had a reasonable

⁵F.F. Nos. 11, 32, and 33.

⁶F.F. Nos. 9, 10, 12, 17, and 34.

⁷F.F. No. 37.

likelihood of success on the merits. Therefore, the appropriate remedy in this case is to issue an order, pursuant to Ohio Revised Code § 4117.12(B)(3), requiring the Union to cease and desist from failing to fairly represent all public employees in a bargaining unit and from otherwise violating O.R.C. § 4117.11(B)(6) and ordering the Union to post the Notice to Employees for sixty days in all of the usual and normal posting locations where the Engineers' employees, who are represented by the Union, work.

III. CONCLUSION

For the reasons expressed above, we conclude that the failure by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO, to advance Charline Collier's grievance, after indicating that it would advance the grievance, constitutes a violation of Ohio Revised Code § 4117.11(B)(6). We also find that Ms. Collier's grievance would not likely have succeeded on the merits. Therefore, the appropriate remedy is the issuance of a cease-and-desist order with the posting of a Notice to Employees.

Pohler, Chairman, and Gillmor, Vice Chairman, concur.