

IN THE SUPREME COURT OF OHIO

THE STATE EX REL., BARBARA HALL, : Case No. 09-0159
: :
Relator-Appellee, : :
: : On Appeal from the
-vs- : : Cuyahoga County Court of
: : Appeals, 8th District
: :
STATE EMPLOYMENT RELATIONS BOARD, : Court of Appeals Case No.
: : CA-07-090808
: :
Respondent-Appellant. : :

**BRIEF OF AMICUS CURIAE, OHIO COUNCIL 8, AFSCME, AFL-CIO
IN SUPPORT OF RESPONDENT-APPELLANT,
STATE EMPLOYMENT RELATIONS BOARD**

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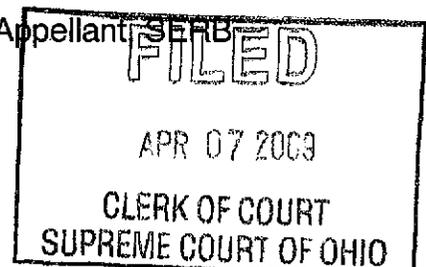


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I. DESIGNATIONS

Amicus Curiae Ohio Council 8, AFSCME, AFL-CIO OC8

Charging Party, Barbara Hall Hall

Collective Bargaining Agreement CBA

Cuyahoga County Department of Job and
Family Services and the Cuyahoga County
Board of County Commissioners Employer

Exhibit Exb.

Local 1746, AFSCME, AFL-CIO Local 1746

Local 1746 President Pamela Brown Local President Brown or Brown

OC8 and Local 1746 when referenced jointly Union

Ohio State Employment Relations Board SERB

Unfair Labor Practice ULP

II. TABLE OF AUTHORITIES

<i>Air Line Pilots Assn. Int'l v. O'Neill</i> (1991), 499 U.S. 65, 111 S.Ct. 1127	7
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<i>Lorain City School Dist. Bd. of Edn. v. SERB</i> (1988), 40 Ohio St. 3d 257	7,16
<i>SERB v. Miami Univ.</i> (1994), 71 Ohio St. 3d 351	7,15,16
<i>State v. Bethel</i> (2006), 110 Ohio St. 3d 416	14
<i>State ex rel. Dayton F.O.P. No. 44</i> (1986) 22 Ohio St. 3d 1	6
<i>State ex rel. Hamilton Co. Bd. of Commrs. v. SERB</i> (2004), 102 Ohio St. 3d 344	5,6
<i>State ex rel. Portage Lakes Edn. Assn. v. SERB</i> (2002), 95 Ohio St. 3d 533	5,6,9,18
<i>Vaca v. Sipes</i> (1967), 386 U.S. 171, 87 S.Ct. 903	7

III. STATEMENT OF THE CASE AND FACTS

Amicus Curiae Ohio Council 8, AFSCME, AFL-CIO adopts the statement of case and facts as presented by Appellant SERB in its brief.

IV. ARGUMENT

PROPOSITION OF LAW:

THE OHIO STATE EMPLOYMENT RELATIONS BOARD DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED BARBARA HALL'S UNFAIR LABOR PRACTICE CHARGE FOR LACK OF PROBABLE CAUSE.

A. Abuse of Discretion Legal Standard

"Probable-cause determinations by SERB under R.C. 4117.12(B) are not reviewable by direct appeal. ... Instead, in the absence of an adequate remedy in the ordinary courts of law, 'an action in mandamus is the appropriate remedy to obtain judicial review of order by the State Employment Relations Board and dismissing unfair labor practice charges for lack of probable cause.'" *The State ex rel. Portage Lakes Edn. Assn. v. SERB* (2002), 95 Ohio St. 3d 533, 540 at ¶ 35 (citations omitted). Mandamus, however, will only issue to correct an abuse of discretion by SERB in dismissing an unfair labor practice charge. *See id.* "An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude." *State ex rel. Hamilton Co. Bd. of Commrs. v. SERB* (2004), 102 Ohio St. 3d 344, 347.

SERB is only required to "issue a complaint and conduct a hearing on an unfair labor practice charge, if, following an investigation, it has reasonable ground to believe that an unfair labor practice has occurred." *Portage Lakes, supra* at ¶ 38. "Because mandamus proceedings are premised upon the relators[] establishing an abuse of

discretion by SERB in its probable-cause determination, courts should not substitute their judgment for that of the administrative agency.” *Id.* at 542, ¶ 41. In fact, “the right to extraordinary relief in mandamus to compel SERB to issue a complaint on unfair labor practice charges is premised upon relators[] establishing that SERB abused its discretion *at the time it dismissed the charges. It is axiomatic that SERB could not abuse its discretion based on evidence that was not properly before the board when it made its decision.* Consequently, the review of a SERB decision is generally limited to the facts as they existed at the time SERB made its decision.” *Id.* at ¶ 55 (emphasis added; citations omitted) and *followed by State ex rel. Hamilton Co. Bd. of Commrs, supra.* Further, “the examination of any claimed new evidence [does *not*] warrant a finding that SERB abused its discretion in dismissing [a] case . . . for lack of probable cause,” *Portage Lakes, supra* at ¶ 54, and this Court has stated that it will not substitute its judgment for that of an agency’s if there is conflicting evidence on an issue. *Id.* at ¶ 41. Further, if there are disputes regarding conflicting evidence, those disputes “are properly determined by SERB, which was designated by the General Assembly to facilitate an amicable, comprehensive, effective labor-management relationship between public employees and employers.” *District 1199, The Health Care & Social Services Union, SEIU v. SERB* (Jun. 30, 2003), Case No. 02AP-391, 2003 Ohio App. LEXIS 3103 at ¶ 27 (10th Dist.) (hereinafter “*District 1199*”), attached as Appx. Exb. A, *citing State ex rel. Dayton F.O.P. No. 44* (1986) 22 Ohio St. 3d 1, 5.

B. SERB Standard for Review of Unfair Labor Practice Charges Alleging a Failure of the Duty of Fair Representation by Unions

SERB is entitled to due deference from the courts when the board interprets R.C. Chapter 4117. *Lorain City School Dist. Bd. of Edn. v. SERB* (1988), 40 Ohio St. 3d 257, syll. at ¶ 2. When interpreting R.C. 4117.11(B)(6) regarding a Union's duty of fair representation and whether that duty is breached, SERB first adopted the *Vaca* standard from the U.S. Supreme Court in which the Court held that "[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 SERB v. OCSEA, Local 11*, SERB 98-010 (07-22-98), 1998 OPER (LRP) LEXIS 488 (hereinafter "*OCSEA-Cook*") at 2, attached as Appx. Exb. B, citing *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89)(hereinafter "*AFSCME*"); see also *Vaca v. Sipes* (1967), 386 U.S. 171, 87 S.Ct. 903 and *Air Line Pilots Assn. Int'l v. O'Neill* (1991), 499 U.S. 65, 111 S.Ct. 1127. SERB then "formulated its own definition and guidelines"¹ for a union's duty of fair representation and stated in its *Wheeland* decision that

The union's representative duty involves balancing the interests of a diverse group. This balancing occurs most often in bargaining, but it also may be a legitimate concern in resolving grievances and other contract limitation issues. Given this essential component of an exclusive representative's function, flexibility and deference must be accorded the union in its efforts to seek benefits and enforcement for the unit as a whole, even though the desires of individual employees or groups of employees within the unit may go unfulfilled.

The foregoing practical considerations form the foundation for our determination of whether a union's action is "arbitrary." In

¹ It is within SERB's "jurisdiction to formulate its own definition and criteria as to what was a duty of fair representation pursuant to R.C. 4117.11." *Wheeland, infra* at 5; see also *SERB v. Miami Univ.* (1994), 71 Ohio St. 3d 351.

making such an assessment, this Board will look to the union's reason for its action or inaction. Is there a rational basis for the union's position? If there is, the action is not arbitrary. We accord the union great deference in evaluating approaches to bargaining and contract enforcement. Exclusive representatives must be able to form, evaluate, and pursue strategies for bargaining and contract enforcement. In interpreting and pursuing contract rights, unions must have leeway to assess and allow for ramifications and merits. Thus, a union's reason for a given approach will be examined not for its wisdom, for we cannot second-guess a union on its assessment of merit, but to determine merely whether the reason is rational.

If there are no apparent factors that show legitimate reason for a union's approach to an issue, the Board will not automatically assume arbitrariness. Rather, we will look to evidence of improper motive: bad faith or discriminatory intent. An element of intent must be present; it may be evinced by discrimination based upon an irrelevant and invidious consideration, or it may be indicated by hostile action or malicious dishonesty -- i.e., bad faith. **In the absence of such intent, if there is no rational basis for the action, arbitrariness will be found only if the conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment.**

In the Matter of Wheeland v. SERB (Jun. 6, 1995), Case No. 94APE10-1424, 1995 Ohio App. LEXIS 2369 (10th Dist.) at 4 (emphasis added), attached in Appx. as Exb. C, citing *AFSCME, supra*. SERB modified this definition of arbitrary conduct in its *OCSEA-Cook* case to "include a failure to take a required and basic step without justification or viable excuse." *OCSEA-Cook, supra* at 3. SERB's purpose in modifying *AFSCME* was not to eliminate the honest mistake/simple negligence standard, but rather to clarify that if a charging party meets his/her burden in showing that a union acted arbitrarily by failing to take a required and basic step, a rebuttable presumption is created that requires the union to come forth with a justification or excuse in order to rebut that

presumption. See *id.* “[I]f the justification or excuse constitutes simple negligence, [SERB] will find that the conduct is not arbitrary.” *Id.* While “[t]imely filing is both basic and required, ”if timeliness is not an issue and the Union did *not* fail to take a required and basic step, the conduct is not arbitrary. *Id.*

SERB will also look at “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 act were,” *SERB v. AFSCME OCSEA Local 11*, SERB 99-009 (05-21-99), 1999 OPER (LRP) LEXIS 352 (hereinafter “*OCSEA-Collier*”) at 4, attached as Appx. Exb. D, and “any information that may rebut the charge or offer a defense to the violation alleged. Issues such as . . . the failure to show any indication of unlawful motivation may be sufficient to secure dismissal of a case even when the facts alleged in the charge have been verified.” *Portage Lakes, supra* at ¶ 40 (citation omitted).

C. Argument

SERB did not abuse its discretion when it dismissed Barbara Hall’s unfair labor practice charge for lack of probable cause, and the court of appeals erred in granting mandamus by substituting its judgment for that of SERB’s, (1) because the appellate court considered an issue not presented to SERB by Hall in her ULP charge and found that the Union failed to take a required and basic step at Step 5 of the grievance process – a step not mandated by the CBA; (2) because the lower court misapplied the standard of review when it held that the Union’s discovery of the Employer’s failure to

provide a Step 3 grievance response, and the resulting delay, but not untimeliness, in processing the grievance, was anything but an honest mistake and that SERB based its determination upon a standard inconsistent with prior rulings; (3) because a review of SERB's investigative file shows that the court of appeals got it completely wrong when it ruled SERB had given the Union an opportunity to present witness statements that SERB had not given Hall; and (4) because the additional three affidavits presented to the lower court by Hall and used by the court in reaching its decision without having the affidavits ever presented to SERB during its investigation were improperly considered by the court of appeals.

First, the appellate court erred when it considered an issue not presented to SERB by Hall in her ULP charge and found that OC8 failed to take a required and basic step at Step 5 of the grievance process – a step not mandated by the CBA. In her ULP charge, Hall claimed that OC8 allegedly failed to provide her a grievance copy and failed to keep Hall updated; that Local President Brown allegedly reassured Hall that her grievance would be arbitrated; that OC8 did not file a grievance over being placed on paid administrative leave pending Cuyahoga JFS's child abuse investigation; and that OC8 took three years to inform Hall her grievance did not have the merit to proceed to arbitration when the CBA provided that discharge grievances should be expedited. See Record, Hall ULP Charge. The Union provided evidence through Local President Brown's statement, that copies of the discharge grievance were provided to Hall and that Brown did keep Hall updated on the grievance's status; that contrary to Hall's claims, Brown repeatedly told Hall that her grievance would likely not be arbitrated; and that it was standard policy for the Employer to place employees on paid administrative

leave when they are under a pending investigation and thus there is no harm to the employees that requires a grievance at that point. See Record, Union Response, Exhibit C, Brown Statement. Because factual disputes are properly determined by SERB and courts are not to substitute their judgment for that of SERB's, SERB did not err in finding no probable cause on these claims. See *District 1199, supra*. However, nowhere in her ULP Charge does Hall claim that the Union's demand for arbitration was untimely or missed. In fact, Hall's main focus centers on the delay in the Step 3 processing caused by the Employer's failure to provide its Step 3 response to the grievance until the Union discovered the omission and requested the response. "Because that [wa]s the only issue set forth in [Hall's] complaint, it arguably is the only issue SERB should have decided," *District 1199* at ¶ 31, and arguably the only issue the appellate court should have reviewed. As a result, the court committed reversible error in going beyond the issue complained of by Hall in her ULP Charge.

Further, the appellate court erred in determining that the Union failed to take a required and basic step at Step 5 of the grievance process. The parties agreed to the following key provisions in their CBA:

1. Article 10, § 5 states "that the employee complaints regarding unjust or discriminatory suspensions and/or discharge be handled promptly" and "[t]herefore, all such disciplinary action may be reviewed through the Grievance Procedure, beginning at Step 3." See Record, Hall ULP Charge, Exb. E at 17. Hall's grievance was filed at Step 3 of the grievance procedure. See Record, Union Response, Exb. C, Brown Statement.

2. Article 11, Step 4(A) provides that “[o]nce a grievance has been appealed to arbitration, it will be referred to mediation unless either party determines not to mediate a particular grievance.” Hall ULP Charge, *supra* at 22 (emphasis added). There is *no time frame* under this section for the parties to make the mediation referral decision. Sections (B) through (J) of Step 4 then describe the parties’ agreement regarding the mediation process including the mutual selection of a panel of five (5) mediators to be determined by the *parties*, and not to be provided by the Federal Mediation and Conciliation Service, or any other service for that matter. Further, subsection (H) provides that if the grievance is not resolved at mediation, “the mediator will provide an oral advisory opinion as to how the grievance is likely to be decided *if it is presented at arbitration.*” This language clearly contemplates that mediation occurs separately from arbitration, and shifts the parties back to Step 5 if the grievance is unresolved at mediation.
3. Article 11, Step 5 (Arbitration) provides that “[i]f the grievance is not satisfactorily settled at Step 3, the Union may, within thirty (30) days after the receipt of the Step 3 answer, submit the issue to arbitration. The Union shall notify the Federal Mediation and Conciliation Service (“FMCS”) and the other party of its

intent to arbitrate. The DHS and the Union shall meet jointly to appoint a mutually agreed upon person to serve as Arbitrator within seven (7) days. * * *” *Id.* at 25. While the Union *may* submit a grievance to arbitration at Step 5 within the 30 day time frame, there is *no time frame* for notifying FMCS of the intent to arbitrate. That is intentional due to the requirements of the Step 4 Mediation process.

4. Article 11, Step 5 (Expedited Arbitration) provides that “[t]he parties agree grievances that involve a removal, suspension of five (5) days or more, or an ‘inter-departmental’ policy grievance as defined at Section 4 of this Article, shall be arbitrated on an expedited bases *at the discretion of the Union.*” *Id.* at 26. It is not mandatory that the grievance be arbitrated on an expedited basis.

“In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties. The general rule is that contracts should be construed so as to give effect to the intention of the parties.” *Aultman Hospital Assn. v. Community Mutual Insurance Co.* (1989), 46 Ohio St. 3d 51, 54. “Where the parties following negotiation make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides.” *Id.*

Further, “[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.” *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146 at syll. ¶2. “In the construction of a contract courts should give effect, if possible, *to every provision therein contained*, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.” *State v. Bethel* (2006), 110 Ohio St. 3d 416, 423 (other citations omitted)(emphasis added).

In the instant case, by finding that the Union missed a required and basic step by not notifying FMCS of the Union’s intent to arbitrate, the eighth district appellate court failed to construe the entire Grievance and Arbitration procedure and thus rendered the Mediation procedure at Step 4, and the Arbitration/Expedited Arbitration procedures at Step 5 totally nonsensical. In their agreement, the parties specifically provide that before the mediation process can be used, the Union has to appeal a grievance to arbitration. That language equates with the first sentence of Step 5 in which the Union may submit a grievance to arbitration within 30 days of the Step 3 answer. After the grievance is submitted to arbitration, under Step 4, both parties have the option of choosing to not mediate a grievance and the parties do not require a specific time within which to make such a decision. If the parties do decide to mediate, they then proceed to subsection (B) of Step 4 where they mutually agree upon a mediation panel and do not request one from FMCS or any other arbitrator clearinghouse service. If the parties

decide to *not* mediate a grievance, then pursuant to Step 5, the Union shall then notify FMCS of its intent to arbitrate and meet with the Employer to mutually select an arbitrator; if unsuccessful, then either party may request a list of arbitrators from FMCS.

If the lower court's interpretation of the Step 5 arbitration language is correct in that the Union missed a step by not notifying FMCS and then selecting an arbitrator, then the appellate court would have the parties simultaneously selecting a mediation panel and an arbitrator, and processing the grievance at Step 4 and Step 5 *at the same time*. This result makes no sense and is contrary to contract construction law and the clear intent of the parties to try and resolve a grievance at mediation before proceeding to arbitration if they so desire. Further, it creates an absurdity by requiring the Employer and the Union to process a grievance through mediation and arbitration at the same time. As a result, the court of appeals was wrong when it found the Union missed a required and basic step at Step 5, and thus committed reversible error in further finding that SERB abused its discretion.

Second, the lower court misapplied the standard of review for SERB determinations finding a lack of probable cause when the court held that the Union's discovery of the Employer's failure to provide a Step 3 grievance response, and the resulting delay, but not untimeliness, in processing the grievance, was anything but an honest mistake, and that SERB's determination was based upon a standard inconsistent with prior rulings. In its decision, the lower court ignored SERB precedent which provides that an honest mistake or misjudgment could provide a justification or excuse and would be considered simple negligence. See *SERB Standard of Review* section, *supra* at 6-9. As this Court stated in its *Miami University* case, it is within

SERB's "jurisdiction to formulate its own definition and criteria as to what was a duty of fair representation pursuant to R.C. 4711.11," see *Miami University, supra* at fn.1, and SERB is entitled to due deference. See *Lorain City Schools, supra*. In direct contradiction with SERB's definition, however, the appellate court found that "negligence does not provide an excuse." Ct. App. Dec. at 16. The court of appeals then, on its own, "note[d]" that the Union allegedly failed to take a basic and required step in filing for Step 5 Arbitration. As stated in the above section, the lower court's determination flies in the face of contract construction and results in a nonsensical interpretation when viewed with the Step 4 Mediation section of the grievance procedure, and does not meet the standard stated by SERB that missing a basic and required step involves the Union's failure to timely file and follow the time requirements in the grievance and arbitration process. See *OCSEA-Cook, supra*. In the instant case, the Union did not miss a step in the processing of Hall's grievance; it was the Employer that failed to answer the grievance within the 20 days provided in Step 3. The CBA, however, does not provide a mechanism for the Union to move the grievance to the next step without the Step 3 answer, and there is no contractual or legal duty requiring the Union to ensure that the Employer issue its Step 3 answer.

Further, the court of appeals erred in comparing the facts in the instant case to the facts in the *OCSEA-Collier* case in which a Union steward intentionally abandoned a grievance and let it "fall through the cracks" by not appealing it to the next step in the grievance process after indicating to the grievant that he would advance the grievance, and then concealing from the grievant the fact that he did not file such an appeal. See

OCSEA-Collier, supra at 5. In the instant case, however, the facts are totally distinguishable: first, the Union never abandoned the grievance; second, the Union did not miss a step in the grievance process; and third, the local president kept Hall apprised of the grievance's status stating it was still active and in the process, which was true. The only problem in the process was the local president's mistaken belief that the Employer had answered the grievance at Step 3, when in fact, the Employer had not done so. See Record, Union Response, Exb. C, Brown Statement. Once the Union discovered the Employer's omission, the Union requested the Step 3 answer which was provided on or about December 20, 2006. *Id.*, Exb. B at B-12. The Union then timely submitted the grievance to arbitration pursuant to the first sentence in Step 5 in order to protect contractual time lines while the Union reviewed the grievance for possible mediation or arbitration. In its decision, however, the appellate court seemed to transfer the responsibility for the Employer's failure to timely respond to Hall's grievance to the Union, which as stated above, is not a duty of the Union required by contract or law. As a result, the lower court erred and its decision must be reversed.

Third, a review of SERB's investigative file shows that the court of appeals got it completely wrong when it ruled SERB had given the Union an opportunity to present witness statements that SERB had not given Hall. Had the court of appeals carefully reviewed the record before SERB, it would have noted that in addition to Hall's ULP charge and the facts stated therein, Hall had already provided SERB with her own, separate witness statement in the form of an affidavit. See Record, Hall ULP Charge, Exb. B. In fact, it was the Union that had not yet been provided with the opportunity to provide any witness statements at the time the SERB investigator sent the request for

information to the Union. As a result, it is not only disingenuous for Hall to claim she was not invited to provide a statement when in fact she already had done so and clearly knew she could do so, but it was obviously untrue. And for the appellate court to find otherwise was reversible error.

Fourth, the additional three affidavits presented to the lower court by Hall and used by the court in reaching its decision without having ever been presented to SERB during its investigation were improperly considered by the court of appeals. As stated above, Hall clearly had knowledge that she could submit a witness statement for SERB's review because she had already done so. Therefore, when she received the request for information from the investigator asking for all documentation supporting Hall's position, Hall had every opportunity to present the additional affidavits. Hall, however, chose not to do so, and cannot now cry foul because of her own decision to omit them from SERB's review. Further, the lower court erred in considering them at all because "[t]he review of a SERB decision is generally limited to the facts as they existed at the time SERB made its decision," *Portage Lakes, supra*, and Hall has alleged no extraordinary facts to cause the courts to find that SERB abused its discretion on this matter.

Assuming *arguendo* that the affidavits could have been properly before the lower court, the affidavits are not only irrelevant but add nothing new to the discussion. Only one of the three affiants was even working in the hotline telephone call-taking division in the beginning of 2004, so personal knowledge of the rules is lacking. See Hall Motion for Summary Judgment Affidavits of Baughs, Rogers, and Howard, Exbs. C, D, and E. In addition, the affiants' statements regarding the non-use of the decision-tree structure

for non-referral calls not only adds nothing new to the evidence and is not contradictory to the evidence properly submitted to SERB for its review, but the statements also miss the point regarding Hall's mistakes in handling the child abuse call in the first place. First, the Employer's policy clearly states that when physical or sexual abuse is alleged, the case *must* be referred for further investigation. See Record, Union Response, Exb. A at A-10. After being referred, the case is then assigned a priority for investigation based upon the decision tree. If the case is not referred for further investigation, then the decision tree is not utilized. See *id.* at A-11. In the instant case, Hall made a mistake in not referring a case in which the caller clearly told Hall that the child's aunt stated that "she was with him *yesterday* and he kept saying his bottom was hurting and he acknowledged that the mother's boyfriend had touched him there" *Id.* at Exb. A-1 (emphasis added). In addition, Hall failed to even note the allegation properly in the computer for her supervisor to review. Although Hall claims her supervisor told her to label the call a "non-referral," there is no evidence in the transcript or computer to note that fact, and it is not credible that Hall described the entire conversation with the caller to the supervisor during the 17-second delay when Hall was waiting for the child's mother's name. As a result, the additional affidavits are not only irrelevant, but were improperly considered by the lower courts and this Court should so find.

IV. CONCLUSION

For all of the above reasons, Amicus Curiae Ohio Council 8, AFSCME, AFL-CIO urges this Court to reverse the Eighth District Court of Appeals and find that SERB did not abuse its discretion in dismissing Hall's unfair labor practice charge.

Respectfully submitted,



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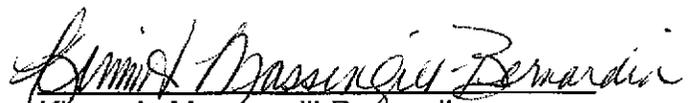
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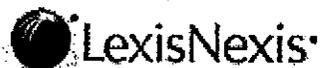
The undersigned certifies that an exact copy of the foregoing Brief was sent by regular U.S. mail to **Gerald R. Walton, Esq. and John J. Schneider, Esq.**, 2800 Euclid Avenue, Suite 320, Cleveland, Ohio 44115; and to **Richard Cordray, Attorney General, Benjamin C. Mizer, Esq., Elisabeth A. Long, Deputy Solicitor, and Anne Light Hoke, Asst. Attorney General**, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on this 7th day of April, 2009.



Kimm A. Massengill-Bernardin

Associate General Counsel

APPENDIX



2 of 2 DOCUMENTS

**District 1199, The Health Care & Social Services Union, SEIU, ALF-CIO,
Appellants-Appellants, v. State Employment Relations Board et al., Appellees-
Appellees.**

No. 02AP-391

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN
COUNTY**

2003 Ohio 3436; 2003 Ohio App. LEXIS 3103

June 30, 2003, Rendered

PRIOR HISTORY: **[**1]** APPEAL from the Franklin County Court of Common Pleas. C.P.C. No. 01CVF-03-2423.

DISPOSITION: Judgment was reversed and case was remanded with instructions.

COUNSEL: Hunter, Carnahan and Shoub, Michael J. Hunter and Robert R. Byard, for appellants.

Jim Petro, Attorney General, and Michael D. Allen, for appellee, State Employment Relations Board.

Allison Vaughn, for amicus curiae OCSEA, AFSCME Local 11, AFL-CIO.

JUDGES: BRYANT and TYACK, JJ., concur. PETREBE, P.J., dissents.

OPINION

(REGULAR CALENDAR)

PER CURIAM.

[*P1] This matter comes before the court on appeal from a judgment of the Franklin County Court of Common Pleas affirming a decision of the State Employment Relations Board ("SERB") in favor of appellee, Pauline Bryant and against appellants, Service Employees International Union District 1199, AFL-CIO and union representatives Deborah Perkins and Michele Gray (collectively, "the union").

[*P2] Bryant was employed as a registered nurse with the Ohio Corrections Medical Center ("CMC") and

was a member of the union. The CMC of Ohio is the medical center and health care provider for individuals incarcerated by the Ohio Department of Rehabilitation and Correction. The CMC is a party **[**2]** to a collective bargaining agreement ("CBA") with the union which represents the interests of the health care professionals employed by CMC.

[*P3] The CBA contains a grievance procedure which culminates in binding arbitration. At Article 24, Section 24.03(A), the CBA provides that "when the agency [CMC] determines that overtime is necessary, overtime shall be offered on a rotating basis, at least to the first five (5) qualified employees with the most state seniority who usually work the shift where the opportunity occurs." As a result, the parties had agreed that any opportunity to work overtime would first be offered to the employees in the location or department where the overtime was needed. In order to put this policy into effect, the parties created a "call list," an overtime "roster," and a monthly "sign-up sheet." Using these techniques, overtime was to be offered on a rotating basis first to employees on the shift and department where the overtime was needed, and then to qualified senior employees at the worksite. However, during the period covering May 21, 1999 to June 16, 1999, a number of CMC employees complained that CMC was not abiding by the overtime provisions **[**3]** of the CBA.

[*P4] On June 16, 1999, volunteer union representative, Deborah Perkins, filed a grievance on behalf of a number of the nurses who worked in her department, alleging that CMC had assigned overtime to employees who worked outside of the department and had not offered the overtime to the employees who



worked within the department as required by the CBA. In June, four individuals came forward and personally requested that Perkins list them as named grievants on a formal complaint. Perkins also listed two additional individuals on the grievance when she learned that those individuals had made the same overtime complaint to another union representative.

[*P5] Although Bryant was employed in the same department as the named grievants and therefore was contractually entitled to the same offer of overtime, neither Perkins nor Hill personally named Bryant in the grievance. The record has strong evidence that Bryant was aware of the availability of overtime work as well as the manner in which to obtain overtime. Nonetheless, she regularly refused such work and had no complaint regarding the manner in which it was being assigned until December 1999, when she overheard **[**4]** her co-workers discussing the settlement of the grievance. Importantly, Bryant testified that she did not ask the union to file a grievance on her behalf. Thus, in one manner or another, all of the grievants who participated in the settlement personally sought out their union representatives in order to pursue their grievance.

[*P6] Pursuant to the terms of the CBA, the grievance Perkins filed alleging noncompliance with the overtime provisions of the agreement had to be filed within 15 days of the violation giving rise to the grievance, as Article 7.04 of the agreement provides:

[*P7] " * * * When a group of bargaining unit employees desires to file a grievance involving an alleged violation that affects more than one (1) employee in the same way, the grievance may be filed by the union. A grievance so initiated shall be called a Class Grievance. Class Grievances shall be filed by the Union within fifteen (15) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the Class Grievance. Class Grievances shall be initiated directly at Step Two (2) of the grievance procedure if the entire class is under the jurisdiction * * **[**5]** * of more than one (1) Step Two (2) management representative. The Union shall identify the class involved, including the names if necessary, if requested by the agency head or designee."

[*P8] Under that provision, grievances involving more than one employee are to be filed directly at "Step 2" of the grievance procedure, or, if the grievance involves multiple grievants who work for more than one "Step 2" supervisor, the grievance may be filed directly at "Step 3" of the procedure. In order to resolve disputes arising under the CBA, a group of trained mediators and arbitrators was formed from which individuals are called upon to mediate and/or arbitrate disputes. On August 12, 1999, a "Step 3" hearing was held, and the grievance

Perkins filed was denied. Thereafter, the grievance proceeded to mediation on November 8, 1999, as provided for under "Step 4" of the grievance procedure. The mediation took place at the state of Ohio, Office of Collective Bargaining and, through the parties' efforts, the grievance was settled.

[*P9] By the time the matter reached mediation, Perkins allegedly had become aware that Bryant also would have been entitled to overtime had she wished **[**6]** to work additional hours. Therefore, Perkins attempted to include Bryant in the settlement of the grievance. The mediator, however, stated that Bryant could not participate in the settlement as she had not been added, nor had she brought a grievance of her own in a timely manner. Moreover, in an advisory opinion, the mediator stated that, in his opinion and from drawing upon past experience, if the matter was taken to arbitration, the arbitrators also would refuse to allow Bryant to be included in the grievance.

[*P10] On December 21, 1999, Perkins and Gray met with officials from the Office of Collective Bargaining in order to execute the settlement agreement. Undeterred by the mediator's refusal to include Bryant in the settlement agreement, or his advisory opinion about the result if the matter were taken to binding arbitration, Perkins and Gray once again attempted to include Bryant in the settlement of the grievance. Specifically, they drafted the following addendum which they submitted for incorporation:

[*P11] "Union and Management agree that per Sections 7.04, and 7.10A of the current contract, that the class involved in the above grievance should include all RN-2's **[**7]** that are listed on the overtime call list for the time period in question. Therefore Pauline Bryant RN-2 Will [sic] be included in the settlement of this grievance."

[*P12] CMC declined to voluntarily pay Bryant according to the terms of the settlement agreement. Although the union representatives repeatedly tried to include Bryant in the settlement of the June 16, 1999 grievance, their efforts during the nonbinding portion of the contractual process were unsuccessful. Having failed to secure participation in the settlement, on January 21, 2000, Bryant filed two unfair labor practice charges against the union, alleging as follows:

[*P13] "I, Pauline Bryant, am a RN2 for the State of Ohio/Corrections Medical Center (CMC). I received a copy of an amendment [sic] to class grievance # 27-04-990707-0362-02-11, on 22 Dec. 99. Debaroh [sic] Perkins and Michelle Gray are the DR&C/CMC delegates, parties to the grievance. The delegates contends [sic] that between May 31, 1999 and Jun [sic] 16, 1999, CMC Management 'did not contact any staff

members on any shifts regarding overtime opportunities on all shifts that resulted from call offs or other staff shortages.' The union [**8] sought as its remedy that eight (at time and one half) be awarded for each missed overtime opportunity, for each impacted employee. To this end the following RN2's received awards: John Kershner, Kevin Swords, Toni Brady and Lesa Morris. I was not represented in the class grievance by the Union or CMC delegates D. Perkins or M. Gray. I charge that these delegates and the union violated my rights to fair representation by intentionally omitting [sic] my name from the class grievance."

[*P14] ~~On June 22, 2000~~, SERB found probable cause sufficient to warrant a hearing before an Administrative Law Judge ("ALJ"). After an evidentiary hearing before the ALJ on September 6, 2000, as well as post-hearing briefs, on November 21, 2000, the ALJ issued a proposed order concluding that the union had violated R.C. 4117.11(B)(1) and (B)(6) when it settled a grievance without including a known member of the affected class.

[*P15] On December 13, 2000, the union filed exceptions to the proposed order of the ALJ. On March 1, 2001, SERB issued a decision in which it found that the union had violated its duty of fair representation. The union timely appealed that [**9] order to the Franklin County Court of Common Pleas, and the court of common pleas released a decision affirming SERB's order. The union appeals the order of the trial court, setting forth the following six assignments of error:

[*P16] "[1.] The common pleas court erred in affirming the order of appellee State Employment Relations Board ('SERB') that appellants violated R.C. 4117.11(B)(1) and (B)(6). SERB's order was not supported by substantial evidence and should have been reversed under the standards applicable to R.C. 4117.13 appeals.

[*P17] "[2.] The court of common pleas erred to the prejudice of appellants by failing to review and analyze the SERB opinion and order from which the appeal was taken, and by failing to correctly apply the appropriate standards of review.

[*P18] "[3.] The court of common pleas erred in granting deference to an administrative interpretation of a collective bargaining agreement, especially where the administrative interpretation differed from that of the contractually established mediator upon whose interpretation appellants had relied in settling the grievance at issue. SERB's [**10] order substituted the judgment of SERB for that of the contractually established mediator and the common pleas court erred in allowing SERB's opinion and order to stand.

[*P19] "[4.] The common pleas court erred to the prejudice of appellants in affirming the opinion and order of SERB that appellants would have been successful in arbitrating a claim for Bryant and could have settled claims for the named grievants while proceeding to arbitration on Bryant's claim, and the common pleas court also erred in affirming the opinion and order of SERB that appellants failed to take a basic and required step of the grievance procedure with regard to Bryant and that appellant's reliance upon the opinion of the contractually established mediator was arbitrary.

[*P20] "[5.] The common pleas court erred to the prejudice of appellants in upholding SERB's order and determination that appellants engaged in unfair labor practices against Pauline Bryant in settling a grievance in which Bryant was not named and had never requested that the union pursue, and the court also erred in failing to find that Bryant's claims were barred by her failures to file or attempt to file a grievance.

[**11] [*P21] "[6.] The trial court erred to the prejudice of appellant Union in affirming SERB's opinion and order that the Union was a proper party to the complaint."

[*P22] All of the union's assignments of error, except the second, similarly challenge SERB's adjudication of Bryant's grievance. They therefore will be discussed jointly.

[*P23] The Ohio Supreme Court explained the review process on appeal in *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835, that:

[*P24] "R.C. 4117.13(D) governs appeals of SERB's orders to courts of common pleas. It provides in relevant part:

[*P25] " 'Any person aggrieved by any final order of the board granting or denying, in whole or in part, the relief sought may appeal to the court of common pleas of any county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal * * * .

[*P26] " The court has exclusive jurisdiction [**12] to grant the temporary relief or restraining order it considers proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. *The findings of the board as to the facts, if supported by substantial evidence on the record as a whole, are conclusive.* (Emphasis added.)'

[*P27] "In *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260, 533 N.E.2d 264, 266, this court described the extremely deferential standard of review applied to factual determinations of SERB pursuant to R.C. 4117.13(D). We observed therein that disputes as to conflicting evidence * * * are properly determined by SERB, which was designated by the General Assembly to facilitate an amicable, comprehensive, effective labor-management relationship between public employees and employers. *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44, v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 5, 22 OBR 1, 4, 488 N.E.2d 181, 184-185. As long as SERB's decision on such matters is supported by substantial evidence, it must be affirmed. [*13] Courts should not be required to intervene in every factual dispute between contesting parties.'

[*P28] "When undertaking a review of an order of adjudication rendered by an administrative agency, a court of common pleas acts in a limited appellate capacity. See, generally, *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 279-280, 58 O.O. 51, 53-54, 131 N.E.2d 390, 393-394.

[*P29] "Accordingly, while resolution of conflicting evidence is the province of SERB, the determination of whether the order of the agency can withstand the standard of review prescribed by R.C. 4117.13(D) is essentially a question of law for the court of common pleas. As such, a reviewing court which seeks to ascertain whether the common pleas court has applied the appropriate standard of review to SERB's factual findings is not compelled to adhere to the conclusion reached by the common pleas court. Rather, it is the prerogative and the responsibility of the court entertaining the appeal to investigate whether the lower court accorded due deference to the factfinder.

[*P30] "This is not unlike the function performed by this court in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273, [*14] and in *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 10 OBR 500, 462 N.E.2d 407, and prescribed by R.C. 119.12 for courts of appeals." 63 Ohio St.3d at 343-344.

[*P31] Given that law, we initially note that Bryant's complaint against the union charged the union with violating her "rights to fair representation by intentionally omitting [sic] [her] name from the class grievance." Because that is the only issue set forth in Bryant's complaint, it arguably is the only issue SERB should have decided. Instead, SERB framed the issue it determined as: "District 1199, Service Employees International Union, AFL-CIO * * * Ms. Michele Gray, and Ms. Doborah Perkins [sic] violated Ohio Revised Code * * * by settling a class grievance without

including a known member of the affected class in the settlement."

[*P32] In resolving the issue it framed, SERB divided the issue into two parts: whether the union breached its duty to Bryant in failing to include Bryant in the filed grievance, and whether the union breached its duty in settling the grievance without including Bryant. SERB applied R.C. 4117.11(B)(1) and (B)(6), which [*15] provide:

[*P33] "(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

[*P34] "(1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. * * *

[*P35] " * * * [or]

[*P36] "(6) Fail to fairly represent all public employees in a bargaining unit[.]"

[*P37] In its opinion, SERB explained that when an unfair labor practice charge is filed which alleges that a union has violated its duty of fair representation under R.C. 4117.11(B)(1) and (B)(6), SERB determines whether the union has acted either arbitrarily, discriminatorily, or in bad faith. A breach of the union's duty exists if any of these factors is present. In this case, there was no allegation that the union acted in bad faith or in a discriminatory manner. Thus, SERB first determined whether the union's failure to specifically name Bryant on the class grievance was an arbitrary omission.

[*P38] SERB explained that it has adopted the analysis of the United States Sixth Circuit Court of Appeals in order to determine whether or not conduct is arbitrary. [*16] In *Vencl v. Internatl. Union of Operating Engineers* (1998), 137 F.3d 420, 426, the court held 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." SERB explained that a union has certain basic and required actions that it must take in order to fulfill its duty of fair representation. It then listed several examples, including the filing of a grievance, the processing of a grievance, as well as the duty to mediate and/or arbitrate the grievance when appropriate.

[*P39] SERB also noted that the parties' CBA contains a grievance procedure which culminates, if need be, in final, binding arbitration. Class grievances under the CBA could be initiated in three ways. First, a grievance could be designated a "class action," and filed

listing some or all of the names of grievants. Second, a grievance could be filed as a class action by merely listing several names of similarly situated grievants. Finally, a class grievance could also be filed listing no names at all.

[*P40] In this [**17] case, Perkins filed a class grievance at "Step 3" of the CBA grievance procedure, which listed several names, and which was also signed by two of the named individuals. In the grievance, Perkins alleged that "management did not contact any staff members on any shifts regarding overtime opportunities on all shifts that resulted from call offs or other staff shortages." Although Bryant's name was not listed on the grievance, she was a known member of the class whose name was listed on the overtime call sheet which CMC should have used.

[*P41] SERB, however, determined that Perkins requested relief for all of the nurses, not only those named on the grievance, who had missed overtime opportunities as a result of CMC's failure to abide by the terms of the CBA. Thus, while the grievance was not specifically labeled a "class grievance," SERB deemed it a class grievance because it requested relief for six named employees as well as all others similarly situated. SERB thus determined that the union had not acted in an arbitrary manner when it did not list Bryant's name on the grievance. In its opinion, SERB explained:

[*P42] "In our review of what constitutes arbitrary acts, we [**18] are not requiring union officials to endlessly search for all potential unnamed grievants to determine if any of them wishes to file a grievance on a particular issue before filing a grievance. Under many collective bargaining agreements, the time period for initiating a grievance is relatively brief. * * *

[*P43] "In the present case, the CBA requires the Union to identify the class members by name only when requested by the Agency Head or designee. Under 'Statement of the Grievance' Ms. Perkins wrote: 'Management did not contact *any* staff members on *any* shifts regarding overtime opportunities on *all* shifts that resulted from call offs or other staff shortages.' * * * The essential elements of a class grievance under the CBA are met when more than one bargaining-unit member files a grievance alleging a violation that affects more than one member in the same way. Although the grievance in question was not labeled a class grievance, it falls within the description of a class grievance according to the CBA's terms." (Emphasis sic.) 22 Ohio St. 3d at 7.

[*P44] SERB went on to note that the documents acknowledging receipt of the grievance and rescheduling of the grievance [**19] both refer to it as a class action. It also explained that the grievance was filed at "Step 3,"

in accordance with the CBA's requirement for class grievances. Accordingly, SERB concluded that the omission of Bryant's name from the initial filing of the grievance did not deprive her of her status as a member of the affected class. SERB arguably did not err in concluding that the union did not act in an arbitrary manner when it did not list Bryant's name on the filed grievance. Even if SERB properly decided the first of the two parts of the issue it framed, it erred in its conclusion under the second part.

[*P45] SERB's second determination, challenged by the union was that the union acted in an arbitrary manner in violation of R.C. 4117.11(B)(1) and (B)(6) when it settled the grievance excluding one known member of the class. We cannot agree.

[*P46] Perkins and Gray attempted more than once to include Bryant in the settlement. The mediator refused to permit it and later issued an advisory opinion that the arbitrators would have refused to allow Bryant to participate in the settlement. With those facts, we are unable to conclude the union failed [**20] Bryant. See *Curth v. Faraday, Inc. (E.D.Mich.1975), 401 F. Supp. 678, 681* (concluding union's failure to arbitrate a grievance because of a lack of local union funds and because the union had been advised that the arbitrator would likely rule against the grievance did not constitute arbitrary conduct because the decision not to proceed to arbitration was based on rational and objective grounds).

[*P47] In addition, we are reluctant to conclude the union should have jeopardized a settlement beneficial to all concerned members, except Bryant, in order to take the matter to the next level in the grievance process in an attempt to include Bryant. See, e.g., *Lowe v. Hotel & Restaurant Employees Union, Local 705 (1973), 389 Mich. 123, 145-147, 205 N.W.2d 167* ("having regard for the good of the general membership, the union is vested with discretion which permits it to weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, the cost, even the desirability of winning the award, against those considerations which affect the membership as a whole"). As a result, we cannot conclude the union acted arbitrarily [**21] in the face of a mediator that repeatedly refused to allow the union to include Bryant in the settlement, and a settlement that was beneficial to all the other settling members.

[*P48] Under the totality of the largely undisputed facts and circumstances presented in this matter, SERB erred in concluding that the union should have taken steps beyond the mediation level on Bryant's behalf. While the mediator's advisory opinion was not binding, it provided enough guidance to the union to take the union's actions outside the realm of arbitrary. Moreover,

the record does not indicate that Bryant ever requested the union take the matter to the next level in the grievance procedure, or that SERB concluded an attempt to pursue the next level likely would have resulted in a ruling favorable to Bryant, given the mediator's opinion to the contrary.

[*P49] For the foregoing reasons, the first, third, fourth, fifth and sixth assignments of error are sustained to the extent indicated, rendering the second assignment of error moot. Accordingly, the judgment of the Franklin County Court of Common Pleas is reversed and the matter is remanded to that court with instructions to return the **[**22]** matter to SERB to enter a determination that the union did not commit an unfair labor practice.

Judgment reversed and case remanded with instructions.

BRYANT and TYACK, JJ., concur.

PETREE, P.J., dissents.

DISSENT BY: PETREE

DISSENT

PETREE, P.J., dissenting.

[*P50] As noted by the majority, this matter comes before the court on appeal from a judgment of the Franklin County Court of Common Pleas affirming a decision in favor of appellee Pauline Bryant by the Ohio State Employment Relations Board ("SERB"). In this case, the majority concludes that the trial court's opinion affirming the decision rendered by SERB should be reversed, and this matter should be remanded to that court with instructions to return the matter to SERB so that SERB may enter a determination that the Service Employees International Union District 1199, AFL-CIO ("union") did not commit an unfair labor practice. Being unable to agree with that conclusion, I respectfully dissent.

[*P51] On June 16, 1999, volunteer union representative, Deborah Perkins, filed a grievance on behalf of all of the nurses who worked in her department alleging that the Ohio Corrections Medical Center ("CMC") had **[**23]** assigned overtime to nurses who worked outside of the department prior to offering the overtime to the nurses who worked within the department as required by the Collective Bargaining Agreement ("CBA"). There is no dispute in this matter that the grievance filed by Perkins qualified as a class grievance pursuant to Article 7.04 of the CBA. That section of the CBA provides that:

[*P52] " * * * When a group of bargaining unit employees desires to file a grievance involving an

alleged violation that affects more than one (1) employee in the same way, the grievance may be filed by the union. A grievance so initiated shall be called a Class Grievance. Class Grievances shall be filed by the Union within fifteen (15) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the Class Grievance. Class Grievances shall be initiated directly at Step Two (2) of the grievance procedure if the entire class is under the jurisdiction * * * of more than one (1) Step Two (2) management representative. The Union shall identify the class involved, including the names if necessary, if requested by the agency head or designee."

[*P53] On August 12, 1999, a **[**24]** "Step 3" hearing was held in accordance with the grievance procedure contained in the CBA. Thereafter, the grievance proceeded to mediation as provided for under "Step 4" of the grievance procedure. The mediation took place at the State of Ohio, Office of Collective Bargaining, and through the parties' efforts, a settlement of the grievance was achieved.

[*P54] Although the union representatives repeatedly tried to include Bryant in the settlement of the grievance, their efforts during the nonbinding portion of the CBA grievance process were unsuccessful. Having experienced no success in securing participation, Bryant filed an unfair labor practices charge against the union, accusing the union of failing to fulfill its duty of fair representation.

[*P55] On June 22, 2000, SERB found probable cause sufficient to warrant a hearing before an Administrative Law Judge ("ALJ"). The parties presented documentary and testimonial evidence to the ALJ, and following the conclusion of that hearing, the parties filed post-hearing briefs. On November 21, 2000, the ALJ issued a proposed order in which she concluded that the appellants had violated R.C. 4117.11(B)(1) **[**25]** and (B)(6) when they settled the grievance excluding a known member of the affected class.

[*P56] On March 1, 2001, SERB issued an independent decision in which it found that the appellants had violated their duty of fair representation. SERB's order was later affirmed by the Franklin County Court of Common Pleas. Having carefully reviewed the record, briefs, and arguments of the parties, I conclude that the essential issue presented is whether the union, when it filed a class grievance, violated its duty to fairly and equally represent all class members when it settled the grievance excluding Bryant, a known member of the applicable class, and when it failed or refused to pursue all available remedies available to it pursuant to the CBA. I believe that, contrary to the conclusion of the majority, the opinion of the mediator was supported by

the record and the admissions and statements of the parties. It was not, in my opinion, "an advisory opinion that the arbitrators would have refused to allow Bryant to participate in the settlement * * *," as stated in the majority opinion.

[*P57] Although Bryant's name was not listed on the grievance, there is no question or dispute [**26] in this case that she was a known member of the class, whose name was listed on the overtime call sheet which should have been used by CMC. After the grievance had been filed, a "Step 3" hearing was held in accordance with the provisions of the CBA. However, at the conclusion of the hearing, the entire grievance was denied. Interestingly, although they had been informed their grievance had been denied, the union took advantage of its rights under the CBA and required the parties to proceed to structured mediation, the next step of the grievance procedure contained in the CBA.

[*P58] During the course of mediation, Perkins continued her efforts to "add" Bryant to the grievance, but was unsuccessful in doing so despite the fact that the grievance was filed as a class grievance, and despite the fact that there was no question that Bryant was similarly situated with the other members of the class. Appellants make much of the fact that after a settlement was reached regarding "the class," the mediator was asked to render an advisory opinion as to whether or not Bryant would be allowed to participate in the settlement if the matter were taken beyond mediation to arbitration. Again, [**27] I believe the record clearly shows that the CBA provides that the mediator was qualified only to render an unofficial, nonbinding opinion.

[*P59] According to SERB, "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." *Vencl v. Internatl. Union of Operating Engineers* (1998), 137 F.3d 420, 426. SERB continued, explaining that a union has certain basic and required actions that it must take in order to fulfill its duty of fair representation. Id. It then listed several examples, including the filing of a grievance and the processing of a grievance, as well the duty to mediate and/or arbitrate the grievance on behalf of the union's members.

[*P60] In this case, four employees initially approached Perkins and asked her to file a grievance on their behalf. However, when she did so, Perkins requested relief for all of the nurses who had missed overtime opportunities as a result of CMC's failure to abide by the terms of the CBA, not merely those named on the grievance. Thus, while the [**28] grievance was not specifically labeled a "class grievance," because it

requested relief for six named employees as well as all others similarly situated, it qualified as a class grievance when it was filed. Because the grievance qualified as a class grievance when it was filed, it is beyond argument that Bryant was a member of the class from the very beginning.

[*P61] The Ohio Supreme Court in *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835, stated:

[*P62] "In *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260, 533 N.E.2d 264, 266, this court described the extremely deferential standard of review applied to factual determinations of SERB pursuant to *R.C. 4117.13(D)*. We observed therein that disputes as to conflicting evidence " * * * are properly determined by SERB, which was designated by the General Assembly to facilitate an amicable, comprehensive, effective labor-management relationship between public employees and employers. *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44, v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 5, 22 OBR 1, 4, 488 N.E.2d 181, 184-185. [**29] As long as SERB's decision on such matters is supported by substantial evidence, it must be affirmed. Courts should not be required to intervene in every factual dispute between contesting parties." 63 Ohio St.3d at 343.

[*P63] There is no question that Bryant was a member of the class of grievants which, except for her, all received compensation as a result of CMC's violation of the overtime provisions of the CBA. Indeed, a second identical grievance was filed based upon the same facts and conduct in which Bryant's participation as a class member was never challenged even though she was not a "named" grievant. There is no question that the record in this case reveals that the parties treated this grievance as a class grievance. However, in light of all of the uncontested facts of this case, including the union's admitted attempts to obtain "permission" to add Bryant to the class of which she was already a member, the union agreed to leave Bryant out of the settlement and proceed no further based upon nothing more than an informal opinion of a mediator who had no authority under the CBA to make any rulings against either of the parties.

[*P64] As noted by the majority, the union [**30] argued that its decision to settle the matter to the exclusion of Bryant, and proceed no further under the provisions of the CBA, was justified in light of the mediator's nonbinding advisory opinion. However, as noted by SERB, the union's failure to exhaust the available avenues set forth in the CBA to protect Bryant's

rights was deliberate and, in my view, was not based upon any distinguishable fact or rational justification.

[*P65] Although Bryant had everything to gain and nothing to lose by proceeding to arbitration, the union refused to request arbitration on her behalf. Having thoughtfully reviewed this matter, I believe that the only convincing explanation for the union's behavior is that it would have had to invest additional time and money to settle the grievance if it were to properly represent

Bryant's interest. In light of the facts of this case, I conclude that the appellants' failure to represent Bryant through the established grievance procedure set forth in the CBA once it had agreed to a settlement which included all of the other members of the class was arbitrary and in violation of *R.C. 4117.11(B)(1) and (B)(6)*. Accordingly, I would [**31] rule that the trial court correctly affirmed SERB's decision in this case. As the majority concludes otherwise, I respectfully dissent.

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Ohio Public Employee ReporterIn re State Employment Relations Board, Complainant, v. Ohio Civil Service Employees Association,
AFSCME, Local 11, Chapter 2525, Respondent.

AFSCME OCSEA CHAPTER 2525

Docket No. 97-ULP-04-0181

Ohio State Employment Relations Board

1998 OPER (LRP) LEXIS 488SERB 98-010

May 15, 1998, Decided

July 22, 1998, Issued

HEADNOTES:

Duty Of Fair Representation -- Grievance Filing -- Negligence -- 15.31, 23.26, 73.113 Where record was insufficient to determine whether union failed to take basic and required step of mailing grievance appeal, SERB declined to find that union acted arbitrarily in breach of its duty of fair representation. Therefore, where charge did not allege that union acted in bad faith or discriminated against employee, charge was dismissed because complainant failed to satisfy burden of demonstrating that an unfair practice occurred. Duty Of Fair Representation -- Standards -- 23.1, 73.113 In order to bring Board's standard for evaluating breach of statutory duty of fair representation into conformance with U.S. Supreme Court's holding in *Vaca v. Sipes*, 386 US 171 (1967), SERB modified In re AFSCME Local 2312, SERB 89-029 (1989) to hold that arbitrariness, discrimination and bad faith are distinct components of the same statutory duty of fair representation and are to be viewed on an equal basis. Therefore, an inquiry into a union's actions will not end upon a finding that the stated reason for its actions was rational.

PANEL: Before Pohler, Chairman; Gillmor, Vice Chairman; and Mason, Board Member**OPINIONBY:** GILLMOR, Vice Chairman:**OPINION:** Order (Opinion Attached)

On April 10, 1997, Sandra A. Cook ("Charging Party") filed an unfair labor practice charge against the Ohio Civil Service Employees Association, AFSCME, Local 11, Chapter 2525 ("OCSEA" or "Respondent") alleging that OCSEA had violated Ohio Revised Code ("O.R.C.") 4117.11 (B)(1) and (B)(6). On August 28, 1997, the State Employment Relations Board ("SERB" or "Complainant") determined that there was probable cause to believe that OCSEA committed an unfair labor practice by not properly filing the Charging Party's grievance appeal. On September 17, 1997, a complaint was issued alleging violation of O.R.C. 4117.11 (B)(6).

A hearing was conducted on November 6, 1997. The Complainant and the Respondent filed post hearing briefs. On January 14, 1998, the Hearing Officer's Proposed Order in the above-styled case was issued. Exceptions to the proposed order and a response to exceptions were filed.

After a review of the Hearing Officer's Proposed Order, 15 OPER 1113, the exceptions, response to exceptions, and the record before us, the Findings of Fact and Conclusions of Law in the Hearing Officer's Proposed Order are adopted, the complaint is dismissed, and the charge is dismissed with prejudice pursuant to the attached Opinion, incorporated by reference.

It is so ordered.

POHLER, Chairman; GILLMOR, Vice Chairman; and MASON, Board Member, concur. Opinion
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, 15 OPER 1113, 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. Background

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 from July 4 through July 24, 1996. OCSEA timely filed a grievance

APPX. EXHIBIT

B

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 Ms. 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 Courts 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, 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 reasons for its contractual conduct, but we did express the following: "There is no doubt that to meet

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 evidential 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 Vendl 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 OCR had no record indicating that

contents of what he was mailing. The parties have stipulated that OCSEA 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, 6 OPER 6738, (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, 11 OPER 1041, (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.

----- Footnotes -----

1 Findings of Fact Nos. 4-20.

2 AFSCME, *supra* at 3-202.

3 When 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.

----- End Footnotes -----

CONCURRY: MASON

CONCUR:

Concurring Opinion:

Mason, Board Member:

I agree with the majority's conclusion in this case 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). However, I do not agree with the majority's analysis for two reasons: 1) the majority's analysis of SERB's prior precedents is at best inaccurate and misleading; and 2) the majority's analysis and discussion and its announced new standard muddy the water and, instead of helping public employees and employee organizations to understand what the law requires, it creates confusion.

The duty of fair representation is one of the most fully developed areas in SERB's case law. For almost a decade, different administrations carefully and thoughtfully built a body of law step-by-step, interpreting the not-so-intuitive topic of what constitutes a violation of the duty of fair representation. In *In re AFSCME, Local 2312, SERB 89-029 (10-16-89)* ("AFSCME"), the first key opinion in this area, the Board laid out a straight-forward procedure on how to determine whether a violation of the duty of fair representation occurred. Adopting the U.S. Supreme Court standard in *Vaca v. Sipes, 386 U.S. 171, 207, 64 L.R.R.M. 2369, 2376 (1967)* ("Vaca"), which stated, "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," SERB laid out the first step in interpreting this standard. The first step under AFSCME is to determine whether there is a rational basis for the union's position. This is an easy step to understand and implement. Obviously, if there are non-pretextual legitimate reasons for the union's actions, no violation has occurred because according to the federal courts and SERB, the union is permitted a wide range of discretion in carrying out both collective bargaining and contract administration responsibilities. This preliminary step is logical since the existence of non-pretextual legitimate reasons usually indicates there is no arbitrariness, discrimination or bad faith. Where no apparent factors that show legitimate reasons can be demonstrated, the second step under AFSCME is to look for evidence of bad faith or discriminatory intent. If neither is present, arbitrariness under AFSCME will be found only if the union's conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment.

The majority articulated three reasons why the standard set forth in AFSCME should be modified. First, according to the majority, "AFSCME appears to place an unbalanced emphasis on the component of arbitrariness. Arbitrariness is characterized as 'the now-ubiquitous duty-of-fair-representation linchpin.' When applying the AFSCME test, we would look at bad faith and discriminatory intent only after looking at the 'linchpin' of arbitrariness."¹ The majority creates an issue where none exists. The characterization of arbitrariness as the linchpin of the duty of fair representation has nothing to do with placing an unbalanced emphasis on the component of arbitrariness. Arbitrariness is the linchpin of the duty of fair representation in the sense that it is much easier to prove arbitrariness than bad faith or discriminatory intent since motivation does not play a part in the former. To prove arbitrariness, an objective analysis of the circumstances is all that is needed. To prove bad faith or discriminatory intent, motivation must be determined, which is a much more difficult task.² Thus, characterizing arbitrariness as the linchpin of the duty of fair representation is a practical procedural matter and has nothing to do with "placing an unbalanced emphasis on the component of arbitrariness" as the majority claims.

AFSCME, the seminal duty of fair representation case in Ohio, has never been and should not now be interpreted as promoting one component over the others. As a matter of fact, the majority never substantiates its claim that the U.S. Supreme Court viewed arbitrariness, discrimination, and bad faith as distinct components of the same duty that should be reviewed on an equal basis.³ Had the majority applied to Vaca the same analysis it applies to AFSCME, i.e., highlighting one sentence to make an issue where none exists, Vaca itself could be attacked as "placing an unbalanced emphasis" on some components and treating them unequally. For example, the Vaca Court said: "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employed has an absolute right to have his grievance taken to arbitration . . ." ⁴ (emphasis added). The Vaca Court says only arbitrarily, and does not mention the components of discrimination and bad faith. The Vaca Court also said: "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."⁵ Here the Court does not mention the component of discriminatory intent. In another example the Vaca Court said: "Since the union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device by providing him with recourse . . ." ⁶ Again, the Vaca Court mentions only the component of arbitrariness and says nothing about discriminatory intent or bad faith. Where, then, are the "distinct components" and "equal basis" in the majority's reading of Vaca? Why should SERB in AFSCME be held to higher scrutiny than the U.S. Supreme Court in Vaca? Clearly, the majority's indulgence in picking out specific sentences to make a dubious point is an act of obfuscation.

As for the order of investigating bad faith, arbitrariness, or discriminatory intent what does it matter which of the Vaca components SERB looks at first? Obviously, SERB cannot look at the three of them at the same time. The fact that the three components are examined in sic a certain order does not mean that they are not reviewed on an equal status. The majority chooses to read AFSCME in a certain way, though admitting that such reading was not the Board's intention, and then argues with the merits of such reading. This exercise is illogical and self-serving. AFSCME, as the Board intended it to be read and as it was interpreted and implemented by subsequent Board opinions, sets forth the most sensible path to follow. When a charge alleging a violation of the duty of fair representation is filed, the motivation of the union for the alleged violation is usually not specified, nor is it required to be specified. However, when SERB investigates the charge, possible bad faith and discriminatory motivations are and always have been examined. SERB investigators and the Board have always treated the three bases of violation, discrimination, bad faith and arbitrariness, on equal grounds.

The majority ignores In re OAPSE, SERB 93-021(12-21-93) ("OAPSE"), which clearly demonstrates that where discrimination or bad faith is suspected the analysis does not primarily and exclusively consider arbitrariness. OAPSE involved a preference by a union of one unit member who was a union official over another unit member. While no violation was found since the contractual language supported the union's position, the Board delved straight into the issue of whether a violation occurred on the bases of discrimination and bad faith. In OAPSE the Board stated: "At the outset it should be stated that any preference by an employee organization in supporting one unit member over another for the reason that the preferred one is a union official is clearly an act of discrimination and bad faith in violation of the duty of fair representation."⁷ Clearly where the issue before the Board involves bad faith or discrimination the Board has never hesitated in the past to deal with these two components head on.

The majority also ignores In re Ohio Civil Service Employees Assn, Local 11, SERB 95-020 (11-8-95) ("Klizer"), where the Board first determined that there was no evidence in the record that the union acted in bad faith or in a discriminatory manner and only afterwards inquired into arbitrariness. All this clearly flies in the face of the majority's reading of AFSCME as mandating first an examination for arbitrariness before looking for bad faith and discrimination. The AFSCME procedure has nothing to do with and does not affect the equality of treatment of the three Vaca components. Hence, the

majority's assumption here is erroneous and unsupported.

Also, the majority reads AFSCME to state that there is no inquiry as to whether a union's 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.⁸ This is another erroneous and unsupported assumption by the majority. First, the majority cites to *In re Ohio Civil Service Employees Assn./AFSCME, Local 11, SERB 93-019 (12-20-93) ("OCSEA")* for this specific assumption.⁹ There is nothing in OCSEA to support such an assumption. No reason given by the union for its action can be accepted as justification if it is pretextual. Again, I would like to direct the majority's attention to OAPSE, where the rational reason the union gave for its action was scrutinized thoroughly by the Board before it was deemed proper.

The second criticism the majority has regarding AFSCME is that the AFSCME standard does not require articulation of the actual reason for the union's controversial conduct. This is not a valid criticism of the AFSCME standard. There is enough specific language in AFSCME dealing with the union's reasons for its controversial act to accommodate such articulation if the majority so wishes. Instead, the majority was obviously more interested in pointing out the obscure "linchpin" sentence. OCSEA,, not AFSCME, is the SERB opinion where the Board ruled that not articulating the actual reason is not by itself a violation of the duty of fair representation. But even in OCSEA the issue of articulating a reason is very carefully laid out as former Chairman Donna Owens wrote for a unanimous Board:

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. It cannot be emphasized enough that we do expect unions to be able to articulate a rational explanation of their actions or inactions where a question arises regarding the duty of fair representation. Clearly, rational behavior is based on rational reasoning, which in most cases implies the ability to articulate the reasoning . . .

However, we are reluctant to find the lack of an articulated reason a per se violation of the duty of fair representation. (emphasis added).

Thus, a careful reading of AFSCME and OCSEA demonstrates that the majority's criticism is unwarranted. As a matter of fact, the majority itself agrees with the prior Board decision that the lack of an articulated reason is not a per se violation. The majority writes: "A union failure to state the reasons behind its action may result in an unrebutted presumption of arbitrariness."¹⁰ (emphasis added). The majority used "may" and not "shall." Clearly, the majority here, like the Board in AFSCME, conceives of a possible situation where a union's failure to state the reasons behind its action may not result in an unrebutted presumption of arbitrariness. Hence, the majority is clearly in agreement with OCSEA that the lack of an articulated reason is not a per se violation. Again, the majority's criticism of prior Board opinions is unjustified especially since the majority's own conclusion does not differ.

But what is more unsettling is the majority statement in the end of its opinion that it is reversing OCSEA "concerning whether the union must articulate the actual reason for the conduct that is in controversy."¹¹ What exactly does the majority reverse? What does this vague statement mean? Moreover, will the lack of an articulated reason result in finding a violation even where the conduct is rational, non-discriminatory and taken in good faith? In the scenario presented in OCSEA, where the actual reason can never be articulated since the union officer who decided on the conduct died, but the conduct was justified and rational, would the Board find a violation?

The third critical point the majority raises demonstrates a complete lack of understanding of the AFSCME standard. The majority states: "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."¹² (emphasis added). First, the majority misstates the AFSCME standard. The AFSCME standard does not start with the conduct but with the question whether there is a rational basis for the union's position. ¹³ This is very important since rational basis includes the articulation of a reason for the conduct. The majority clearly missed this distinction. Evaluating the conduct is the last step when no rational basis is found. Second, on the conduct issue, the major fails to realize that the AFSCME standard as explained by the Board in OCSEA follows the exact footsteps of the U.S. Supreme Court in *Airline Pilots Assn. v. O'Neill, 499 U.S. 65, 136 L.R.R.M. 2721 (1991) ("O'Neill")*, which held that "arbitrariness will be found only if the conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment."¹⁴ Third, the majority's complaint that AFSCME does not allow a gray area between honest mistake or misjudgment and egregious conduct has no basis. Arbitrariness is not a matter of degree; the conduct either exceeds certain boundaries or it does not. There can be no gray area between egregious conduct and honest mistake or misjudgment because egregious conduct is defined as conduct that exceeds honest mistake or misjudgment. Where one ends the other one begins. The issue is not whether a gray area exists or not but where to draw the line between honest mistake and egregious conduct.

The majority does not appreciate the continuous development of SERB case law as a step-by-step interpretation of what constitutes honest mistake and egregious conduct, of where one stops and the other begins, and thus of where to draw the line between an act that is arbitrary in violation of the duty of fair representation and one that is not. The majority writes: "When looking at this issue, we must look at all of the circumstances involved in determining what steps were basic and required, how severe the mistake or misjudgment was, what the consequences of the union's actions were, and what the union's reasons for its acts were."¹⁵ These circumstances are not new and have already been accepted in SERB case law, case law unknown to or disregarded by the majority. For example, the union's reasons for its actions are part of the standard in AFSCME: "In making such an assessment, this Board will look to the union's reason for its action or inaction."¹⁶ The severity of the mistake or misjudgment is the heart of the AFSCME standard, separating an honest mistake or misjudgment from egregious conduct. As a matter of fact, in OCSEA the Board continued to develop the circumstances when an honest mistake stops being an honest mistake and becomes so severe as to cross the line into egregious conduct, and hence a violation. The Board said in OCSEA that "gross negligence, unlike simple negligence, is not within the bounds of honest mistake or misjudgment."¹⁷ Thus, apart from maligning AFSCME without any rational basis, the majority so far has not suggested anything that AFSCME, followed by OCSEA, has not done already or has not encompassed at least implicitly.

The most troublesome part of the majority opinion is the section where it summarizes the "new" standard. It says: "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 either 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. When the Complainant meets this 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 excuse for its conduct."¹⁸ The first part of this standard is neither new nor instructive. It is a mere repetition of the Vaca components, which has long been adopted by SERB, without shedding any light on how to interpret them. The whole point of AFSCME, OCSEA, *In re Ohio Health Care Employees Union, Dist 1199*, SERB 93-020 (12-20-93), *Kizer* and others was to interpret the meaning of arbitrary, discriminatory and bad faith. We are well past the stage of stating the bare factors of what constitutes a violation of the duty of fair representation. It has been ten years since this Board, in AFSCME, stated specifically that the test for a violation of the duty of fair representation is arbitrary, discrimination or bad faith conduct, following *Vaca*. By taking us back to that stage, the majority, contrary to its declaration, does not modify AFSCME in any way. It only takes the contents of a box that for years we so carefully filled up, throws them away, leaves the box exactly as it was, but empty, and announces that today we have a new box. Well, we do not have a new box. We have the same old box, only now it is empty.

If the majority's wish is to incorporate the *Venci v. Int'l Union of Operating Engineers*, 137 F.3d 420, 157 L.R.R.M. 2530 (6th Cir. 1998), example into SERB case law, it does not need to muddle the law by criticizing AFSCME unfairly and unnecessarily and by reversing nondescriptive prior Board precedents on unclear grounds. It needs only to say that a union's failure to take a basic and required step creates a presumption of gross negligence that can be rebutted if the union establishes a justification or excuse for its actions or inactions, and that the Board will not find that an unfair labor practice has occurred if the established justification or excuse constitutes simple negligence. Such a statement would fit well into the development of SERB case law regarding when the line is drawn between honest mistake or misjudgment and egregious conduct.

Finally, as far as the ominous connotation of the majority's statement: "Any SERB precedent in conflict with this holding is expressly overruled" is concerned, I count eight Board opinions apart from AFSCME, OCSEA and OAPSE that involve the duty of fair representation issue. One involves only a procedural issue. Two involve internal union matters. As for the other five opinions it would not take much time to clarify which of these opinions are in conflict and are overruled. I do not believe that the majority's opinion reversed any of SERB's prior opinions. Obviously the majority thinks so. If the majority believes previous SERB precedents have been reversed, it should name them and explain what part is modified or reversed. Failure to do so will cause unnecessary anxiety and confusion. The public deserves better.

----- Footnotes -----

1Majority Opinion, p. 4.

2A review of SERB filings through the years reveals that the vast majority of the allegations, as well as the findings, in duty of fair representation cases involved arbitrary conduct and not discrimination or bad faith.

3Majority Opinion, p. 4.

4*Vaca, supra* at 64 L.R.R.M. 2377.

5Id. at 2378.

6Id. at 2378.

010. at 2370.

7OAPSE, supra at 3-123.

8Majority Opinion, p. 4.

9Majority Opinion, fn.3.

10Majority Opinion, p. 5.

11Majority Opinion, p. 7.

12Majority Opinion, p. 4.

13AFSCME, supra at 3-204.

14OCSEA, supra at 3-116.

15Majority Opinion, pp. 6-7.

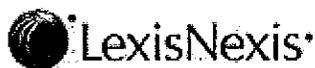
16AFSCME, supra at 3-203.

17OCSEA, supra at 3-116.

18The majority does not make the necessary distinction between "justification" and "actual reason."

On page 5 the majority writes: "When a complainant meets this burden of proof, a breach of duty of fair representation will be found if the union cannot rebut the findings by providing justification or viable excuse for its conduct." (emphasis added). The same language appears on page 7: "Once that burden has been met, the union must come forth with its justification or viable excuse for its actions or inactions." (emphasis added). However, on the bottom of page 7 the majority writes that it reverses OCSEA " . . . concerning whether the union must articulate the actual reason for the conduct that is in controversy." (emphasis added). "Actual reason" is not the same as "justification" or "viable excuse," as OCSEA clearly shows.

----- End Footnotes -----



LEXSBE 1995 OHIO APP LEXIS 2369

In the Matter of: Frances M. Wheeland, (Appellant), (Ohio State Employment Relations Board, Appellee).

No. 94APE10-1424 (ACCELERATED CALENDAR)

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1995 Ohio App. LEXIS 2369

June 6, 1995, Rendered On

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: Blaugrund, Sweeney, Gabel, Herbert & Mesirov, John S. Jones and Christopher B. McNeil, for appellant.

Betty D. Montgomery, Attorney General, Joseph D. Rubino and Jack Decker, for appellee.

Linda K. Fiely, for appellee Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO.

JUDGES: BOWMAN, P.J., YOUNG and LAZARUS, JJ., concur.

OPINION BY: BOWMAN

OPINION

OPINION

BOWMAN, P.J.

Appellant, Frances M. Wheeland, has been an employee of the Ohio Department of Taxation for more than twenty years and is a member of the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO ("union"). In August 1988, appellant was

promoted to a Tax Commissioner Agent 4 and, during her probationary period for that position, she applied for a promotion to the position of Tax Commissioner Agent 5. Appellant was notified that she was not a qualified employee because she was still serving a probationary period for the Tax Commissioner Agent 4 position.

Upon receipt of the notice that she was [*2] not qualified for promotion, appellant consulted with union stewards Patricia Rowe and David Norris, and filed a grievance which states in part:

"Another employee was given the position of Tax Commissioner Agent 5 in December of 1988, at the Freeway Dr. N. location in the Personal Auditing unit. Mrs. Wheeland feels that even though she had not completed her last month of probation for the Agent 4 position she had received she feels that for the length of time and the seniority she has over the employee who received that position (Agent 5) her remaining probation could have been abated."

Both Norris and Rowe, who were new to the position of union steward, expressed their opinion to appellant that she had a valid grievance based on her years of seniority and past practices within the Department of Taxation. Although not specified in the grievance, appellant's complaint is premised on a past practice in the Department of Taxation whereby probationary employees would be considered for, and could receive, a promotion, but the effective date of the promotion would



not occur until after the probationary period had been successfully completed.

The union pursued appellant's [*3] grievance through the Step 4 level of the grievance process provided in the Collective Bargaining Agreement between the state and the union. The grievance was denied at each step, on the basis that appellant was a probationary employee at the time she applied for promotion and, despite the fact that appellant had more seniority than any other applicant, she was not a qualified employee pursuant to *Ohio Adm.Code 123:1-23-03*. In April 1989, the union requested that appellant's grievance be arbitrated.

Due to an increasingly large number of grievances being submitted to arbitration, the union and the state agreed to an informal procedure, outside of the Collective Bargaining Agreement, that came to be known as the "Step Four and a Half Procedure" ("Step 4 1/2"). This procedure involves a meeting between an agency management representative, a paid union staff representative, the president of the employee union, and a representative of the Office of Collective Bargaining but not the employee. The purpose of a Step 4 1/2 meeting is to settle and resolve grievances in an informal setting. Appellant's grievance was scheduled for a Step 4 1/2 meeting and was discussed at the July 1989 meeting. [*4] No resolution of appellant's grievance was reached at that meeting, but it was decided that the union president, Evelyn Dudley, would investigate to determine whether other employees in appellant's circumstances had received a promotion and, if none were found to be similarly situated, the grievance would be withdrawn.

In December 1989, the grievance was withdrawn, however, the agreement signed by the parties does not indicate the reason for the action. Despite repeated requests by appellant of Dudley and later, of the new union president, Margarite Dummitt, as to the status of her grievance, appellant was not notified the grievance was withdrawn until April 1991.

In June 1991, appellant filed an unfair labor practice charge against the union alleging a violation of *R.C. 4117.11(B)(1)* and *(B)(6)*.¹ The State Employment Relations Board ("SERB") found probable cause that the union had committed an unfair labor practice and a complaint was issued in June 1992. The hearing officer found no violation of *R.C. 4117.11(B)(1)* or *(B)(6)* by the failure of the union to notify appellant that her grievance had been withdrawn, but did find that the withdrawal of the grievance was an unfair [*5] labor practice and ordered that appellant's grievance be submitted to arbitration. All parties filed exceptions to the hearing officer's report. SERB adopted the hearing officer's

finding that the failure to notify appellant of the withdrawal of her grievance was not an unfair labor practice but rejected the hearing officer's finding that withdrawing the grievance was an unfair labor practice.

1 *R.C. 4117.11(B)(1)* and *(B)(6)* provide:

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

"(1) Restrain or coerce employees in the exercise of the rights guaranteed in *Chapter 4117. of the Revised Code*. This division does not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.

" ***

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

[*6] Appellant appealed to the Franklin County Court of Common Pleas, which affirmed the order of SERB. Appellant filed a timely notice of appeal and has set forth the following assignments of error:

"First Assignment of Error: The State Employment Relations Board (SERB) erred when it rejected the recommendations of its hearing examiner and found Appellee had committed no violation of *R.C. 4117.11(B)(1)* or *(6)* and when it refused to require the parties to arbitrate the grievance. ***

"Second Assignment of Error: The Common Pleas Court erred in its application of law to fact and its deference to SERB's legal analysis when the Court

affirmed the decision of SERB finding no violation of R.C. 4117.11(B)(1) or (6)."

Appellant's assignments of error are related and will be addressed together.

In her first assignment of error, appellant contends SERB erred in rejecting the hearing officer's report by substituting its own definition of a union's duty of fair representation for the definition set forth in *Vaca v. Sipes* (1967), 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903, and *Air Line Pilots Assn., Internat. v. O'Neill* (1991), 499 U.S. 65, 111 S. Ct. [*7] 1127, 113 L. Ed. 2d 51 ("O'Neill"). In her second assignment of error, appellant contends that the court of common pleas erred when it affirmed the order of SERB.

R.C. 4117.12 provides that, when SERB determines there is probable cause an unfair labor practice has been committed, it should issue a notice of hearing and a hearing will be held before SERB, a board member or a hearing officer. In this instance, the matter was referred to a hearing officer. If no exceptions are filed to the recommended order, the recommended order becomes the order of SERB. If exceptions are filed, as occurred in this case, R.C. 4117.12(B)(2) authorizes SERB to rescind or modify the recommended order. Thus, contrary to what appellant argues, SERB was not required to accept the hearing officer's recommended order, but was required to make an independent evaluation of the facts and analysis of the law in order to respond to the exceptions. To require the deference appellant would have accorded to the hearing officer's recommended order, would make SERB little more than a rubber stamp and the filing of exceptions a meaningless exercise.

R.C. 4117.13 provides that an aggrieved party may appeal to the [*8] court of common pleas. R.C. 4117.13(B) provides that "the findings of the board as to the facts, if supported by substantial evidence, on the record as a whole, are conclusive." In *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, the Ohio Supreme Court held, at paragraphs one and two of the syllabus:

"1. The standard of review of a decision of the State Employment Relations Board on an unfair labor practice charge is whether there is substantial evidence to support that decision.

"2. Courts must afford due deference to the State Employment Relations Board's interpretation of R.C. Chapter 4117."

The court further stated, at 260-261:

" *** In reviewing the order, courts must accord due deference to SERB's interpretation of R.C. Chapter 4117. Otherwise, there would be no purpose in creating a specialized administrative agency, such as SERB, to make determinations. ***

"It was clearly the intention of the General Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117. *** This authority must necessarily include the power to interpret the Act to achieve its [*9] purposes. ***

"In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion " *** implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *** Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. *** "

Therefore, in reviewing a decision of the court of common pleas, the appellate court must determine whether the common pleas court erred as a matter of law in its legal analysis and whether it abused its discretion in evaluating the evidence.

In support of her argument that SERB erred in finding the union did not commit an unfair labor practice when it failed to arbitrate her claim and notify her of the withdrawal of her claim, appellant relies on *Vaca* and *O'Neill*. In *Vaca*, Benjamin Owens filed a grievance contesting his discharge [*10] from his employment at Swift & Company, and alleged the union had failed in its duty of fair representation when it elected not to take his grievance to arbitration pursuant to the Collective Bargaining Agreement between the union and Swift & Company. The United States Supreme Court stated that, to be effective, the collective bargaining system must

subordinate the interest of individual employees to the collective interest of all employees in the bargaining unit and, therefore, an individual employee did not have an absolute right to compel arbitration of his or her grievance. The court reasoned that allowing an individual employee to compel arbitration of a grievance regardless of its merits, would undermine the collective bargaining system and result in unsystematic negotiations. Therefore, the court held that a breach of duty of fair representation in processing a grievance would be found to occur "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, at 190.

Vaca was followed in *O'Neill*, in which the court held that a duty of fair representation applied to all union activity, not just [*11] the grievance process. The court recognized the need to give deference to union activity and stated, at 1135:

" *** Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. *** "

The court further held, at 1130:

" *** That a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *** as to be irrational."

In *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), SERB discussed the application of *Vaca* to R.C. 4117.11(B)(6), and formulated its own definition and guidelines to determine when a union had committed an unfair labor practice by violating its duty of fair representation. SERB stated, at 203-204:

" *** The union's representative duty involves balancing the interests of a diverse group. This balancing occurs most often in bargaining, as noted by the Supreme Court in *Steele v. Louisville & Nashville Railroad (1944)*, 323 U.S. 192, 89 L. Ed. 173, [*12] 65 S. Ct. 226, but it also may be a legitimate concern in resolving grievances and other contract administration issues. Given this essential component of an exclusive representative's function, flexibility and deference must be accorded the union in

its efforts to seek benefits and enforcement for the unit as a whole, even though the desires of individual employees or groups of employees within the unit may go unfulfilled.

"The foregoing practical considerations form the foundation for our determination of whether a union's action is 'arbitrary.' In making such an assessment, this Board will look to the union's reason for its action or inaction. Is there a rational basis for the union's position? If there is, the action is not arbitrary. We accord the union great deference in evaluating approaches to bargaining and contract enforcement. Exclusive representatives must be able to form, evaluate, and pursue strategies for bargaining and contract enforcement. In interpreting and pursuing contract rights, unions must have leeway to assess and allow for ramifications and merits. Thus, a union's reason for a given approach will be examined not for its wisdom, for we cannot second-guess [*13] a union on its assessment of merit, but to determine merely whether the reason is rational.

~~if there are no apparent factors that show legitimate reason for a union's approach to an issue, the Board will not automatically assume arbitrariness.~~ Rather, we will look to evidence of improper motive: bad faith or discriminatory intent. An element of intent must be present; it may be evinced by discrimination based upon an irrelevant and invidious consideration, or it may be indicated by hostile action or malicious dishonesty -- i.e., bad faith. In the absence of such intent, if there is no rational basis for the action, arbitrariness will be found only if the conduct is so egregious as to be beyond the bounds of honest mistake or misjudgment."

Appellant argues the *AFSCME* standard is invalid because it requires the employee to show that, if there is no articulated reason for the union's actions, bad faith or a discriminatory interest must be shown. In the absence of such intent, the employee must show that the union's

conduct is so "egregious as to be beyond the bounds of honest mistake or misjudgment." *AFSCME*. Appellant argues that, under *Vaca* and [*14] *O'Neill*, the union must express its reasons for a particular course of action and it is insufficient to look only to the union's conduct.

In *State Emp. Relations Bd. v. Miami Univ. (1994)*, 71 Ohio St.3d 351, 643 N.E.2d 1113, the court discussed the relationship between federal law and Ohio public employment law, and stated, at 353-354:

"It is also important to note the relationship that federal decisions bear to Ohio public-sector labor law. Since *R.C. Chapter 4117*'s treatment of ULP cases is modeled to a large extent on the federal statutes that empower the NLRB to resolve ULP charges in cases within its jurisdiction *** the NLRB's experience *** can be instructive ***.' [*State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* *** [1993], 66 Ohio St.3d [485], at 495, 613 N.E.2d at 612-613. It is not, however, conclusive. The prime focus must remain whether the federal approach comports with the goals of the General Assembly when it enacted those statutes, particularly *R.C. 4117.11* (which defines ULPs) ***. *Id.*, 66 Ohio St.3d at 494, 613 N.E.2d at 612. In addition, 'the only sources of law whose production binds [SERB] are the General [*15] Assembly of Ohio, Ohio courts, and the federal courts (with territorial jurisdiction) when deciding federal constitutional questions. These are the authorities to which SERB's ligaments of responsibility attach and no others.' *In re City of Bedford Hts.* (July 24, 1987), SERB 87-016, 1987 SERB Official Rptr. 3-54, at 3-55."

In *Vaca* and *O'Neill*, the United States Supreme Court was not deciding federal constitutional issues, but was addressing issues arising from the National Labor Relations Act. As stated in *Miami Valley*, while the discussion in *Vaca* and *O'Neill* is instructive, it is not binding. To a large degree, the reasoning and guidelines set forth in *AFSCME* parallel *Vaca* and *O'Neill*; however, to the extent the decision in *AFSCME* differs, it was within the jurisdiction of SERB to formulate its own definition and criteria as to what was a duty of fair representation pursuant to *R.C. 4117.11*. The definition set forth by SERB in *AFSCME* is not unreasonable and does not conflict with the language of *R.C. Chapter*

4117. Therefore, the trial court did not err in its legal analysis and in deferring to SERB's interpretation of the statutory [*16] duty of the union to fairly represent its members.

Having determined that the trial court did not err as a matter of law in deferring to SERB's legal interpretation of *R.C. 4117.11*, we must also determine whether the trial court abused its discretion in finding there was substantial evidence to support SERB's order. The parties in this action were subject to a Collective Bargaining Agreement which provides, in Section 17.05(A) and Section 43.03:

"[Section 17.05(A)] The Agency shall first review the bids of the applicants from within the office, county or 'institution'. Interviews may be scheduled at the discretion of the Agency. The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee."

"[Section 43.03] Likewise, after the effective date of this agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this agreement."

The Collective Bargaining Agreement does not address whether a probationary employee is qualified to apply for or receive a promotion. *R.C. 4117.10* provides [*17] in part:

" *** Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees. *** "

Ohio Adm.Code 123:1-23-03 provides:

"No person shall be deemed eligible for promotion who has not satisfactorily completed the required probationary period as defined in Chapter 123:1-19."

In reviewing the evidence, SERB determined that, although clearly preferable, it was not a violation of the

duty of fair representation *per se* for a union to fail to articulate its reasons for withdrawing appellant's grievance and SERB could look to the union's conduct to determine whether its actions would constitute a violation. Here, the evidence supports an inference of a rational reason for withdrawing appellant's grievance. Tim Stauffer testified that appellant's grievance was discussed and the union agreed to investigate to determine whether there were instances of disparate treatment. Inasmuch as the grievance was withdrawn, it is reasonable to infer that [*18] no such examples were found. Although Betty Grant and Patricia Rowe testified they had applied for and received promotions during a probationary period, such action occurred before the effective date of the Collective Bargaining Agreement. No evidence was presented of a probationary employee receiving a promotion after the agreement took effect and Section 43.03 of the Collective Bargaining Agreement provides that past practices were not binding in disputes arising under the agreement. The Ohio Administrative Code provides, and was interpreted by the union and the Department of Taxation, to mean that probationary employees were ineligible to be promoted.

Although not articulated, the union's conduct, taken within context of the facts of this case and the applicable law, would support a finding that the withdrawal of appellant's grievance, inasmuch as it was lacking in merit, was a rational act. Past practices were not binding

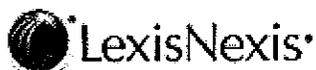
and *Ohio Adm.Code 123:1-23-03* would bar a probationary employee from being promoted. There was no evidence that the act was done in bad faith or for a discriminatory purpose. Withdrawing a grievance from the arbitration process, that had little or no chance of [*19] success, was not so far "outside a 'wide range of reasonableness,' *** as to be irrational," *O'Neill*.

Likewise, the trial court did not abuse its discretion in finding there was substantial evidence that the failure to notify appellant of the withdrawal of her grievance, in this instance, did not violate *R.C. 4117.11*. While the union should have kept appellant apprised of the status of her grievance, evidence supports a finding that the failure to do so was more the result of simple negligence resulting from an overwhelming number of cases, as well as a change in union leadership, rather than an act that was arbitrary, discriminatory or in bad faith. As the trial court noted, the union should be more accountable to its members.

For the foregoing reasons, appellant's first and second assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

YOUNG and LAZARUS, JJ., concur.



1 of 7 DOCUMENTS

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Ohio Public Employee Reporter

In re State Employment Relations Board, Complainant, v. Ohio Civil Service Employees
Association, AFSCME, Local 11, AFL-CIO, Respondent.

SERB v. AFSCME OCSEA LOCAL 11

Docket No. 97-ULP-09-0501

Ohio State Employment Relations Board

1999 OPER (LRP) LEXIS 352; SERB 99-009

April 22, 1999, Decided

May 21, 1999, Issued

HEADNOTES:

Breach Of Duty Of Fair Representation -- Failure To Timely Process Grievance -- Remedy -- 23.26, 23.51, 73.113
Although there was no evidence of bad faith or discrimination in union steward's failure to advance employee's promotion grievance to step 2 of the grievance process, evidence that union steward failed to properly and timely advance grievance, and that he concealed that fact from employee, was sufficiently egregious to support finding of breach of duty of fair representation. Union steward's actions constituted gross negligence which went beyond honest mistake or misjudgment where union steward never informed employee that grievance had "fallen through the cracks," even though repeatedly questioned by the grievant and other union representatives regarding the status of the grievance. However, because employee failed to present evidence in support of her contention that she timely filed a valid job application, no remedy was warranted because it was unlikely that employee would have prevailed on the merits of her grievance. Accordingly, union was ordered to cease and desist and to post notice. SERB adopted Finding of Facts as amended and Conclusions of Law in hearing officer's proposed order, 15 OPER 1551 (1998).

PANEL: Before Pohler, Chairman; Gillmor, Vice Chairman; and Verich, Board Member

OPINION: Order

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

APPX. EXHIBIT

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"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. Opinion

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complaint") 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.

OCSEA II

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 either 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 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).

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 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 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(13)(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.

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

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

3 F.F. Nos. 22, 23, 25, 26, and 28.

4 We 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)*

5 F.F. Nos. 11, 32, and 33.

6 F.F. Nos. 9, 10, 12, 17, and 34.

7 F.F. No. 37.

----- End Footnotes -----

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Enforcement Labor & Employment Law Collective Bargaining & Labor Relations Fair Representation Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Breach of Duty of Fair Representation