

ORIGINAL

THE SUPREME COURT OF OHIO

Disciplinary Counsel,)
)
Relator,)
)
v.)
)
Raymond Thomas Lee, III,)
)
Respondent.)

Case No. 2014-1744

RESPONDENT'S RESPONSE TO
ORDER TO SHOW CAUSE AND
OBJECTIONS TO FINDINGS OF
FACT AND RECOMMENDATION
OF THE BOARD OF
GRIEVANCES AND DISCIPLINE

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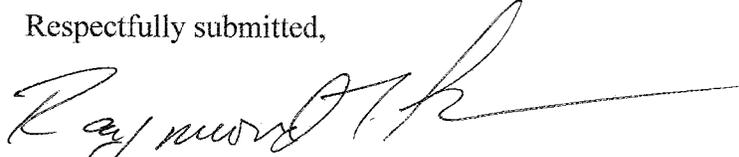
THE SUPREME COURT OF OHIO

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)	ORDER TO SHOW CAUSE AND
Raymond Thomas Lee, III,)	OBJECTIONS TO FINDINGS OF
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Respondent.)	OF THE BOARD OF
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Respondent respectfully responds to this Court's Order to Show Cause, filed on October 24, 2014, and objects to the findings of fact and recommendation of the Board of Grievances and Discipline. Respondent objects to the finding that an attorney-client relationship existed between himself and Ms. Patricia Lee-Buhl and to the finding that the relationship between Ms. Lee-Buhl and Respondent is governed by state law. Respondent further objects to the finding that he failed to cooperate with the investigation by the Office of Disciplinary Counsel. Respondent also objects to the recommendation that he be indefinitely suspended from the practice of law in Ohio.

In support of these objections, Respondent respectfully submits the following Memorandum of Law in Support of Objections.

November 13, 2014

Respectfully submitted,

Raymond Thomas Lee, III

THE SUPREME COURT OF OHIO

Disciplinary Counsel,)	Case No. 2014-1744
)	
Relator,)	
)	
v.)	MEMORANDUM OF LAW IN
)	SUPPORT OF RESPONDENT'S
Raymond Thomas Lee, III,)	OBJECTIONS TO FINDINGS OF
)	FACT AND RECOMMENDATION
)	OF THE BOARD OF
Respondent.)	GRIEVANCES AND DISCIPLINE

I. Introduction

This matter primarily concerns the interaction of Federal labor law policy, Federal sector labor law (labor law which governs Federal employment as opposed to private sector employment or public employment at the state level or lower), and state regulation, *vel non*, of attorneys engaged in the practice of Federal sector labor law. The complaining party, Ms. Patricia Lee-Buhl, was a Federal employee employed by the Department of Defense at Fort Knox, Kentucky, where she was a member of a collective bargaining unit represented by the Federal Education Association - Stateside Region ("FEA-SR"). FEA-SR, pursuant to Federal sector labor law, 5 U.S.C. Chapter 71, owed a duty to Ms. Lee-Buhl to represent her in connection with her Federal employment. Respondent is an attorney who was retained by FEA-SR to assist FEA-SR in fulfilling its organizational obligation to represent members of the collective bargaining unit. Ms. Lee-Buhl has never claimed to have retained Respondent in his

personal capacity as an attorney licensed to practice law by the state of Ohio and Respondent did not agree to represent Ms. Lee-Buhl individually. Rather, FEA-SR represented Ms. Lee-Buhl as a member of the collective bargaining unit pursuant to Federal sector labor law.

FEA-SR fulfilled its Federal law obligation to represent Ms. Lee-Buhl while acting through individuals. At various times, Ms. Caroline Myers, FEA-SR Area Director, Dorothy Lee, FEA-SR General Counsel, Ms. Glenda Simmons, President of the FEA-SR local at Fort Knox, and Respondent, all provided Ms. Lee-Buhl with representation. Ms. Lee-Buhl candidly testified that she did not believe that Respondent was representing her separately from FEA-SR representing her. Transcript, Volume II, at 255.

Notwithstanding the nature of the relationship outlined above, Ms. Lee-Buhl filed a complaint with the Office of Disciplinary Counsel, who in turn initiated the instant proceeding, concerning her representation by Respondent. Because Ms. Lee-Buhl's complaint concerns her grievance with respect to the representation provided by FEA-SR, acting through Respondent and others, Federal law preempts the instant action which, by its very nature, is a state law proceeding seeking to adjudicate the quality of representation provided by a Federal sector union, acting in part through an attorney the union retained to provide such representation, pursuant to a Federal statute in an area of law which the United States Supreme Court has determined to be within the exclusive province of the FLRA. If actions such as the instant proceedings are permitted, Federal sector unions will be threatened with having each of the fifty states be able to regulate and therefore control the conduct of attorneys the union retain or employ to fulfill its representational obligations under Federal law.

In a separate but overlapping context, the relationship which is formed between a Federal sector bargaining unit member being represented by a union acting through an attorney retained or employed by a Federal sector union in order for the union to fulfill its Federal law obligation to represent the bargaining unit member is not an attorney-client relationship which is governed by state law. In the instant proceeding, the Findings of Fact and Recommendation found that the relationship between Ms. Lee-Buhl and Respondent was governed by Kentucky state law. Findings and Recommendation, ¶ 57. The Findings of Fact and Recommendation also recognized that, in Kentucky, “an attorney-client relationship is a question of contract formation.” *Id.*, ¶ 58. While the contract may be express or implied, the contract is only formed through implication if the putative client has a reasonable belief or expectation *based on the attorney’s conduct* that the attorney has also entered into the contract. *Id.* (Citing cases). The Findings and Recommendation then found the existence of an attorney-client relationship based on erroneous findings of fact which were not even the basis of Ms. Lee-Buhl’s belief that an attorney-client relationship existed. Ms. Lee-Buhl testified that she believed that an attorney-client relationship existed because she was a member of the collective bargaining unit, that as such, she was represented by FEA-SR, and that when FEA-SR provided this representation through an individual who was an attorney, that created the formation of an attorney-client relationship. Transcript, Vol. II, at 253-255, 261-267. That belief is not reasonable and it was not based on the conduct of Respondent. Therefore, even under the guise of state regulation of the relationship between Ms. Lee-Buhl and Respondent, a contract was not formed and no attorney-client relationship existed.

With respect to the failure to cooperate count, the evidence shows that Respondent responded to the Office of Disciplinary Counsel on June 4, 2012, with a three (3) page letter and ten (10) separate enclosures. Exhibit 43, at 5-34. The evidence further shows that Respondent responded to emails from Office of Disciplinary Counsel personnel in November of 2012. Exhibit 43, at 1-3. The evidence shows that Respondent responded to the Office of Disciplinary Counsel again on January 11, 2013. Exhibit 43, at 4. The evidence also shows that Respondent responded to the Office of Disciplinary Counsel again on May 27, 2013. Exhibit 43. While I concede that I accidentally overlooked one area of inquiry in my last response (the Tompkins matter), an oversight in a response is not the same as a failure to cooperate. Moreover, the Findings and Recommendation erroneously found that “Respondent ignored [the inquiry on the Tompkins matter] in his response letter and admitted at the hearing of this matter that he refused to address that part of the inquiry.” Findings and Recommendation, at ¶ 75. *That is simply not true.* Respondent never “ignored” or “refused” any inquiry. It was a mere oversight. Respondent answered extensive questions regarding the Tompkins matter during his deposition and during the hearing Respondent merely objected to the line of inquiry and that objection was sustained and the testimony stricken from the record. Transcript, Vol I, at 114-115, Vol II, at 308-309. In short, there was no inquiry which was received by Respondent to which Respondent did not provide a response.

Finally, as to mitigation and aggravation, even if this Court should find adverse to Respondent, the Findings and Recommendation failed to recognize that, throughout the period at issue, with but one brief period, Respondent had an honest and good faith belief that there was no attorney-client relationship with Ms. Lee-Buhl and that Ms. Lee-Buhl was represented by a

privately retained Kentucky attorney. As to the belief that no attorney-client relationship existed, that belief still exists, even if it is not shared. As to the belief that Ms. Lee-Buhl was represented by a privately retained Kentucky attorney, Ms. Lee-Buhl admitted that in her testimony. Transcript, Vol II, at 251-253. At no time did Respondent act with a dishonest or selfish motive; Ms. Lee-Buhl was never charged a fee and Respondent had nothing to gain.

II. Statement of Facts

The Federal Education Association - Stateside Region is a Federal union representing a bargaining unit of Federally employed educators within the Department of Defense. Trish Lee-Buhl was such an educator. Ms. Lee-Buhl was employed by the Department of Defense as a special education teacher at Fort Knox, Kentucky. As such, Ms. Lee-Buhl was a member of the bargaining unit represented by FEA-SR. In the spring of 2007, someone at Fort Knox made an allegation that Ms. Lee-Buhl had engaged in physical abuse of one of her young students. Because this type of investigation may lead to disciplinary action by the school employer, Ms. Lee-Buhl was represented by FEA-SR during the investigation into the allegation of child abuse. FEA-SR has a duty to provide representation of all bargaining unit employees. Sometimes this representation is provided by attorneys and some times by non-attorneys, such as local Presidents or building representatives (known as "FRS" for Faculty Representative Spokesperson). In the investigation into the allegation of child abuse, Ms. Lee-Buhl was represented by FEA-SR in the person of Dorothy Lee, FEA-SR's General Counsel. Prior to the conclusion of the investigation, during the summer following the 2006-2007 school year, Ms. Lee-Buhl left Fort Knox to accompany her husband, an active duty Army officer, to Kwajalein Atoll. Ms. Lee-Buhl did not

resign, instead she obtained Leave Without Pay (“LWOP”), so that if her husband received return orders to Fort Knox, she could resume her employment at the Fort Knox schools.

At the conclusion of the investigation into the child abuse allegation, in August of 2007, the Army’s Special Assistant U.S. Attorney declined to prosecute the allegation. Exhibit 50. Nonetheless, the investigation lead to Ms. Lee-Buhl being listed on an Army data base as having engaged in child abuse and the Army Special Assistant U.S. Attorney forwarded the report of investigation to both the headquarters element of the school system¹ and state of Kentucky’s Education Professional Standards Board (“EPSB”). DDESS acted on the report by proposing to remove (fire) Ms. Lee-Buhl. Eventually, the EPSB acted on the report by writing to Ms. Lee-Buhl for a response.

FEA-SR provided Ms. Lee-Buhl with representation as to the proposal to remove her. Acting through Respondent, an attorney retained by FEA-SR, union submitted a letter to the proposing official seeking a copy of the material relied upon for issuing the proposed removal. Exhibit 49, at 8. FEA-SR, acting through its Director, Caroline Myers, also requested that Ms. Lee-Buhl’s LWOP be extended. Exhibit 49, at 10. DDESS responded to Ms. Myers by denying further LWOP. Exhibit 49, at 19. Without the extension of LWOP, Ms. Lee-Buhl resigned. Id. DDESS chose to accept Ms. Lee-Buhl’s resignation rather than pursue the proposed removal. Id.

Ms. Lee-Buhl and/or FEA-SR could have filed a individual / Association grievance challenging the denial of leave without pay. Exhibit 55. Such an action could have had potential beneficial effects and potential negative effects. Id. Since Ms. Lee-Buhl was the one who would

¹ Organizationally, the Fort Knox Schools are a “school district” within a Department of Defense activity, the Department of Defense Education Activity (“DODEA”), and its suborganization, the Domestic Dependents Elementary and Secondary Schools (“DDESS”).

have benefitted or suffered from the effects, FEA-SR left the choice to her as to whether to challenge the denial of LWOP. Id. At the time she made that choice, Ms. Lee-Buhl was aware of all three negative results of the report of investigation into the allegations of child abuse (proposed removal, being listed in the Army data base, and the report of investigation going to EPSB). Id. In response to her queries, Respondent provided Ms. Lee-Buhl with a written summary of what FEA-SR could do for her by way of representation. Id. Of note, Respondent did not offer personal legal representation outside of the context of representation by FEA-SR as one of the options. Id. Rather, all of the options were expressly in the context of what FEA-SR could provide for Ms. Lee-Buhl rather than what Respondent could or would provide individually. Id. In the end, Ms. Lee-Buhl elected to not challenge the denial of LWOP and allow her resignation to proceed into effect.

On November 28, 2007, EPSB wrote to Ms. Lee-Buhl and sought her response to the allegations of child abuse. Exhibit 2. Ms. Lee-Buhl sought assistance from FEA-SR, writing to Ms. Caroline Myers, (Director of FEA-SR, not an attorney), Dorothy Lee (General Counsel of FEA-SR, an attorney), Glenda Simmons (local President for Fort Knox, not an attorney), and Respondent. Exhibit 3. Although all of the FEA-SR officials had reviewed Ms. Lee-Buhl's draft response to EPSB, Respondent responded to Ms. Lee-Buhl on behalf of FEA-SR. Id. This FEA-SR response does not offer to provide individual legal representation. Id. Instead, it offered a practical assessment as to tone of her response and offered to facilitate getting her response to EPSB in a timely fashion and further offered to follow up on Ms. Lee-Buhl's personal response to EPSB by submitting something of an FEA-SR response in support of Ms. Lee-Buhl. Id. The FEA-SR response discussed was clearly not an offer of individual legal representation as it would

be submitted by “Dorothy / Caroline / Glenda and / or I[,]” two attorneys and two non-attorneys. Ms. Lee-Buhl understood that this was an offer of a union submission on her behalf as opposed to an offer of individual representation. She responded by saying that “I understand that you – Ray and Dorothy – will fax and mail this response to Ms. Sneed and then will follow with a supporting union statement.” Exhibit 4.

As agreed, Respondent did forward Ms. Lee-Buhl’s personal response to the EPSB. Exhibit 5. Of note, the cover sheet for the facsimile transmission makes no claim by Respondent of representing Ms. Lee-Buhl. Id. To the contrary, it states that Ms. Lee-Buhl’s response is being forwarded “as a courtesy to” Ms. Lee-Buhl because of her being physically on Kwajalein Atoll. Id. This cover sheet was also forwarded to Ms. Lee-Buhl and Ms. Lee-Buhl did not make any contemporaneous claim that there should have been language of personal representation by Respondent.

At the hearing, Ms. Lee-Buhl testified that throughout and certainly by January of 2008, she believed she had an attorney-client relationship with both Respondent and Dorothy Lee, FEA-SR’s General Counsel. Ms. Lee-Buhl testified as to the foundation for that belief being that the matter (the EPSB proceedings) arose out of her employment by DDESS at Fort Knox, that FEA-SR represented bargaining unit employees at Fort Knox, that she was a bargaining unit employee at Fort Knox, and that among the people FEA-SR utilized to provide her with union representation were attorneys in the person of Respondent and Dorothy Lee. Transcript, Vol II, at 253-255, 261-267.

With all due respect to Ms. Lee-Buhl, however, that testimony is not only unreasonable, it is belied by the facts at the time. Moreover, it does not rely on any act or conduct of Respondent

or Dorothy Lee to form the implied basis for a contract forming the putative attorney-client relationship. In the first instance, Ms. Lee-Buhl submitted a personal response to EPSB but did not make *any* contemporaneous assertion of being represented by either Dorothy Lee or Respondent – not to the EPSB, not to FEA-SR, and not to either Dorothy Lee or Respondent. In the numerous communications between Ms. Lee-Buhl and Dorothy Lee and Respondent at the time, Ms. Lee-Buhl did not make *any* assertions that she considered herself represented by either Respondent or Dorothy Lee, much less represented by Respondent outside the context of Respondent being an attorney retained by FEA-SR to provide union representation to bargaining unit members. And Ms. Lee-Buhl’s testimony plainly ignores the writing, Exhibit 55, provided by Respondent at the time Ms. Lee-Buhl was considering whether to challenge the denial of LWOP, to the effect that it was FEA-SR, not Respondent individually, which was providing representation to her.

But most significantly, Ms. Lee-Buhl wrote to Respondent and Dorothy Lee, among others, reporting on the efforts of her “private attorney.” For example, when EPSB wrote to Ms. Lee-Buhl on March 19, 2008, informing her that they had voted to hear the case, Exhibit 7, Ms. Lee-Buhl wrote to all of the FEA-SR officials she had previously contacted, the attorneys and non-attorneys alike, and, on April 29, 2008, reported that “our private attorney reviewed the letter and told us to prepare for a hearing[.]” Exhibit 8. Again, on October 1, 2008, Ms. Lee-Buhl wrote to both Respondent and Dorothy Lee reporting on the efforts of her “private attorney” working on the data base issue – an issue which, just like the EPSB matter, grew out of child abuse allegation while she was a bargaining unit member at Fort Knox. Exhibit 52. If Ms. Lee-Buhl recognized that she was not represented by Respondent or Dorothy Lee on the data base

issue, she certainly knew that she was not being represented by Respondent or Dorothy Lee on the EPSB matter. In fact, she admitted as much: “I appreciate all your help, I know you owe me nothing as I am no longer a union member[.]” Id. Indeed, this was later confirmed yet again when, a year and a half later, Ms. Lee-Buhl wrote to Dorothy Lee (but not Respondent), seeking a second opinion on her private attorney’s advice to not ask about the status of the EPSB proceeding. Exhibit 12.

The absence of a prior attorney-client relationship between Ms. Lee-Buhl and Respondent was again confirmed when, in 2011, years after any involvement by Respondent in Ms. Lee-Buhl’s affairs, Ms. Lee-Buhl reported that the EPSB matter was approaching a summary judgment and sought further assistance from both the FEA-SR General Counsel and Respondent. Exhibit 49, at 22. Respondent made the mistake of trying to help and endeavored to obtain a copy of the EPSB “Notice of Statement of Charges and Issues,” contacted the attorney for the EPSB, and reported back to Ms. Lee-Buhl. Exhibit 49, at 23-24. In the contact with the EPSB attorney, Respondent represented that Ms. Lee-Buhl had authorized an attempt at representation but that Respondent was not a Kentucky attorney. Exhibit 49, at 23. Respondent forwarded that contact to Ms. Lee-Buhl, Exhibit 49, at 24, and Ms. Lee-Buhl did not protest a recent authorization for Respondent to attempt representation. Respondent also informed Ms. Lee-Buhl that he was not a Kentucky attorney and so might not be permitted to represent her on the EPSB proceeding. Id. The following day, Respondent wrote to the hearing officer, via facsimile and regular mail, informing the hearing officer that “I have also *recently* been authorized by Ms. Lee-Buhl to represent her in this above referenced matter, *subject to your approval.*” Exhibit 49, at 25 (emphasis added). This communication was also provided to Ms. Lee-Buhl and she again did

not claim that Respondent had been her attorney all along. Exhibit 23. Indeed, while she asked a question regarding the letter to the hearing officer, she made no comment on either Respondent's assertion of a "recent" authorization or on the conditional nature of the potential representation.

Id.

Since the hearing officer never authorized Respondent's representation of Ms. Lee-Buhl, Respondent was precluded from engaging in such representation by Kentucky law. Further, the harm at issue then, a default, had been entered before Respondent had even attempted representation. Exhibit 19. Subsequent to those proceedings, Ms. Lee-Buhl retained another private attorney and he represented Ms. Lee-Buhl, at FEA expense, to a resolution.

Ms. Lee-Buhl eventually contacted The Office of Disciplinary Counsel and initiated the instant proceedings. The Office of Disciplinary Counsel wrote to Respondent and Respondent replied. The Office of Disciplinary Counsel contends they did not receive Respondent's reply. This is certainly possible. See e.g., Exhibit 53. Through a series of communications and failed communications, Respondent replied to all of The Office of Disciplinary Counsel's communications which Respondent received. Exhibit 49. Respondent naturally did not respond to communications which Respondent did not receive. Tellingly, however, Respondent sent an email to The Office of Disciplinary Counsel's attorney in November of 2012, Exhibit 49 at 1-2, accurately describing his June 4, 2012, letter, Exhibit 49, at 5-7, which The Office of Disciplinary Counsel contends was not received until May of 2013. Regardless, the evidence shows that Respondent sent no less than three separate mailings to the Office of Disciplinary Counsel and a number of electronic mail messages and responded to each inquiry received.

III. Argument

As an initial matter, Respondent respectfully submits that the instant complaint is a Ohio state law action alleging a violation of Kentucky regulation of the practice of law in the course of a Federal sector labor law matter. This scenario raises a number of issues which Respondent attempts to address below. In brief (relatively anyway), Respondent respectfully submits that Federal labor law preempts state law where the subject matter of the state law action constitutes an alleged violation of Federal labor law. Thus, attorneys retained by labor unions to provide union representation to constituent members where the duty of the union to provide that representation is governed by Federal labor are not subject to state law actions in connection with their union representation. This is true in Federal sector labor law as well as private sector labor law. In fact, the Federal preemption of state law is more clear in the area of Federal sector employment than it is in Federal labor law governing private employment. In any event, the regulation of the provision of representation by Federal sector unions to Federal employees who are collective bargaining unit members is a matter committed exclusively to Federal law and administered by the Federal Labor Relations Authority ("FLRA").

In the alternative, should this Court hold that Federal sector labor law is an area for state law regulation, the Board is still required to establish the existence of an attorney-client relationship by clear and convincing evidence before it may properly find Respondent guilty of a breach of the ethical duties which flow from an attorney-client relationship. The record evidence does not meet that standard. As the Board found, the existence of an attorney-client relationship, *vel non*, in the instant case, is governed by Kentucky law. Findings and Recommendation, ¶ 57. Under Kentucky law, the question of the existence of an attorney-client relationship is a question

of contract formation. Id., ¶ 58. Generally, the contract may be either express or implied, but if the claimed relationship is alleged to have been formed by implication, the putative client must have a “reasonable belief of expectation” which is based on the attorney’s conduct. Id.

Moreover, where the claim of such implicit formation of the attorney-client relationship is based on contact between an organization’s attorney and a constituent member of the organization, there must be “clear consent” of the attorney to enter into the relationship. Innes v. Howell Corp., 76 F.3d 702, 712 (6th Cir. 1996).

In the instant matter, Ms. Lee-Buhl did claim an express formation of an attorney client relationship. Rather, she relied on her belief that she was a member of the bargaining unit, FEA-SR owed a duty of representation to members of the bargaining unit, FEA-SR provided that representation through both attorneys and non-attorneys, and when the FEA-SR representation was provided by attorneys, an attorney-client relationship was formed. Transcript, Vol II, at 253-255, 261-267. That belief is not correct, not reasonable, and not based on the conduct of the attorney. Therefore, no attorney-client relationship was formed even under Kentucky law.

Regarding the finding of failure to cooperate, the Office of Disciplinary Counsel made a number of inquiries of Respondent, some of which were actually delivered to Respondent and some of which were not. Respondent responded to all of the inquiries which were delivered and some of his responses were delivered and some were not. Respondent did overlook one area of inquiry but an oversight does not equal a failure to cooperate and Respondent testified fully regarding that area of inquiry at his deposition and to some degree at the hearing before his objection was sustained and the testimony stricken. Transcript, Vol I, at 114-115, Vol II, at 308-309. The evidence may show that not all of Respondent’s responses were delivered to the Office

of Disciplinary Counsel but, as with the oversight, an unsuccessful attempt to deliver a response by mail is a failure of delivery, not a lack of cooperation.

A. Federal Labor Law Generally Preempts State Law Causes of Action Where it is Applicable and Federal Sector Labor Law Completely Preempts State Law Causes of Action With Respect to Representation of Federal Employees by Agents of a Federal Sector Union.

Pursuant to Federal labor law, unions owe a duty of representation to members of the bargaining unit represented by the union. Like all organizational entities, unions fulfill this duty of representation through elected officers, union employees, and others retained or employed by the union. Among these officers and employees and others are attorneys and non-attorneys alike. But a union is not a law firm and its representational obligations and potential liabilities are governed by Federal law and labor policy, not state law. Both the contours of the duties of representation which the union owes to its constituent bargaining unit members and the contours of the remedies available to constituent bargaining unit members for breaches of those duties, i.e., the regulation of the duty to represent, are governed by Federal labor law and policy. See *e.g.*, Carino v. Stefan, 376 F.3d 156 (3d Cir. 2004) (private sector employment), Arnold v. Air Midwest, Inc., 100 F.3d 857 (10th Cir. 1996) (private sector employment), and Montplaisir v. Leighton, 875 F.2d 1 (1st Cir. 1989) (Federal sector employment).

In private sector employment, a breach of a duty of representation by a union is regulated as to the union as an entity only – actions against individual union officials are precluded by Federal law. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 249 (1962). This is true even if the individual's conduct was unauthorized by the union and was in violation of the collective bargaining agreement. Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981). Separate but

related to immunity from suit, Federal law in this area preempts state law actions regardless of how they are styled or plead. “With monotonous regularity, court after court has cited Atkinson to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process.” Montplaisir, supra, 875 F.2d at 4.

State law claims against attorneys acting on behalf of unions are precluded in malpractice claims as well other state-law actions, and to union retained attorneys as well as union employed attorneys. Carino v. Stefan, supra (citing cases). This preemption applies to Federal sector employment and Federal sector labor unions, even more than in the context of private sector employment. Montplaisir v. Leighton, supra. Thus, since the complaint at issue in the instant matter arises out of Respondent’s representation of Trish Buhl as a union retained attorney fulfilling the union’s duty of representation of Trish Buhl as a bargaining unit member, any such complaint is governed exclusively by Federal law and not by state law. And the Federal law which preempts state law, the Civil Service Reform Act (“CSRA”), has been recognized time and again by the United States Supreme Court as presenting a carefully crafted system of regulation governing Federal employment so as to preclude and preempt any cause of action by any party where the claim is within the parameters of the coverage of the CSRA, regardless of who is bringing the action or how the action is styled or plead. See Karahalios v. NFFE, 489 U.S. 527 (1989). See also Elgin v. Department of Treasury, 132 S.Ct. 2126 (2012), United States v. Fausto, 484 U.S. 439 (1988), Bush v. Lucas, 462 U.S. 367 (1983)

The Board found that the instant subject matter was proper for state court regulation because a disciplinary action is inherently different than a state law tort action. Findings and

Recommendation, ¶ 55. Respondent fully agrees with that assertion. But it does not address the issue of preemption and does not overcome Federal preemption. As the Findings and Recommendation stated (quoting this Court): “The purpose of a disciplinary action is to protect the public interest and to ensure that members of the bar are competent to practice a profession imbued with public trust.” *Id.* But where the segment of the public being protected is comprised of Federal employees, it is the Federal government which gets to choose how and where that public interest is served, and with respect to Federal sector labor law, the Federal government has decided that the regulation of provision of representation by Union agents in the context of Federal employment is exclusively vested in the FLRA. *Karahalios v. NFFE*, supra. Regulation of the provision of representation by the individual states risks fifty different sets of rules governing a Federal imposed and prescribed duty intended to be uniform. For that reason, Federal law preempts state law in this area. As the Court in *Montplaisir* explained:

Most recently, the Supreme Court has ruled that district courts cannot entertain a federal employee's damages action against his union for an ostensible breach of the union's duty of fair representation. *Karahalios*, 109 S.Ct. at 1287. The Court refused to imply a private cause of action from CSRA's fair representation provision, 5 U.S.C. § 7114(a)(1), reasoning that such suits "would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to ... the FLRA and to confine the courts to the role given them under the Act." *Karahalios*, 109 S.Ct. at 1288. *Karahalios*, it would seem, is an ominous portent for the present plaintiffs: they could not have sued PATCO in federal court for the poor advice they received; that would have been a "fair representation" claim, and barred. It would, therefore, be incongruous to allow pursuit of those very claims against those who implemented the union's course of action.

The same result obtains once it is recognized that the complaint's allegations amount *au fond* to unfair labor practice charges. Compare 5 U.S.C. § 7116(b) ("it shall be an unfair labor practice for a labor organization.... (7)(A) to call, or participate in, a strike, work stoppage, or slowdown ... or (B) to condone any [such] activity ... by failing to take action to prevent or stop [it]"). *Congress meant to vest the FLRA with "exclusive and final authority to issue unfair*

*labor practice complaints," limiting opportunities for judicial review to those delineated in 5 U.S.C. § 7123. Karahalios, 109 S.Ct. at 1287 (citing legislative history); Clark v. Mark, 590 F.Supp. 1, 8 (N.D.N.Y.1980) (claims which "are arguable unfair labor practices ... must be dismissed as pre-empted under [CSRA]."); cf. San Diego Building Trades 4*4 Council v. Garmon, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959) (when "activities which a State purports to regulate ... constitute an unfair labor practice under [the NLRA], due regard for the federal enactment requires that state jurisdiction must yield"). That appellants chose not to couch their complaint as an unfair labor practice cuts no mustard. **Where labor-law preemption is an issue, creative labelling cannot carry the day.** Rather, the needed reconnaissance focuses upon "the conduct being regulated, not the formal description of governing legal standards...." *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971); see also *Columbia Power Trades*, 671 F.2d at 329 (FLRA's exclusive jurisdiction cannot be thwarted by party's characterization of lawsuit).*

Montplaisir, supra (emphasis added).

B. Even Under Kentucky Law, Respondent Did Not Form an Attorney-Client Relationship with Ms. Lee-Buhl.

As noted above, even if state law is held to regulate the relationship between and attorney retained or employed by a Federal sector union to provide the union's representation to a Federal employee within the union's collective bargaining unit, an attorney-client relationship was not formed in the instant matter between Ms. Lee-Buhl and Respondent. Again, such a relationship is a question of contract formation and the contract may be created expressly or by implication but if by implication, it must be based on the reasonable belief or expectation of the putative client based upon the attorney's conduct. Findings and Recommendation, ¶ 58. In the instant matter, there is no assertion of an express contract formation. The Findings and Recommendations found the contract formation in part because "[t]here were numerous instances where Respondent gave Buhl advice regarding the investigation being conducted by the Kentucky Board." *Id.*, ¶ 59. But this proves nothing. Respondent provided that advice on behalf

of his client, FEA-SR, so that FEA-SR could fulfill its obligation under Federal sector labor law, 5 U.S.C. Chapter 71, to provide representation to a bargaining unit member. If merely giving advice to a bargaining unit member could create an attorney-client relationship, attorneys acting on behalf of Federal sector unions would form attorney-client relationships with virtually every member of the bargaining unit.

The Findings and Recommendation also relied on a patently erroneous reading of email communication to find an attorney-client relationship: "Respondent also led her to believe that he had drafted and would submit a 'lawyer' supplement' to her written rebuttal letter to the Kentucky Board's initial investigatory letter." *That is simply not true.* What Respondent wrote to Ms. Lee-Buhl was:

With that said, it is my view that we should submit your draft as the reply. Once that is done, Dorothy / Caroline / Glenda and / or I can also submit supplemental argument and / or material but your reply would have the full impact of a very personal and very adamant denial. There is no risk that it would be read by some administrative bureaucrat as just some lawyer telling you what to say / putting words in your mouth.

Ladies [Ms. Lee-Buhl, Dorothy, Caroline, and Glenda] - your thoughts?

* * *

I have something pretty close to go so if you disagree with my suggestion, that's fine. I am mainly thinking that righteous indignation, as long as its genuine, is as compelling a response at this point as any other approach and it does not preclude Dorothy or I adding a lawyer argument as a supplement. If we go that way, we want the lawyer supplement to arrive AFTER your personal response so that your personal response has the full impact.

Relator's Exhibit 5. Read in context, the "I have something pretty close to go" was a statement that I had drafted a more refined reply if the group did not want to submit Ms. Lee-Buhl's reply but she did so that portion became irrelevant. Further, the supplemental submission was to be submitted by "Dorothy / Caroline / Glenda and / or I," two lawyers and two non-lawyers so it

could not possibly be considered a supplement provided by Ms. Lee-Buhl's personal attorney. Further still, Ms. Buhl plainly understood that the supplemental submission would be a submission by FEA-SR – not Respondent acting as her personal attorney. We know this because Ms. Lee-Buhl responded by forwarding her personal and *pro se* response and saying “I understand that you - Ray and Dorothy - will fax and mail this response to Ms. Sneed and then follow with *a supporting union statement.*” Relator's Exhibit 4.

Still further, there is simply no evidence of the formation of an attorney-client relationship between Respondent and Ms. Lee-Buhl outside of Respondent's work for FEA-SR in providing union representation to a constituent member. In fact, Ms. Lee-Buhl expressly testified that she did not believe that Respondent was representing her separate from FEA-SR representing her. Transcript, Vol II, at 255. Since the Complaint at issue alleges violations of an attorney's duty to a client under Kentucky law, Kentucky Rule 1.13 governs. There, Kentucky makes clear that an attorney retained by an organization has an attorney-client relationship with the organization, not the constituent members of the organization. Even where the organizationally retained attorney needs to communicate with a constituent member in a context that implicates privileged communication covered by Kentucky Rule 1.6, that “does not mean, however, that constituents of an organizational client are clients of the lawyer.” Comment 2 to Rule 1.13 (2009). This has long been the status of the law governing the formation of attorney-client relationships under Kentucky law.

In Innes v. Howell Corp., *supra*, for example, the plaintiff had been the President of Lake Coal and had been personally named a defendant in an environmental action defended by Lake Coal's corporate counsel. When the corporate counsel later took action adverse to the plaintiff's

interests, plaintiff sued for legal malpractice. On appeal, the Sixth Circuit upheld a finding that there had not been an attorney-client relationship between the Lake Coal's President and Lake Coal's corporate counsel. The Court explained:

Under Kentucky law, [the creation of an attorney-client relationship] is a simple question of contract formation. The *Daugherty* court explains: "The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties." . . . Thus, the existence of the relationship hinges on the fact of mutual assent, either explicit or tacit, and not on the special ethical rules that govern in a unique negligence regime. . . .

This is true even in a situation like this one here, where the president of a corporation argues that counsel, retained by the corporation for a certain matter, was also his personal counsel on that same matter. Plaintiff contends that because Innes was named a defendant in an environmental proceeding against Lake Coal, Cook must have represented him as well as Lake Coal in that proceeding. This is incorrect. The law is generally settled that an attorney for a corporation does not automatically represent the corporation's constituents in their individual capacities, even on the same matters. There must be clear consent.

Innes, 76 F.2d at 711-712 (citations omitted).

In the instant matter, there is not the slightest indication of "clear consent" by Respondent to enter into an attorney-client relationship with Ms. Lee-Buhl, separate from Respondent's duties to FEA-SR to provide union representation to Ms. Lee-Buhl, at least until the failed March 2011 effort. And even then, Respondent made clear to all involved that he was not a Kentucky attorney and could only undertake actual representation *if* he was granted permission which was never granted.

Not only was there not "clear consent" to such a relationship by Respondent, the evidence shows, contrary to her testimony, that Ms. Lee-Buhl also realized that the representation provided by Respondent was union representation with the union providing the representation to Ms. Lee-Buhl through the union's retention of Respondent. Ms. Lee-Buhl never once asserted an

independent attorney-client relationship with Respondent and affirmatively represented having a “private attorney” working on the EPSB matter until she was faced with the March 2011 situation that resulted in the default. See Exhibit 8 (Ms. Lee-Buhl reporting that “our private attorney reviewed the [EPSB] letter and told us to prepare for a hearing[.]”), Exhibit 52 (reporting her “private attorney” work results on the data base issue), and Exhibit 12 (seeking a second opinion on the private attorney’s advice not to inquire of the EPSB case status).

While Ms. Lee-Buhl testified that the “private attorney” only worked on the criminal aspect, this is belied by the fact that each of the above representations occurred well after August of 2007 when the Special Assistant U.S. Attorney reported that criminal prosecution had been declined. Exhibit 50. Moreover, even Ms. Lee-Buhl testified that she never mentioned the “criminal” limitation of her private attorney to Respondent, only to FEA-SR’s General Counsel.

Simply put, there was never the formation of an attorney-client relationship between Respondent and Ms. Lee-Buhl and so there could not have been a violation of Respondent’s duty to Ms. Lee-Buhl as a client. See generally Levinson Legal Ethics in the Employment Law Context: Who Is the Client?, 37 N. Ky. L. Rev. 1 (provided with Respondent’s written closing argument).

C. There is No Clear and Convincing Evidence that Respondent Failed to Cooperate in the Office of Disciplinary Counsel Investigation.

Finally, the evidence simply does not support a finding that Respondent failed to cooperate with The Office of Disciplinary Counsel. Respondent responded to the communications he did receive and did not respond to communications he did not receive. That Respondent could have done more does not render Respondent uncooperative. That the Office of

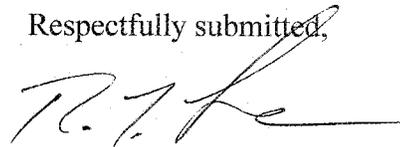
Disciplinary Counsel denies receiving a response which Respondent mailed does not constitute a failure to cooperate.

IV. Conclusion

For the foregoing reasons, Respondent respectfully objects to the Findings of Fact and Recommendation in this case and urges this Court to not impose discipline. In the alternative, if discipline is considered, Respondent respectfully requests that it be kept in mind that he never sought or obtained any personal gain from any conduct in this matter and was acting in a good faith and honestly held belief that he did not have an attorney-client relationship with Ms. Lee-Buhl.

November 13, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. T. Lee, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

R. T. Lee, III

CERTIFICATE OF SERVICE

I do hereby certify that a copy of this pleading is being served on this date, November 13, 2014, upon the Board of Commissioners on Grievances & Discipline by placing a copy of this pleading in the Regular U.S. Mail, postage prepaid, and addressed as follows:

Honorable Richard A. Dove
Secretary of the Board
Board of Commissioners on Grievances & Discipline
The Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, OH 43215

November 13, 2014

A handwritten signature in black ink, appearing to read 'R. T. Lee, III', with a stylized flourish at the end.

R. T. Lee, III