

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|--------------------------------------|---|--------------------|
| The State ex rel. Jeffrey J. Carnes, | : | |
| Relator, | : | |
| v. | : | No. 16AP-46 |
| State Employment Relations Board, | : | (REGULAR CALENDAR) |
| Respondent. | : | |

D E C I S I O N

Rendered on March 14, 2017

On brief: *Adams & Liming LLC, and Sharon Cason-Adams*, for relator.

On brief: *Michael DeWine, Attorney General, Michael D. Allen and Jonathan R. Khouri*, for respondent.

IN MANDAMUS

ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, P.J.

{¶ 1} Jeffrey J. Carnes filed this action in mandamus seeking a writ to compel the State Employment Relations Board ("SERB") to issue a complaint and conduct a hearing based on his allegations that the Ohio Civil Service Employee Association ("OCSEA") had engaged in an unfair labor practice ("ULP").

{¶ 2} In accord with Loc.R. 13(M) of the Tenth District Court of Appeals, this mandamus case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 3} Counsel for Carnes has filed objections to the magistrate's decision. Counsel for SERB has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Carnes worked for almost 20 years for the Ohio Department of Taxation. As is true for most state employees, his employment was heavily governed by a collective bargaining agreement ("CBA") between the department for which he worked and his union OCSEA.

{¶ 5} In September 2014, Carnes was notified that he was being fired based on his alleged unsatisfactory work performance. Carnes filed a grievance to contest the firing. The grievance went through several procedural steps but was not resolved. Eventually the Discharge Review Committee of OCSEA met to consider Carnes' grievance. That committee found no reason to proceed further because the facts set forth in the letter firing Carnes were essentially correct.

{¶ 6} Carnes disagreed with the committee's finding and filed an appeal. That appeal was referred to Sandra Bell, chief counsel for OCSEA. Bell initially expressed an intention to have an arbitration hearing on the issues related to the firing of Carnes. Later Bell informed Carnes that she agreed with the findings of the Discharge Review Committee.

{¶ 7} Carnes and his counsel viewed the failure or refusal of the union to continue pursuing the grievance of his firing as a failure to represent Carnes fairly as required by R.C. 4117.11(B)(6) which reads: "It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to: * * * [f]ail to fairly represent all public employees in a bargaining unit." Therefore, they filed the ULP charges against the union with SERB.

{¶ 8} SERB investigated the ULP charges and rejected the charges. Carnes and his counsel then filed this mandamus case in an attempt to overturn SERB's determinations.

{¶ 9} R.C. 4117.11 requires SERB to issue a complaint and conduct a hearing on an ULP if, and only if, SERB has reasonable grounds to believe that an ULP has occurred. Here, SERB found that reasonable grounds to believe an ULP had occurred did not exist.

{¶ 10} Our magistrate carefully analyzed the agreements set forth on behalf of Carnes as to why the lack of reasonable grounds finding was not wrong. Carnes and his counsel may have their own speculation as to bad faith on behalf of OCSEA, but that speculation does not constitute proof that the multiple levels of OCSEA, which reviewed the termination of Carnes, wanted Carnes fired and therefore refused to arbitrate.

{¶ 11} Turning to the actual objections filed on behalf of Carnes:

A. The Magistrate erred by failing to recognize the fact that the Union's General Counsel admitted Carnes' grievance was meritorious and therefore, worthy of arbitration.

B. The Magistrate erred by misstating Carnes' argument. Contrary to the Magistrate's conclusions, Carnes' arguments do not require SERB or this Court to make "inferences" that the Union acted in bad faith. The Union's failure to comply with explicit contractual deadlines and the Union's subsequent misstatements of fact are concrete evidence of bad faith supporting an unfair labor practice charge.

C. The Magistrate erred when he concluded that Carnes has not borne his burden of demonstrating that SERB abused its discretion in finding no probable cause to further investigate his ULP charge.

D. The Magistrate erred when he concluded that Carnes has not established a clear legal right to have SERB issue a probable cause finding on his ULP charge or a clear legal duty on the part of SERB to do so.

{¶ 12} The fact that Bell initially was willing to go forward with arbitration does not mean that later, after gathering more facts, she could not conclude otherwise.

{¶ 13} Objection A is overruled.

{¶ 14} No bad faith on behalf of the union, OCSEA, has been demonstrated. Our magistrate did not misstate the argument. Instead, our magistrate rejected the argument for the reasons set forth in the magistrate's decision.

{¶ 15} Objection B is overruled.

{¶ 16} Objection C seems to imply that the burden of demonstrating the need for a writ somehow was SERB's burden, as opposed to a burden on Carnes to show an error or

abuse of discretion. The burden has always been on Carnes to show a clear legal right to a writ of mandamus. Carnes has not demonstrated that right.

{¶ 17} Objection C is overruled.

{¶ 18} The fourth objection, D, is no more than a restating of the earlier objections, especially objection C.

{¶ 19} Further, we agree with the findings of fact and conclusions of law set forth in the magistrate's decision. As a result, we overrule objection D.

{¶ 20} All four objections having been overruled, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

KLATT and LUPER SCHUSTER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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| State Employment Relations Board, | : | (REGULAR CALENDAR) |
| Respondent. | : | |

MAGISTRATE'S DECISION

Rendered on October 31, 2016

Adams & Liming LLC, and Sharon Cason-Adams, for relator.

Michael DeWine, Attorney General, Michael D. Allen, and Jonathan R. Khouri, for respondent.

IN MANDAMUS

{¶ 21} Relator, Jeffrey J. Carnes, brings this original action seeking a writ of mandamus ordering respondent, State Employment Relations Board ("SERB"), to find that probable cause exists to investigate relator's unfair labor practice ("ULP") charge against the Ohio Civil Service Employee Association ("OCSEA"), and ordering SERB to issue a complaint and conduct a hearing on the ULP charge.

Findings of Fact:

{¶ 22} 1. Relator worked for nearly 20 years for the Ohio Department of Taxation ("department"). His final position was that of Information Technologist.

{¶ 23} 2. Relator's union representation during the period in question was provided by OCSEA, AFSCME Local 11, AFL-CIO ("OCSEA" or "union").

{¶ 24} 3. Relator's employment was governed by a collective bargaining agreement ("CBA") between OCSEA and the department, effective March 1, 2012 through February 28, 2015.

{¶ 25} 4. By letter dated September 17, 2014, the department notified relator that it would terminate relator's employment effective September 18, 2014 on the basis of neglect of duty and unsatisfactory work performance. Specifically, the termination letter asserts that relator failed to timely and accurately send out an e-mail tax alert to a specific group of department e-mail subscribers, causing unwarranted alarm to the recipient taxpayers, and inconvenience to the department in responding to the resulting taxpayer inquiries. The termination letter also refers to relator's past disciplinary history including multiple written reprimands and three working suspensions for similar violations.

{¶ 26} 5. Relator contested the circumstances surrounding his discharge by filing a grievance through the union on September 18, 2014.

{¶ 27} 6. The grievance proceeded various procedural steps to mediation on February 12, 2015 without resolution.

{¶ 28} 7. The union's Discharge Review Committee ("review committee") met to consider relator's grievance on February 15, 2015.

{¶ 29} 8. By letter dated March 5, 2015, the review committee advised relator that, based on the substantive merits of the grievance, the union would not advance the grievance to arbitration: "The committee determined that there is no reasonable likelihood that anything can be gained by arbitrating this matter. The facts alleged in management's September 4, 2015, discipline notice is [sic] essentially correct."

{¶ 30} 9. Following through on the review committee's action, the union notified the state's Office of Collective Bargaining ("OCB") of its intent not to pursue arbitration on relator's grievance. The notice is dated March 12, 2015.

{¶ 31} 10. Relator filed a written appeal of the review committee's decision on March 13, 2015.

{¶ 32} 11. Sandra Bell, chief counsel for the union, acknowledged receipt of relator's appeal from the review committee's determination by letter dated March 17, 2015 and announced her intent to further investigate the grievance's eligibility for arbitration.

{¶ 33} 12. Bell notified relator and OCB on April 9, 2015, by separate letter to each, that the union would request arbitration on relator's grievance.

{¶ 34} 13. Counsel for relator thereafter made several attempts to ascertain the status of the grievance and schedule arbitration.

{¶ 35} 14. On July 20, 2015, Bell informed relator in writing that, after again reviewing the file, she agreed with the review committee that the merits of the grievance did not warrant referral to arbitration.

{¶ 36} 15. On September 30, 2015, relator filed a ULP charge before SERB asserting that the union's refusal to take his grievance to arbitration violated the union's duty under R.C. 4117.11(B)(6) to "fairly represent all public employees in a bargaining unit."

{¶ 37} 16. SERB's investigator requested information from both parties and produced a memorandum recommending that SERB dismiss the ULP charge for lack of probable cause.

{¶ 38} 17. On November 19, 2015, SERB entered its order dismissing relator's ULP charge for lack of probable cause, finding that relator did not provide sufficient information or documentation to demonstrate that the union's actions were arbitrary, discriminatory, or in bad faith when the union did not advance the termination grievance to arbitration. SERB concluded that the union had taken the basic and required steps in its representation of relator.

{¶ 39} 18. SERB denied reconsideration of its order on January 7, 2016.

Conclusions of Law:

{¶ 40} An employee organization commits an unfair labor practice if it "[f]ail[s] to fairly represent all public employees in a bargaining unit." R.C. 4117.11(B)(6). "Whoever violates section 4117.11 of the Revised Code is guilty of an unfair labor practice remediable by the state employment relations board." R.C. 4117.12(A). Any public employee in a bargaining unit may file a charge with SERB alleging that an employee organization committed an unfair labor practice by failing to fairly represent the employee. R.C. 4117.12(B). In accordance with the process detailed in R.C. 4117.12(B), "SERB must issue a complaint and conduct a hearing on an unfair labor practice charge if, following an investigation, it has a reasonable ground to believe that an unfair labor practice has

occurred." *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, ¶ 38.

{¶ 41} SERB's probable cause determinations are not reviewable by direct appeal. *Ohio Assn. of Pub. School Emps., Chapter 643, AFSCME/AFL-CIO v. Dayton City School Dist. Bd. of Edn.*, 59 Ohio St.3d 159 (1991). In the absence of an adequate remedy in the ordinary course of the law, the present action in mandamus is the appropriate remedy to obtain judicial review of SERB's order dismissing the ULP charge for lack of probable cause. *State ex rel. Serv. Emp. Internatl. Union, Dist. 925 v. State Emp. Relations Bd.*, 81 Ohio St.3d 173 (1998), syllabus. "The pertinent issue is whether probable cause exists to believe that an unfair labor practice has occurred, not whether an unfair labor practice actually occurred." (Emphasis omitted.) *Id.* at 181. However, because mandamus proceedings are premised on the relator establishing an abuse of discretion by SERB in making its probable cause determination, a court reviewing the action in mandamus may not merely substitute its judgment for that of the administrative agency. *Portage Lakes* at ¶ 41. " ' "If there are no apparent factors to show legitimate reason for a union's approach to an issue, [SERB] will not automatically assume arbitrariness. Rather, [it] will look to evidence of improper motive: bad faith or discriminatory 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." ' " *State ex rel. Hall v. State Emp. Relations Bd.*, 122 Ohio St.3d 528, 2009-Ohio-3603 ¶ 22, quoting *In re Wheeland*, 10th Dist. No. 94APE10-1424, (June 6, 1995), quoting *In re State Employer. Relations Bd. v. AFSCME Local 2312*, SERB No. 89-029 (Oct. 16, 1989).

{¶ 42} Relator asserted before SERB that the union's expressed basis for forgoing arbitration was pretextual, and that the refusal occurred not because the grievance lacked merit, but because union legal staff, at some point, realized that the union had failed to timely act under the terms of the CBA, and arbitration was no longer available. Based on the chronology of the inquiry and the communications from union legal staff, relator asserts that SERB should have drawn an inference that the union had acted in bad faith to cover its own failure to comply with CBA deadlines, and that this establishes probable cause of a R.C. 4117.11(B)(6) violation for failure to fairly represent relator in his termination grievance.

{¶ 43} To establish that the union's poor timing deprived him of the opportunity to arbitrate, relator points out that, pursuant to the first part of Article 25.01(K) of the CBA, the union was required to notify OCB of the results of the review committee meetings within 14 days. The review of relator's grievance and decision not to select the grievance for arbitration took place on February 25, 2015. In the stipulated record here, the letter notifying OCB of the results of the review committee meeting is dated March 12, 2015, 15 days after the meeting and, therefore, outside the time provided for such notice under the CBA.

{¶ 44} The negative impact of this delay, relator argues, flows from the second part of Article 25.01(K) of the CBA, providing that the union had 60 days to reinstate the claim for arbitration beginning with OCB's receipt of the results of the review committee. Relator argues that the union, having failed to timely communicate the results of the discharge review committee, was aware that it had forfeited the 60-day period for reinstating the grievance, and as a result cut short Bell's initial effort to further examine relator's grievance and request arbitration.

{¶ 45} Relator's argument in this action is therefore built on three stacked predicates or inferences: (1) that his grievance had colorable merit based on the factual circumstances surrounding his discharge, and the union would have found arbitration warranted had it conducted a proper review of the facts; (2) that the opportunity to arbitrate the grievance was irrevocably lost when the union communicated the results of the review committee meeting one day late; and (3) that the union acted in bad faith, declining to pursue arbitration not based on the merits of the grievance, but to mask its own dilatory actions in failing to timely comply with the provisions of the CBA.

{¶ 46} The magistrate first disagrees with relator's assumption that further good-faith investigation and examination by the union of the circumstances surrounding relator's discharge would have established that his grievance merited arbitration. Public employees have no absolute right under R.C. 4117.11(B)(6) to see a grievance taken to arbitration. *AFSCME Local 2312*, SERB No. 89-029. As a result, unions have discretion in deciding which grievances warrant the allocation of resources to take them to arbitration. *In re State Emp. Relations Bd., v. Ohio Civil Serv. Emp. Assn.*, *AFSCME Local 11, AFL-CIO*, SERB No. 93-019 (Dec. 20, 1993), citing *Vaca v. Sipes*, 386 U.S. 171

(1967). The circumstances surrounding relator's discharge were well-developed in relator's submissions to the SERB investigator. Although relator's initial union grievance did not contest his past history of employment disciplinary actions, he strongly disagreed with the premise that he was at fault for the latest problem. Relator asserted that the actions of his supervisor created a situation in which relator could not possibly comply with instructions, and that his supervisor actually approved the text of the taxpayer notice at issue. The union pursued the initial grievance, but eventually determined through its review committee proceedings that the evidence did not warrant arbitration. Before SERB, the union noted that the employer submitted evidence that the final taxpayer notice produced by relator did not comply with the draft language provided to relator by his superiors.

{¶ 47} Based on the state of the evidence submitted to SERB, the magistrate concludes that SERB did not abuse its discretion in dismissing the ULP charge to the extent that the dismissal must in part be based on the merits of relator's underlying grievance and the union's expressed reasons for foregoing arbitration.

{¶ 48} Turning to the assertion that the union's delays inevitably foreclosed any opportunity to arbitrate, the magistrate concludes that the timing of the union's handling of relator's appeal from the review committee's determination does not mandate a probable cause finding by SERB. The magistrate first notes that neither party addresses an additional provision of the CBA that weakens relator's argument in this respect. Under Article 25.02 of the CBA, an employee is required to request arbitration within 180 days of filing of a grievance. The grievance here was filed on September 18, 2014. The time limit for filing for arbitration would have fallen, therefore, on March 17, 2015, a scant four days after relator requested the union to reconsider its February 25, 2015 refusal to refer the matter to arbitration. If this 180-day limit is binding, any subsequent actions or promises to review the matter and consider arbitration by Bell were immaterial because the deadline had already run.

{¶ 49} On the other hand, as the tone of Bell's communications may indicate, both the union and the OCB may have considered that the 60-day reinstatement provision of Article 25.01(K) of the CBA acted as an automatic extension of the 180-day provision of Article 25.02. Even in that case, however, the magistrate further observes that under

Article 25.06 of the agreement, time limits may be extended in mutual agreement of the parties in writing. If an extension was theoretically available under Article 25.06 through accommodation with OCB, this weakens any inference that the union was inescapably compelled to forego arbitration once it gave notice of the review committee decision to OCB more than 14 days after the committee took action. This correspondingly undermines relator's proposed inference that the union advanced the pretextual reason that the grievance lacked merit in order to cover its own mishandling of the deadlines involved.

{¶ 50} The matter is distinguishable from *State ex rel. Fuller v. State Emp. Relations Bd.*, 193 Ohio App.3d 272, 2011-Ohio-1599 (1st Dist.) cited by relator. In *Fuller*, the union filed a " 'blatantly untimely' " notice of arbitration. *Id.* at ¶ 12, which precluded any opportunity to arbitrate the employee's discharge. In contrast to the present case, the union in *Fuller* had fully intended to ask for arbitration upon expiration of a stay agreed to by the employer pending certain related judicial proceedings. The First District Court of Appeals affirmed the writ issued by the court of common pleas ordering SERB to vacate its dismissal of the employee's ULP charge and to find probable cause that the union engaged in unfair labor practices.

{¶ 51} Relator in the present case requires us to stack inferences of bad faith on top of an allegedly-unjustifiable precursor decision by the union not to request arbitration. Bell's initial decision to re-examine the arbitration question, and subsequent reconsideration of that decision, did not amount to the simple negligent failure to meet the arbitration deadline found in *Fuller*.

{¶ 52} The magistrate finds that relator has not borne his burden of demonstrating that SERB abused its discretion in finding no probable cause to further investigate the ULP charge. SERB was entitled to conclude that the facial reasons provided by the union, that is, the relative futility of arbitration in this case, were credible. Given the deference accorded to SERB in a mandamus action challenging SERB's decision as an abuse of discretion, we find that SERB did not abuse its discretion in finding that there was no bad faith in the union's action, or that relator was differently treated from other bargaining union members. Relator has not demonstrated that the union did not take a basic and required step in representing him based solely on the timing of the arbitration decision.

The union provided a rational basis for ultimately declining to take the matter to arbitration. Relator asks us to substitute a speculative theory of bad faith based on the union's own errors, but the record does not support necessary inference that those errors were in fact fatal to arbitration, or that Bell's ultimate reconsideration of the arbitration question was in bad faith.

{¶ 53} Based on the foregoing, the magistrate concludes that relator has not established a clear legal right to have SERB issue a probable cause finding on his ULP charge or a clear legal duty on the part of SERB to do so. SERB did not abuse its discretion in finding a lack of probable cause, nor did SERB fail to properly investigate the charge. It is the magistrate's decision that this court must deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
MARTIN L. DAVIS

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).