STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
GERARD A. MCCONNELL,	*	
Charging Party,	*	
v.	*	PSLRB Case No. SV 2013-07
AFSCME, LOCAL 1693	*	
Charged Party	*	

* * * * * * * * * * * * *

DECISION AND ORDER DENYING REQUEST FOR RELIEF
AND DISMISSING CHARGE

I. INTRODUCTION

On October 26, 2012, Gerard A. McConnell ("McConnell"), a non-certificated employee of the Anne Arundel County Board of Education ("County Board"), filed a Charge of Violation of Title 6, Subtitle 4 or Subtitle 5 of the Education Article ("Form PSLRB-05"), with the Public School Labor Relations Board ("PSLRB").[1] Form PSLRB-05 reflects the authority granted to the PSLRB by Section 2-205(e)(4)(i) of the Education Article to "decide any controversy or dispute arising under Title 6, Subtitle 4 or Subtitle 5 of this Article."

In his Charge, McConnell claims that his union, AFSCME Local 1693 ("Union"),[2]

[1] As a non-certificated employee, McConnell's Charge falls under Subtitle 5.
[2] McConnell's Charge names Local Union President Roland Johnson as a "Charged Party." Inasmuch as the PSLRB has ruled that its jurisdiction extends to "employee organizations," rather than individual employees, officers, or other representatives of such organizations (see, e.g., *Sylvia Walker, et al. v. The Baltimore Teachers*

breached its "duty of fair representation" in violation of Section 6-509(b) of the Education Article[3] by failing to assist him in pursuing back wages for the period he was suspended from employment by the County Board.

II. FINDINGS OF FACT

At the outset, we note that the collective bargaining agreement between the Union and the County Board does not contain a contractual grievance procedure to protest disciplinary and discharge actions. Rather, that agreement provides for such protests to be made exclusively pursuant to Section 4-205(c) of the Education Article of the Annotated Code of Maryland, over which this Board has no jurisdiction.

On November 17, 2010, a meeting was held between McConnell and the County Board to discuss proposed disciplinary action arising from McConnell's absences from work. By letter dated November 18, 2010, the County Board notified McConnell that he was being "reprimanded and suspended without pay … as a result of repeated violations of Board Policy GADD – Absences without Authorized Leave …." The November 18, 2010, letter further notified McConnell of his "right to a hearing, with counsel, including a union representative, before the Superintendent's designee …." McConnell chose not to seek union representation and instead retained a private attorney. By letter dated November 19, 2010, McConnell's attorney notified the County Board that he would be

---

Union, et al., PSLRB Case No. SV 2012-10 (2012); *Scott A. Jones v. Robert Jay Kessler*, PSLRB Case No. SV-13-10 (2013)), we shall treat the Union as the "Charged Party" and dismiss the Charge as to Union President Johnson.

[3] Section 6-509(b). "Fair Representation" – (1) An employee organization designated as an exclusive representative shall represent all employees in the unit fairly and without discrimination, whether or not the employees are members of the employee organization."

representing McConnell in this matter, and requested a hearing to challenge the "indefinite suspension."

On July 11, 2011, an appeal hearing was held on this issue before Hearing Examiner William C. Mitchell, Jr. McConnell's private attorney represented him at the hearing. Based on the evidence presented, the Hearing Examiner recommended that McConnell's "indefinite suspension be lifted" and that he be "reinstated to his job …." The Hearing Examiner did not, however, specifically address the issue that provides the basis for the dispute in this case, i.e., whether McConnell should receive back pay for the period in which he was on indefinite suspension.

On February 16, 2012, the County Board issued an Opinion and Order adopting the Hearing Examiner's recommendation.[4] McConnell did not further appeal the matter to the State Board as was his right under Section 4-205(c)(3) of the Education Article.[5]

Beginning on or about July 2, 2012, McConnell's attorney sent several emails to Union President Roland Johnson ("Johnson") seeking his agreement to co-sign a letter notifying the County Board that they had reviewed the Hearing Examiner's decision and determined that McConnell "should be afforded back pay for the time he was suspended/terminated from employment by the Board to his return to employment as recommended by Mr. Mitchell."[6]

---

[4] McConnell returned to work but was ultimately terminated, which action is not a part of this case.

[5] Md. Code Ann., Educ. § 4-205(c)(3) ("A decision of a county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent. The decision may be further appealed to the State Board if taken in writing within 30 days after the decision of the county board.").

[6] There is no evidence that Johnson ever signed this letter.

On July 30, 2012, McConnell's attorney sent an email to Johnson inquiring as to whether the Union would be "willing to be a party to the lawsuit against the County concerning the payment of [McConnell's] back wages." McConnell's attorney further stated, "I need the Union to be a party to sue under the negotiated agreement between the Union and the County."

On August 8, 2012, McConnell's attorney sent another email to Johnson reasserting his belief that McConnell was entitled to back wages:

> Although the Hearing Examiner addresses the leave Mr. McConnell was improperly forced to use in his decision, he does not address the suspension period while Mr. McConnell was unjustly suspended from his job and because the Hearing Officer opinion points out that the termination was not warranted, that leave should have been paid ....[7]

On August 29, 2012, McConnell's attorney sent yet another email to Johnson questioning whether the Union would "participate in the suit pursuing [McConnell's] back wages."

On August 30, 2012, Johnson responded in the negative. Noting that the Union did not receive a copy of the Hearing Examiner's recommendation or the decision of the County Board, Johnson stated that "Mr. McConnell has retained your services from the beginning, you have handled his case, all correspondence was sent to you and it was up to you to file any appeals or objections to the hearing examiner's report within the allotted time frame."

On October 26, 2012, McConnell filed his Charge with the PSLRB. At issue is

[7] As noted above, the Hearing Examiner did not address the issue of whether McConnell was entitled to back pay for the period in which he was on indefinite suspension.

whether the Union breached its duty of fair representation by failing to assist McConnell in attempting to secure back wages assertedly owed for the time he was suspended from employment.

III. POSITIONS OF THE PARTIES

McConnell maintains that the Union represents employees in the County Board bargaining unit, and is the sole and exclusive agent for negotiating their salaries, wages, hours, and other terms and conditions of employment. He claims that the Union is a necessary party for filing suit to recover his back wages as it is signatory to the collective bargaining agreement. Nonetheless, and despite having provided the Union with documentation that the County Board is unwilling to pay his back wages as claimed, McConnell asserts that the Union has refused and continues to refuse to assist him "in pursuing back pay through the court system."

The Union denies that it breached its duty of fair representation. It maintains that McConnell did not rely upon or include the Union in his appeal under Education Article §4-205(c) and that it has never been provided a copy of any of the pertinent documents. The Union further states that McConnell elected to engage the services of a private attorney to vindicate his rights under §4-205(c), which stand separate and apart from collectively bargained terms established pursuant to Title 6, Subtitle 5 of the Education Article. The Union also maintains that McConnell's claim for back pay cannot be remedied through the collective bargaining agreement in that the agreement, as noted above, provides only for statutory remedies.

IV. ANALYSIS

Section 6-509(b) of the Education Article provides that "[a]n employee organization designated as an exclusive representative shall represent all employees in the unit fairly and without discrimination, whether or not the employees are members of the employee organization." The statute therefore codifies the "duty of fair representation" owed by an exclusive bargaining representative "to serve the interests of all members without hostility or discrimination," "to exercise its discretion with complete good faith and honesty," and "to avoid arbitrary conduct." *Sylvia Walker, et al. v. The Baltimore Teachers Union, et al.*, PSLRB Case No. SV 2012-10 (2012) (quoting *Stanley v. American Federation of State and Municipal Employees, Local No. 553, et al.*, 165 Md. App. 1 (2005) (citations omitted)).

For present purposes, we need not determine whether the Union has complied with the substantive standard imposed by the duty of fair representation. As we explain below, this is because the matter at issue—i.e., the Union's refusal to participate in a lawsuit seeking to recover McConnell's back wages—is not within the scope of its duty of fair representation.

In defining a union's duty of fair representation, Maryland has looked to the labor law jurisprudence of the federal courts. *See Offutt v. Montgomery County Board of Education*, 285 Md. 557, 404 A.2d 281 (1979) (citing federal case law to define duty of fair representation); *Stanley,* 165 Md. App. at 15 (2005) (same).

In this regard, the U.S. Supreme Court has explained that the duty of fair representation arises from a union's grant of authority that gives it exclusive power to

represent all employees in a particular bargaining unit. *See Breininger v. Sheet Metal Workers Intern. Ass'n Local Union No. 6*, 493 U.S. 67, 110 S.Ct. 424 (1989); *see also NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181, 87 S.Ct. 2001, 2007 (1967) ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation").

The duty of fair representation is therefore "inextricably linked to the union's status as exclusive bargaining representative." *Felice v. Sever*, 985 F.2d 1221(3d Cir. 1993). Because the duty of fair representation derives from the union's status as exclusive representative of bargaining unit employees, both the courts and labor boards have refused to extend the duty to matters beyond the union's statutory authority as exclusive bargaining representative.

For example, in *Freeman v. Local Union No. 135, Chauffeurs, Teamsters*, 746 F.2d 1316 (7th Cir. 1984), the Seventh Circuit Court of Appeals rejected an employee's claim that his union breached its duty of fair representation by refusing to seek judicial review of an arbitrator's award. In so doing, the appellate court noted that the collective bargaining agreement did not give the union the exclusive right to seek judicial review of the award. It therefore found that the union had no duty to seek judicial review of the arbitrator's decision because "with respect to that decision, it was not acting as his exclusive representative."

Similarly, in *Barrett v Ebasco*, 868 F.2d 170 (5th Cir. 1989), the Fifth Circuit Court of Appeals considered whether a union breached its duty of fair representation by

refusing to file suit to vacate an arbitration award that was adverse to the employee. The appellate court found that the union did not have exclusive control over a suit to set aside the arbitration award, and therefore could not be found to have breached its duty of fair representation:

> The scope of the duty of fair representation is coextensive only with the union's statutory authority to act as the exclusive representative of all employees within the bargaining unit. If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation.

The National Labor Relations Board has likewise found that the duty of fair representation arises only within the context of a union's role as exclusive representative for bargaining unit employees. *See Elevator Constructors Local 8*, 243 NLRB No. 10 (1979) (duty of fair representation is only relevant when the union is acting in its representative capacity).

The same reasoning has been adopted by public sector labor relations boards in a number of states which have concluded that a union's duty of fair representation does not extend to representing employees in matters such as school district personnel hearings, unemployment insurance proceedings, civil service hearings, lawsuits and other matters outside the collective bargaining agreement.

For example, in *Miranda-Saenz v. California School Employees Association*, 22 PERC ¶ 29096 (1989), the California Public Employment Relations Board considered whether a union breached its duty of fair representation by refusing to appear on behalf of an employee at a school district personnel hearing. Citing longstanding precedent, the

Board determined that the exclusive bargaining representative was under no obligation to represent employees in cases involving remedies outside the collective bargaining agreement. It therefore held that the union had no duty to represent the employee at the district personnel hearing, and could not be found in violation of its duty of fair representation for failing to do so. *See also Welch v. California Teachers Association and Oakland Education Association*, 30 PERC ¶ 152 (2006) (upholding dismissal of fair representation claim on grounds that union "does not owe a duty of fair representation to bargaining unit employees when it represents them in matters filed in the courts.").

The New York Public Employment Relations Commission has also determined that a union's duty of fair representation does not extend to proceedings outside the collective bargaining agreement. *See In the Matter of Luis Rivera and Civil Service Employees Association, Inc., Local 1000, AFSCME*, 31 PERB ¶ 4644, 1998 WL 35396832 (1998) (rejecting employee's claim that duty of fair representation required union to provide representation in an unemployment insurance proceeding).

The Florida Public Employment Relations Commission has likewise concluded that the duty of fair representation does not extend to matters outside the collective bargaining agreement. *See Arnold v. AFSCME*, 15 FPER ¶ 20015 (1988), *aff'g*, 14 FPER ¶ 19299 (1988) (duty of fair representation does not require union representation in civil service appeal proceedings that do not involve a contractual grievance).

The same result was reached by the New Jersey Public Employment Relations Commission in *Bergen Community College Faculty Association (NJEA)*, 10 NJPER ¶ 15127, 1984 WL 967885 (1984) (union's duty of fair representation did not extend

beyond contract negotiations and administration, and therefore did not encompass a duty to finance an employee's federal court lawsuit).

The rationale in these cases is that the duty of fair representation stems from the union's grant of exclusive authority to negotiate and administer collective bargaining agreements covering bargaining unit employees. It therefore follows that the duty attaches only in matters over which the union exercises this exclusive grant of authority.

In the matter now before us, the Union's authority as exclusive representative for bargaining unit employees derives from Title 6, Subtitle 5, of the Education Article. As exclusive representative, the Union has negotiated a collective bargaining agreement covering salaries, wages, hours, and other working conditions for all employees in the bargaining unit.

The Union has not, as already stated, negotiated into the collective bargaining agreement a provision allowing for disciplinary appeals through the contractual grievance procedure. Article 5 ("Discipline and Discharge"), Section 3 ("Appeals") of the collective bargaining agreement specifies that disciplinary appeals are to be made "pursuant to Section 4-205(c) of the Education Article of the Annotated Code of Maryland." The statutory appeals process is therefore the exclusive means by which bargaining unit employees may challenge disciplinary actions.

The Union also did not act as McConnell's exclusive representative in the statutory appeal process. While employees are entitled to union representation in such appeals, they may choose to be represented by private counsel. McConnell made the

latter choice by securing a private attorney to represent him in his appeal.[8] As noted above, the weight of authority holds that the duty of fair representation does not attach where a union is not serving as the employee's exclusive representative.

In sum, the appeal process exists outside the collective bargaining agreement, the Union did not represent McConnell in his appeal, and any legal action to enforce McConnell's rights does not depend upon the collective bargaining agreement. There is consequently no basis for finding that the Union has a duty to assist McConnell in bringing a legal action to secure any back wages purportedly owed.

V. CONCLUSION

For the reasons stated herein, we conclude that the Union did not violate its duty of fair representation, and we DISMISS the charge.

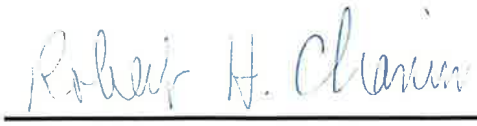
ORDER

IT IS HEREBY ORDERED THAT THE CHARGE IN THE INSTANT MATTER, PSLRB Case No. SV 2013-07, IS DISMISSED.

[8] Nor do we agree with McConnell that the Union is a necessary party to recover McConnell's claimed back wages because it is a signatory to the collective bargaining agreement. As noted above, absent a contractual grievance procedure to protest disciplinary or discharge actions, Section 4-205(c) of the Education Article creates the exclusive forum for employees seeking redress of disciplinary sanctions. Any action to enforce McConnell's rights would therefore derive from the statutory process and not the collective bargaining agreement.

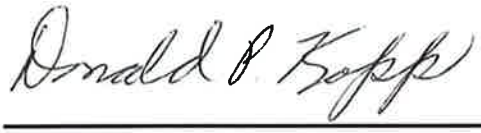
BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman

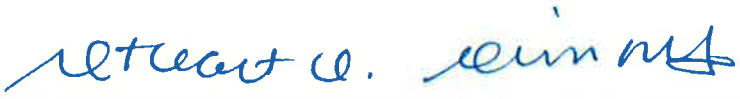


Robert H. Chanin, Member

Charles I. Ecker, Member



Donald P. Kopp, Member



Stuart O. Simms, Member

Glen Burnie, MD
March 28, 2013

APPEAL RIGHTS

Any party aggrieved by this action of the PSLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act—Contested Cases), and Maryland Rules CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).