STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:

Millicent Smith,

Charging Party,

v.

ACE-AFSCME LOCAL 2250,

Charged Party.

PSLRB Case No. SV 2018-13

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I. PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

On May 11, 2018, Millicent Smith filed a Charge of Violation of Title 6, Subtitle 4 or Subtitle 5, of Education Article (Form PSLRB-05) with the Public School Labor Relations Board ("PSLRB"). Form PSLRB-05 reflects the authority granted to the PSLRB by the Education Article of the Annotated Code of Maryland to "decide any controversy or dispute arising under Title 6, Subtitle 4 or 5 of this Article." Md. Code Ann., Educ. § 2-205(e)(4)(i).

In her Charge, Ms. Smith asserts that ACE-AFSCME Local 2250 breached its duty of fair representation in violation of Section 6-509(b) of the Education Article by refusing to process a grievance, which involved the denial of sick leave bank benefits, to arbitration.

On May 21, 2018, ACE-AFSCME Local 2250 filed a Motion to Dismiss and Memorandum of Law ("Response"). In its Response, ACE-AFSCME Local 2250 asserts that "[t]he allegation that Local 2250 violated §6-509(b) of the Education Article of the ***Annotated Code of Maryland*** by failing to provide fair representation to Charging Party is not supported by the facts and is without merit to proceed." ACE-AFSCME Local 2250 contends that, as a result, the Charge should be dismissed.

On June 29, 2018, Ms. Smith responded to ACE-AFSCME Local 2250's Response ("Reply").[1]

I. FACTUAL BACKGROUND

[1] COMAR 14.34.04.04(A)(3) states, "[a] response to a motion to dismiss shall be filed within 10 days of service of a motion to dismiss." COMAR 14.34.04.06(E)(4) states, "[t]he Board may extend any time period set forth in this chapter for good cause shown." Ms. Smith requested an extension to respond to ACE-AFSCME Local 2250's Motion to Dismiss, which was granted by the PSLRB for good cause shown.

This matter arises out of a grievance filed by ACE-AFSCME Local 2250 on July 1, 2013, on behalf of Ms. Smith and other affected members of the union who were allegedly denied sick leave bank benefits. The grievance was processed up to the level of arbitration, at which time ACE-AFSCME Local 2250 and Prince George's County Public Schools ("PGCPS") began settlement discussions.

On March 3, 2017, Damon Felton, attorney for ACE-AFSCME Local 2250, informed Ms. Smith via e-mail that PGCPS would pay her a full year's salary (approximately $55,000) as settlement of the aforementioned grievance. Mr. Felton explained that this was reasonable given the restriction in the sick leave bank rules that limited sick leave bank to "one calendar year of the employee['s] contractual workdays." Ms. Smith refused these terms of settlement.

ACE-AFSCME Local 2250 scheduled the matter for arbitration, and shortly thereafter, began another round of settlement negotiations with PGCPS. ACE-AFSCME Local 2250 held the position that it was not obligated to obtain Ms. Smith's agreement with the terms of a settlement; however, PGCPS refused to reach a settlement agreement without a signature from Ms. Smith.

Because of PGCPS's position not to settle without a signature from Ms. Smith, Mr. Felton again attempted to secure Ms. Smith's agreement. On February 3, 2018, Mr. Felton sent Ms. Smith an email, and explained to her why he believed that the offer that was pending for settlement was an offer she should accept. More specifically, Mr. Felton explained,

> Upon reviewing the case further, it appears that the most you could possibly get from an arbitrator's decision would be a full work year of sick leave bank benefits since there are limits to sick leave bank grants. This, of course, would be if we were to prevail in the proceeding. As you are aware, there are never any guarantees in any legal proceeding and there is a possibility that we could be unsuccessful in the proceeding. If we were to go forward and not prevail, you would receive nothing.
>
> Given this, it is often better to settle an agreement since, as the cliché goes, a bird in the hand is better than two in the bush. I believe PGCPS may now be willing to give you the most (i.e. ALL) I believe we can expect in an arbitration hearing. If this is the case, I would recommend that you accept such an offer since in my legal opinion I see no valid grounds by which an arbitrator would award you more than what the contract would require. Arbitrators issue decisions based on contract language and rarely if ever take into consideration damages. Because of this, if they offer a full year of benefits, it is my opinion that this would be the best possible outcome of an arbitration and continuing to go forward would mean that you would take the chance of getting nothing or getting what they already offered.

> With all this being said, would you be willing to accept the offer for a full year's sick leave bank benefits. I believe the total amount for you would equal about $55,000.

In the period between the time that Mr. Felton sent his February 3, 2018, e-mail, and February 5, 2018, it was determined that $69,000 was the amount that would allow Ms. Smith to receive approximately $55,000 in net income.

Thereafter, on February 5, 2018, Mr. Felton sent Ms. Smith another e-mail stating, "It looks like PGCPS is willing to consider the $69,000 that we discussed… I hope to be able to have something for your [sic] to sign early next week."

After discussions with PGCPS, Mr. Felton discovered that PGCPS's payment of a lump sum amount of $69,000 would result in a higher tax rate. As a result, PGCPS increased the settlement amount to approximately $90,000, allowing Ms. Smith's net income to be approximately $55,000 from the settlement.

On February 23, 2018, Mr. Felton sent Ms. Smith a proposed settlement agreement. This agreement included a clause, which states, in relevant part, "Smith… agrees not to make or file any lawsuits, complaints, charges of discrimination or other proceedings against the Board [of Education of Prince Georges County], or to join in any such lawsuits, complaints, charges of discrimination or other proceedings against the Board… concerning any matter that arose prior to the date of this Agreement."

On February 27, 2018, and in response to Mr. Felton's February 23, 3018, e-mail and the proposed settlement agreement, Ms. Smith sent Mr. Felton an e-mail stating, "Please see the attached documents."[2]

On this same day, Mr. Felton wrote Ms. Smith an e-mail stating, in relevant part, "We will not be making any counter offers. This is the approved settlement agreement. $90k after taxes will be about $55k. If you do not understand something in the settlement agreement I can explain it to you but negotiations are over and this is the settlement."

On March 5, 2018, Ms. Smith sent Mr. Felton an e-mail stating, in relevant part,

> You state in your email that you are not making any counter-offers as if you are working for your own self-interest or that of the other side. I do believe that you are negotiating on my behalf. Correct me if I'm incorrect. If you were not, then I certainly don't trust that this is a good deal for me ***at all.***
>
> You suggest in your email that I'm seeking more money. I am not. I am merely stating in the letter what I wish, but I know that I cannot get, but

[2] It does not appear that Ms. Smith included with her Charge the documents that she states were attached to this e-mail. Based on Mr. Felton's response, as described below, it appears that the attached documents included a counter-offer.

> one thing is for certain, I will be pursuing compensation for ***ALL*** my other injuries and losses beyond what this matter may be able to resolve. There is absolutely no way on God's green earth I would allow you or anybody else to rest my rights away from me for a measly $90K. I nearly fell out of my seat when I learned of their demands and hold-harmless clauses. The facts clearly show that they owe me more than $90K without question, so if they wish to litigate it in a court of law, so be it. It appears to me that the only thing they're offering is that I forfeit my right to be compensated beyond what the record shows that they owe me. That's not a settlement at all. Why should I waive my rights when on the face of my claim, they owe me more than $90K, plus interest, AND punitive damages for withholding my due compensation as hostage all this time without cause?
>
> REMOVE all waiving of my rights, as they pertain to causes of action set apart from the subject matter of my Sick Leave Bank Grievance, and I'll gladly sign the Settlement Offer. **Otherwise, I wish to move forward to arbitration. Win or lose, I'm going to file a claim in court against all responsible for any of my perceived injuries and losses.**

On this same day, and in response to Ms. Smith's e-mail, Mr. Felton stated, in relevant part,

> Because of the uncertainties involved in an arbitration hearing, it is my legal opinion that the settlement terms you were offered are fair. As I noted before in an email to you, it is very likely that the arbitrator, if we were to prevail, may be limited to granting you only a one-year grant (approximately $55,000) of sick leave bank benefits. Given that PGCPS is offering to pay ~$90,000, which is more than what an arbitrator may award, I believe that this is not a matter that should go forward to arbitration.
>
> Please be aware that if you choose to sign the settlement agreement, we have every indication that PGCPS will pay you the full stated amount contained in the settlement agreement (i.e. ~ $90,000). If, however, you do not sign the agreement, I must advise you that I intend on advising my client, Local 2250, not to pursue the matter to arbitration. If this occurs, you could end up receiving nothing from the grievance. If you fully understand that you can possibly receive $90,000 by signing the agreement or $0 by not signing it and you still refuse to sign the settlement agreement please let me know. **Please let me know your answer by 4pm on Thursday, March 8, 2018.**

Based on the record, as of June 29, 2018, the date Ms. Smith filed her Reply, there were no further communications between Ms. Smith and ACE-AFSCME Local 2250 and/or Mr.

Felton. ACE-AFSCME Local 2250 accepted the advice of Mr. Felton and did not pursue Ms. Smith's grievance to arbitration.

II. POSITIONS OF THE PARTIES

As discussed above, in her Charge, Ms. Smith asserts that ACE-AFSCME Local 2250 breached its duty of fair representation in violation of Section 6-509(b) of the Education Article by refusing to process a grievance, which involved the denial of sick leave bank benefits, to arbitration. Ms. Smith states that ACE-AFSCME Local 2250 "is required to proceed with moving my case to arbitration", and further, has "not assisted me in their fiduciary duty to represent my interest as promised, and I am aggrieved… as a result of their breach of duty."

In Response, and as previously explained, ACE-AFSCME Local 2250 asserts that "[t]he allegation that Local 2250 violated §6-509(b) of the Education Article of the ***Annotated Code of Maryland*** by failing to provide fair representation to Charging Party is not supported by the facts and is without merit to proceed." In support of this assertion, ACE-AFSCME Local 2250 states, "… Local 2250 acted in good faith and reached an entirely reasonable settlement agreement with the employer. Given the circumstances, an arbitration of the Charging Party's grievance could result only in a grant of approximately $53,000, pre-tax, *if* Local 2250 were to prevail in arbitration. However, because of negotiations conducted by Local 2250, Charging Party is being offered over $90,000."

III. 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." As the PSLRB has previously stated, this statute codifies the "duty of fair representation" owed by an exclusive negotiating representative "to avoid arbitrary conduct," "to exercise its discretion with complete good faith and honesty," and "to serve the interests of all members [of the negotiating unit] without hostility or discrimination." Sylvia Walker, et al. v. The Baltimore Teachers Union, et al., PSLRB Case No. SV 2012-10 (2010) (*quoting* Stanley v. American Federation of State and Mun. Employees Local No. 533, 165 Md. App. 1, 15 (Md. Ct. Spec. App. 2005) (citations omitted)). Simply stated, a union's decision not to represent a member of the negotiating unit does not violate the duty of fair representation unless the decision is arbitrary, made in bad faith, or discriminatory.

In her Charge, Ms. Smith does not specify whether her claim that ACE-AFSCME Local 2250 violated its duty of fair representation is grounded in arbitrary, bad faith, or discriminatory conduct. Therefore, we review each of these standards in turn.

a. The Arbitrary Standard

In Stanley v. American Federation of State and Mun. Employees Local No. 533, et al., the Maryland Court of Special Appeals outlined the standard for determining whether a union's conduct in representing its members is arbitrary, and therefore, a breach of the duty of fair

representation. 165 Md. App. 1 (Md. Ct. Spec. App. 2005). The Court explained 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.'" Stanley, 165 Md. App. at 15 (*citing* Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991)).

Most importantly, and bearing on the current matter before the PSLRB, the Court made clear that a union is not necessarily in breach of the duty of fair representation if it opts to not process a particular grievance. The Court explained that a union violates its duty of fair representation, "'for example, when it arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion.'" Stanley, 165 Md. App. at 15-16 (*citing* Int'l Bd. of Elec. Workers v. Foust, 442 U.S. 42, 47 (U.S. 1979) (*quoting* Vaca v. Sipes, 386 U.S. 171, 191 (U.S. 1967))). In other words, while a union may refuse to process a grievance, "'"it may not do so without reason, merely at the whim of someone exercising union authority."'" Stanley, 165 Md. App. at 16 (*citing* Neal, 48 Md. App. at 358). The Court further stated:

> '[A] union is accorded considerable discretion in the handling and settling of grievances.' *Neal*, 48 Md. App. At 358, 427 A.2d 1033. A union does not necessarily breach its duty when it declines to take a member's grievance to arbitration. *See Vaca*, 386 U.S. at 191-92, 87 S. Ct. 903; *accord Meola v. Bethlehem Steel Co.*, 246 Md. 226, 235, 228 A.2d 254 (1967). Indeed, 'an employee has no absolute right to insist that his grievance be pressed through any particular state of the contractual grievance procedure. A union may screen grievances and press only those that it concludes will justify the expense and time involved in terms of benefiting the membership at large.' *Neal*, 48 Md. App. At 358-59, 427 A.2d 1033 (citation omitted)(emphasis deleted). '[M]ere negligence... would not state a claim for breach of the duty of fair representation[.]' *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 372-73, 110 S. C. 1904, 109 L.Ed.2d 362 (1990)."

Id.

There is no evidence in the record to support a finding that ACE-AFSCME Local 2250's decision not to process Ms. Smith's grievance to arbitration was in any way unreasonable. In fact, the opposite is true – after representing Ms. Smith for over four-and-a-half years, its decision not to arbitrate her grievance was based on a consideration of the likelihood of success of the arbitration, as well as the terms of the proposed settlement agreement – an assertion made by ACE-AFSCME Local 2250, that Ms. Smith does not refute. As explained by ACE-AFSCME Local 2250 in its Response, "Given the circumstances, an arbitration of the Charging Party's grievance could result only in a grant of approximately $53,000, pre-tax, *if* Local 2250 were to prevail in arbitration. However, because of negotiations conducted by Local 2250, Charging Party is being offered over $90,000." Furthermore, while it is clear that Ms. Smith was not satisfied with the terms of the settlement agreement, that fact alone, without any further evidence, does not render ACE-AFSCME Local 2250's handling of her grievance unreasonable.

b. Bad Faith Standard

In its decision, the Stanley Court also outlined the standard for determining whether a union's conduct with regard to its representation of negotiating unit members was in bad faith. The Court held that, in order to succeed on a theory of a bad faith breach of the duty of fair representation, the party alleging the breach must show "fraud, or deceitful or dishonest action" on behalf of the union. Stanley, 165 Md. App. at 19 (*citing* In re ABF Freight Sys., Inc., Labor Contract Litigation, 988 F.Supp. 556, 564 (D.Md. 1997)). The Court further explained that, "[b]ad faith focuses not on 'the objective adequacy of that union's conduct,' but 'on the subjective motivation of the union officials.'" Stanley, 165 Md. App. at 20 (*quoting* Thompson v. Aluminum Co. of Am., 276 F.3d 651, 658 (4th Cir. 2002)).

In Ms. Smith's Charge, there is no evidence, nor are there any allegations to suggest that ACE-AFSCME Local 2250 acted fraudulently, or in a deceitful or dishonest matter.

c. The Discriminatory Standard

Unlike the standards outlined above concerning a union's duty to refrain from "arbitrary" and "bad faith" conduct when representing negotiating unit members, Maryland courts have not specifically addressed what constitutes "discriminatory" behavior in this regard. Federal case law, including decisions from the National Labor Relations Board (the "NLRB"), upon which the PSLRB has relied in previous cases, provides significant guidance on this matter.

In determining whether a union has acted in a "discriminatory" manner, federal courts have held that a union cannot draw "invidious" distinctions between members when carrying out efforts relating to contract negotiations or administration. Airline Pilots Ass'n Int'l V. O'Neill , 499 U.S. 65 (U.S. 1991). Discrimination is "invidious" if it is based upon impermissible classifications or if it arises from animus. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (U.S. 1944). Thus, a union violates the duty of fair representation by refusing representation to negotiating unit members based on distinctions such as race, Goodman v. Lukens Steel Co., 482 U.S. 656, 665-667 (U.S. 1987), gender, Perugini v. Food & Commercial Workers Local 916, 935 F.2d 1083, 1086-1087 (9th Cir. 1991), citizenship, NLRB v. Longshoreman's Local 1581, 489 F.2d 635, 637-638 (5th Cir. 1974), national origin, religion, Agosto v. Correctional Officers Benevolent Ass'n, 107 F.Supp. 2d 294, 303-04 (S.D.N.Y. 2000), or union membership, Zimmerman v. French Int'l School, 830 F.2d 1316 (4th Cir. 1987), or whether or not the employee in question is an internal union dissident. Postal Service, 272 NLRB 93 (1984).

Ms. Smith has neither alleged nor provided any evidence to support a claim that ACE-AFSCME Local 2250 acted in a discriminatory manner toward her, or that its decisions with regard to her representation throughout the grievance process were in anyway based on any impermissible classification or "invidious" distinction.

In sum, there is no evidence in the record of this case to support a finding that ACE-AFSCME Local 2250's representation of Ms. Smith violated any of the three "duty of fair

representation" standards as articulated by the Maryland Court of Special Appeals -- i.e., it was not arbitrary, in bad faith, or discriminatory.

IV. CONCLUSION

For the foregoing reasons, we conclude that ACE-AFSCME Local 2250 did not violate its duty of fair representation under Section 6-509(b) of the Education Article.

V. ORDER

IT IS HEREBY ORDERED THAT THE CHARGE IN THE INSTANT MATTER, PSLRB Case No. SV 2018-13, IS DISMISSED.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD:

Elizabeth Morgan, Chair

Ronald S. Boozer, Member

Robert H. Chanin, Member

R. Allan Gorsuch, Member

Philip S. Kauffman, Member

Annapolis, MD

September 20, 2018

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).