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OLGA ALVORD,)
)
Complainant,)
)
vs.)
)
ANCHORAGE EDUCATION ASSOCIATION,)
NEA-ALASKA, NEA,)
)
Respondent.)
)

CASE NO. 15-1667-ULP

DECISION AND ORDER NO. 306

ORDER AFFIRMING DISMISSAL FOR LACK OF PROBABLE CAUSE

On October 1, 2015, the Agency's investigating Hearing Officer, Tiffany Thomas, dismissed an unfair labor practice complaint filed by Olga Alvord against her exclusive representative, the Anchorage Education Association, NEA-Alaska, NEA (the Association) (October 1, 2015, Notice of Preliminary Finding After Investigation (Finding)). Alvord appealed the dismissal, which was received on October 13, 2015. The Association did not file a response.

The Board panel, Chair Gary P. Bader, Matthew R. McSorley, and Will Askren reviewed the record and then deliberated on January 14, 2016. The panel majority consisting of Chair Bader and Member McSorley incorporates Thomas's Notice of Preliminary Finding After Investigation and the October 1, 2015 Order of Dismissal (Order) by reference and affirms that dismissal.

DECISION

Statement of the Case

Complainant Olga Alvord filed an unfair labor practice charge on April 27, 2015. She alleged "nearly 30 different complaints" against the Association. (Finding at 2). The complaints describe various incidents surrounding Alvord's employment as a teacher at the Anchorage School District (District). Alvord contends the Association breached its duty of fair representation by failing to file grievances based on each of the various incidents.

Hearing Officer Thomas investigated the charge and concluded there was no probable cause that a violation occurred. In her forty-one page Finding, Thomas analyzed Alvord's various

complaints and concluded that none was supported by probable cause that a duty of fair representation violation occurred. (Finding at 2). Alvord has appealed the Finding and contends variously that the Association "upheld the unreasonable and often irrational actions" of the District, and these actions were irrational, unjust, and unfair. (*See, e.g.*, "Notice of Appeal" at 2, et. seq.).

Issue

In this case, we must determine whether to affirm the hearing officer's dismissal, remand the case for further investigation, or issue a notice of accusation under 8 AAC 97.240. See 8 AAC 97.250(c). "If the complaint . . . was dismissed for failure to state facts that if proven would be an unfair labor practice, the complaining or accusing party may provide additional legal argument in support of its position that the complaint or accusation states an unfair labor practice." 8 AAC 97.250(b).[1]

Findings of Fact and Conclusions of Law

We affirm the hearing officer's decision for the reasons stated in the Finding, and modify it as follows.[2] We emphasize that under the law on the duty of fair representation, the Association is allowed wide leeway in determining whether to process Alvord's complaints. To prevail, a represented employee must show that the Association's "conduct [toward the employee]. . . was arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

In *Truhlar v. U.S. Postal Service*, 600 F.3d 888 (2010), the 7th Circuit for the United States Court of Appeals further described the employee's burden in grievance issues: "To demonstrate that the union acted arbitrarily, [the employee] must show that 'in light of the factual and legal landscape' at the time the union acted, its decision to abandon his grievances was so far outside a wide range of reasonableness, as to be irrational." *Truhlar*, 600 F.3d at 892, citing *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L.Ed.2d 51 (1991).

In *Garrison v. Cassens Transport Company*, 334 F.3d 528 (6th Cir. 2003)(*Garrison*), the court outlined the difficult burden complainants face in proving a duty of fair representation case:

> With regard to the arbitrary prong, "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.'" *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted). Mere negligence on the part of a union does not satisfy this requirement. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73, 376, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990). Moreover, ordinary mistakes, errors, or flaws in judgment

[1] Along with her appeal arguments, Alvord released and filed a multitude of documents previously marked "investigative," (not part of the public file during investigation).

[2] To the extent that this Order is inconsistent with the hearing officer's Finding, the Finding is considered modified. However, any modifications do not conflict with our affirmation of that Finding.

> also will not suffice. *See Walk v. P*I*E* Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992)(citations omitted). That is, "an unwise or even an unconsidered decision by the union is not necessarily an irrational decision." *Id.* In essence then, to prevail, a[n employee] has the difficult task of showing that the union's actions were "wholly irrational." *O'Neill*, 499 U.S. at 78, 111 S.Ct 1127. The "wholly irrational" standard is described in terms of "extreme arbitrariness." *Black*, 15 F.3d at 585 ("[T]he relevant issue in assessing a Union's judgment is not whether it acted incorrectly, but whether it acted in bad faith, or extremely arbitrarily, or discriminatorily." (internal quotation marks and citation omitted).

(*Garrison*, 334 F.3d at 538-39).

Moreover, "[w]hen reviewing a union representative's actions or omissions, we must never lose sight of the fact that union agents are not lawyers, and as a general proposition, cannot be held to the same standard as that of licensed professionals." *See Schoonover v. Consol. Freightways Corp*., 147 F.3d 492, 497 (6th Cir. 1998) (Kennedy, J., dissenting) ("[U]nion representatives are not lawyers. They do not have the advantage of discovery procedures.")." *Garrison*, 334 F.3d at 539. (citations omitted). Finally, "[j]udicial review of union action . . . 'must be highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities." *Spellacy v. Airline Pilots Association-International*, 156 F.3d 120, 126 (2d Cir. 1998).

Here, we find that the record indicates that Association representatives met with Alvord and then met with school district personnel regarding Alvord's complaints. In this process, Association representatives reviewed and addressed the multiple complaints and determined they would not file any grievances. In declining to file grievances, there is nothing in the record to indicate that the Association's decisions were wholly irrational or extremely arbitrary. Moreover, there is insubstantial evidence that the Association's actions were made in bad faith or were discriminatory.

We will now address our dissenting colleague's sole concern regarding the hearing officer's finding on involuntary transfer (displacement) of Alvord to Chugiak High School in 2012. That concern focuses on the Finding's conclusion that Alvord waived her right to file a grievance when she did not timely inform the union about the District's involuntary displacement decision after she was informed of that decision in January 2012.

Section 510(E) of the parties' collective bargaining agreement provides that a grievance must be "received by the district within 25 workdays of the knowledge of the occurrence or non-occurrence" of the act that caused the grievance. The record shows Alvord did not contact the Association until May 2012, more than 25 workdays after she was first informed of the displacement. The Finding indicates that a grievance would need to be filed within 25 workdays after Alvord was informed in January 2012, but the dissent maintains that the 25-day period would not begin until Alvord received "official notice" in May 2012.[3]

[3] We note that the collective bargaining agreement appears to allow a "member" to file a

We conclude that timeliness is not central to the outcome of this particular issue. The primary issue regarding the involuntary displacement is whether the Association's decision to file a grievance at all was arbitrary, discriminatory or in bad faith. The hearing officer's Finding shows that the Association listened to Alvord's concern and then discussed with and questioned the District about its involuntary displacement decision. (Finding at 8). The Finding then provides: "[The Association] reviewed the district[']s response as to why Ms. Alvord had been displaced, confirmed the district was following standard practice and that the displacement did not violate the[Collective Bargaining] Agreement. **It was determined by [the Association] that Ms. Alvord's displacement from Service [High School] did not rise to the level of a grievable contract violation.**" (emphasis added). (Finding at 8).

Thus, timeliness was not a central issue regarding the Association's actions on the involuntary displacement decision. The question for this appeal is whether there was probable cause to find that the Association's decision not to file a grievance was perfunctory or wholly irrational. The reasons for the Association's decision are irrelevant. It is evident, from the record and the analysis in the Finding, that the Association spent time with Alvord and the District and gave thought and consideration to the involuntary displacement, ultimately concluding that the District's displacement decision was not worth pursuing a grievance.[4] We find that this decision and the related actions by the Association do not rise to the level of "extreme arbitrariness."

Regarding the substance and validity of the District's involuntary transfer decision, we note that Section 413 E lists the "[c]riteria to be followed in involuntary transfers . . . in order of importance:

1. Effect on the District's program (including impact on both sending and receiving schools);
2. The member with the least continuous service in the District from an elementary school or the High School/Middle level department affected who fulfills the demonstrated program need; and
3. Distance from the member's domicile to the new assignment.

Based on the "order of importance" the parties placed into their agreement (noted above), the most important factor that drives involuntary displacement decisions is the effect of the decision on the District's program. This factor gives the District wide discretion in determining involuntary transfer decisions. We mention this because it adds credence to the decision by the

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grievance, in addition to the Association. *See* Section 510 (B)(2): "A 'grievant' is a **member**, group of members, or the Association that files a grievance." (emphasis added). Section 510(B)(1) provides that a "'grievance' is a claim by a grievant . . . ." For whatever reason, Alvord did not file a grievance on her own.

[4] *See* Uniserve Director Denise Poole's November 21, 2012 email to Alvord, which provides in part: "[C]ontractually my hands are tied. The District does get to make the choice to reduce either English or Social Studies. I have spent many days on this – not just on your issue but on displacements district wide."

Association to forego pursuing a grievance in this case. Furthermore, "unless discriminatory, wholly irrational, or made in bad faith, it is not for us to second guess the wisdom of the [Association's] decision." *See Garrison*, 334 F.3d at 541.

For the above reasons, we affirm the hearing officer's Finding, as modified, regarding lack of probable cause on the involuntary displacement issue.

We have considered the record and appellant Alvord's arguments on appeal. 8 AAC 97.250(c). We adopt the findings, conclusions, and reasoning in the October 1, 2015 Finding, and we incorporate them into this Decision and Order, with the noted modifications. We find no evidence that the Association's multiple decisions on Alvord's complaints were arbitrary, discriminatory, or in bad faith under the law. We affirm the Order of Dismissal. The appeal of that Order is denied and DISMISSED.

Dated: February 17, 2016

ALASKA LABOR RELATIONS AGENCY

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Gary P. Bader, Chair

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Matthew R. McSorley, Board Member

Concurrence and Dissent of Member Will Askren

I agree with the majority decision on all of the complaints Ms. Alvord has brought forward, except the first regarding the decision to transfer Ms. Alvord to Chugiak High School.

There is insufficient information regarding what the District told the Union as to the reason Ms. Alvord was selected for transfer in 2012. This may be due to an erroneous assumption that because Ms. Alvord was originally told of the intent to transfer her to Chugiak High School in January 2012, and the fact that she did not bring the issue to the union until May 2012, that a grievance would not be upheld because it was untimely (Page 8 of Investigator's report). On its face, this is erroneous. There is significant arbitral precedent that asserts the clock on a grievance starts when the official action occurs, unless the prior disputed notice was irrevocable. In this case, Ms. Alvord was originally informed of the intent to transfer her to Chugiak High School, in January 2012. She received official notice of the transfer in May of 2012. Days later she brought the matter to the union.

There are a number of arbitrators who would rule a grievance timely in this case because until the action takes place there is no remedy available. In addition, anything could happen between the unofficial notice of intent given to Alvord in January and the official notice given in May. Case in point: Ms. Alvord was not transferred to Chugiak High School as she had originally been told, but to East High School, a school much closer to her domicile. This was

due to the union's involvement. However, the move to a closer school did not address Ms. Alvord's complaint. Her complaint was that she was being transferred at all.

In addition to the above timeliness issue, according to the collective bargaining agreement in effect at the time (July 1, 2010-June 30, 2013 CBA, Section 510 B.2.) *"A "grievant" is a member, group of members, or the Association that files a grievance."* The union could have grieved on its own behalf, since it had only learned of the issue in May. Again, there is arbitral precedence to support that argument.

This is not to say the union should have filed a grievance, but only to explain why the reason management gave to the union for Ms. Alvord's transfer is critical in reaching an informed decision. That information is missing from the investigator's report and cannot be gleaned from the supporting documents and emails Ms. Alvord provided, without making assumptions. The union was given a reason for Ms. Alvord's transfer in May 2012 (Investigator's Report, Page 8). The details surrounding what that reason was and whether or not it was grounded in fact is critical to determining the outcome of this complaint. As in most instances, the devil is in the details and in this case, the details simply aren't there.

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Will Askren, Board Member

APPEAL PROCEDURES

This is a final decision of the Alaska Labor Relations Agency. Any appeal or review would be through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Olga Alvord vs Anchorage Education Association, NEA-Alaska, NEA,* Case No. 15-1667-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 17th day of February, 2016.

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Margaret L. Yadlosky
Human Resource Consultant

This is to certify that on this ___ day of February, 2016, a true and correct copy of the foregoing was mailed, postage prepaid, to
Olga Alvord
Kim Dunn, Anchorage Education Association

_____
Signature