Panel Handout: Collective Bargaining and Labor Representation in a "Right to Work" Environment - McDonald v. Polk Education Association

Follow this and additional works at: https://thekeep.eiu.edu/jcba

Part of the Collective Bargaining Commons, and the Higher Education Commons

Recommended Citation
DOI: https://doi.org/10.58188/1941-8043.1575
Available at: https://thekeep.eiu.edu/jcba/vol0/iss11/11

This Proceedings Material is brought to you for free and open access by the Journals at The Keep. It has been accepted for inclusion in Journal of Collective Bargaining in the Academy by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.
EDWARD G. MCDONALD, CHARGING PARTY, v. POLK EDUCATION ASSOCIATION, RESPONDENT.

No. CB-92-018
April 26, 1993

Case Summary
Where employee joined union only after he engaged in misconduct that became subject of grievance, union did not violate its duty of fair representation in revoking employee’s membership, returning his dues, and refusing to process employee’s grievance because of his nonmember status. Further, by advising employee that “you should be granted an arbitration hearing at your own expense, if that is what you want,” union fulfilled its obligation to notify employee that he was entitled to process his grievance individually.

Full Text

Final Order
On August 13, 1992, Edward G. McDonald filed an unfair labor practice charge contending that the Polk Education Association (PEA) had violated Section 447.501(2)(a), Florida Statutes. McDonald alleged that PEA violated its duty of fair representation by refusing either to pursue arbitration of McDonald’s grievances or to authorize McDonald to proceed to arbitration. On August 28, the General Counsel summarily dismissed the charge with leave to refile. On September 17, McDonald filed an amended charge renewing the same violations against PEA. The General Counsel determined that the amended charge failed to state a prima facie case, and again summarily dismissed it with leave to refile.

On October 26, McDonald filed a second amended charge alleging the same violations against PEA. Upon review, the General Counsel found the second amended charge sufficient. On November 23, PEA filed an answer in which it denied violating its duty of fair representation and asserted a number of affirmative defenses. On December 9, PEA filed a motion to dismiss the unfair labor practice charge. On December 10, PEA filed a motion for attorney’s fees.

On December 17, a public hearing was held before a Commission-designated hearing officer. The hearing officer issued his recommended order on January 25, 1993, concluding that: 1) McDonald was not a PEA member for the purpose of processing his grievances; 2) the collective bargaining agreement granted PEA exclusive control over whether a grievance would advance to arbitration; and 3) PEA failed to clearly inform McDonald of the reason it was declining to process his grievances. On February 15, PEA filed twelve exceptions to the hearing officer’s recommended order. On March 1, McDonald filed an answer to PEA’s exceptions.

Briefly summarized, the facts disclose that McDonald was an annual contract teacher with the School Board of Polk County (School Board). On April 23, 1992, the School Board advised McDonald that it was suspending him from employment for
alleged misconduct. On April 24, McDonald filed a dues deduction form and membership application with PEA. On June 1, McDonald filed a grievance against the School Board for alleged violations of the collective bargaining agreement. The School Board did not respond to the complaint. On June 12, McDonald filed a second grievance against the School Board alleging additional violations of the collective bargaining agreement.

On June 18, McDonald sent PEA a letter stating that he was grieving the failure of the School Board to grant him a hearing. This was McDonald’s first contact with the union. McDonald did not seek representation, but asked PEA to request arbitration on his behalf. On June 24, PEA responded to McDonald’s letter and directed him to contact PEA Associate Director, Tex Norman.

On July 6, McDonald also requested the American Arbitration Association (AAA) to schedule an arbitration, which the AAA declined because McDonald was not a party to the contract whose provision he sought to arbitrate. McDonald submitted another request to the School Board and AAA by letter dated July 8, which was also declined by AAA. By letter dated July 16 to AAA, the School Board’s Chairman and to Norman, McDonald requested an immediate arbitration indicating that he was prepared to assume all costs normally borne by the union. By letter dated July 20, McDonald requested PEA to “move the issues grieved to arbitration.” McDonald again agreed to assume PEA’s expense.

On July 28, Norman sent McDonald a letter stating that PEA would not represent him at arbitration because the incident giving rise to the grievance occurred prior to his union membership. Norman also opined that McDonald’s grievance was not timely filed, and that McDonald’s simultaneous submission of the grievance to Steps 1, 2, and 3 violated the contractual procedure. Norman indicated in the letter that these technical errors would preclude the arbitrator from reaching the merits of McDonald’s grievance. However, Norman also stated that regardless of McDonald’s membership status, he should be granted an arbitration hearing at his own expense if he desired to proceed with the grievances. Norman returned McDonald’s “check along with one month’s dues deducted from [his] salary” because he was not eligible for legal services when the dues deduction was made.

In McDonald’s answer to PEA’s exceptions, he contests the hearing officer’s determination that he was not a member of PEA for the purpose of filing his grievances. We will address this issue first because under Section 447.401, Florida Statutes, a public sector union may decline to process grievances for employees who are not members of that union. Thus, the initial issue for consideration is whether Section 447.401 would allow a union to deny an employee membership retroactively in order to avail itself of the existing statutory exception allowing a union to decline representation to non-members. For the reasons discussed below, we conclude that it does when, as here, the retroactive revocation is reasonably based upon a pre-existing disciplinary action for which the employee is seeking representation.

The record evidence reveals that PEA has a policy against representing members with employment problems which “pre-exist” their membership in the union. We conclude that the PEA policy, designed to discourage employees from becoming members of the union only after they need assistance for disciplinary charges, is a reasonable membership restriction. Here, McDonald joined PEA only after he had allegedly committed misconduct. It was this allegation which formed the basis for the School Board’s suspension of McDonald and his subsequent grievance. After revoking McDonald’s membership in the union, PEA reimbursed his membership dues. PEA’s conduct in revoking McDonald’s membership does not present evidence of a breach of its duty of fair representation. See Gow v. AFSCME, Local #1363, 4 FPER ¶ 4168 (1978) (union breaches its representational duty by engaging in arbitrary, discriminatory, or bad faith conduct).

In exception one, PEA asserts that the hearing officer should have granted its motion to dismiss the petition. Prior to the hearing, the Commission reviewed PEA’s motion and concluded that it contained disputed issues of material fact. Because the motion contained allegations of disputed fact which pertained directly to the unfair labor practice charge, we concluded that it was proper for the hearing officer to rule upon the motion. Accordingly, exception one is denied.

In exception two, PEA challenges the hearing officer’s failure to grant its motion for sanctions. PEA contends that McDonald violated Section 120.57(1)(b) 5., Florida Statutes, by making false statements during settlement negotiations. It is the policy of the Commission to encourage settlement discussions in order to resolve disputes between parties. Accordingly, because there was no showing that PEA was prejudiced as a result of any statements made by McDonald during negotiations, we agree with the hearing officer that sanctions are not warranted in this case. Therefore, exception two is denied.
In exceptions three and four, PEA contends that findings of fact 5, 24, and 27 are not necessary for the resolution of the issues in this case. Finding of fact 5 states that “the School Board and McDonald did not reach a settlement” regarding his suspension. Although this finding of fact is not dispositive of the issues in this case, it does chronicle events surrounding McDonald’s grievance. Findings of fact 24 and 27 relate to McDonald’s request for a hearing pursuant to Chapter 120, Florida Statutes. These findings are relevant to the extent they show that McDonald requested the School Board to set a hearing regarding his grievances. Based upon our review of the record, we do not believe it is necessary to strike these factual findings. Accordingly, these exceptions are denied.

The parties to a collective bargaining agreement may provide for the certified bargaining agent to retain exclusive control over which grievances are processed to arbitration. Heath v. School Board of Orange County, 5 FPER ¶ 10074 (1979). The exclusive right to represent employees carries with it the concomitant obligation to fairly represent those employees. Gow, supra. However, Section 447.401, Florida Statutes, allows a union to limit its obligation to fairly represent all employees in a bargaining unit by providing that it need not process grievances for non-members. Essentially, the union is allowed to choose whether it desires to exercise its right of representation on behalf of non-dues-paying unit members. Bartlett v. Hillsborough County Government Association, 11 FPER ¶ 16018 (1984); Florida PBA v. State of Florida, 8 FPER ¶ 13059 (1982). When a union declines to represent an employee because he is not a member of the organization, its duty of fair representation terminates. See Rice v. School Board of Palm Beach County, 8 FPER ¶ 13282 (1982).

In deciding, In re School Board of Leon County, 7 FPER ¶ 12286 (1981), the Commission stated that a union’s right to exclusivity over the administration of a collective bargaining agreement includes the right to settle a grievance or to decline to process a grievance that the union determines is without merit. However, the Commission provided in Weaver v. School District of Leon County, 12 FPER ¶ 17135 (1986), that a bargaining agent is not only to inform a grievant of the reason it is refusing to pursue his grievance, but must also state that the grievant may proceed individually with his grievance if the reason for declining to assist was the grievant’s non-membership status. The Commission stated that this was particularly true when the plain language of the contractual grievance procedure does not indicate that a grievant may pursue his grievance independently.

In exceptions five, six, eight, and nine, PEA challenges the hearing officer’s determination that the collective bargaining agreement reserved to PEA the exclusive right to process grievances at the arbitration stage of the procedure. PEA also contends that individual employees in the bargaining unit are permitted to process their own grievances up to and through arbitration. The PEA argues that Article 28.4(9) of the collective bargaining agreement grants unit members this right. Article 28.4(9) states as follows:

The Association reserves the right to ensure the proper use of the grievance procedure for the bargaining unit. If the Association has declined to process or further process any grievance presented to it, and if any employee or group of employees desire to process it or further process their own grievance through this procedure, the bargaining agent shall be sent copies of all written communications sent by the employer to the employee(s) involved. Further, nothing herein contained shall be construed to prevent any public employees from presenting, at any time, their own grievance in person or by legal counsel to the employer or having such grievance(s) adjusted without the intervention of the bargaining agent, provided however, that the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and provided further that the bargaining agent has been given notice and reasonable opportunity to be present at any meeting called for the resolution for such grievance.

In Heath, the Commission construed a grievance procedure with essentially the same substantive terms as the present contract and concluded that the language preserved to the union the exclusive right to request arbitration unless it decided to exercise its right to represent an employee based upon the employee’s non-membership status. Therefore, we conclude that the contractual grievance procedure here does not provide that employees have unfettered access to the grievance arbitration mechanism.

PEA also contends that references in Step III and IV of the grievance procedure to the union are “clarified” in paragraph 3, which expressly contemplates arbitration by individual unit members. Further, PEA states that Miscellaneous Provision No. 13 provides that after an informal procedure, the grievant may, as opposed to must, present the grievance in writing to PEA.

Based upon our reading of the entire contract, we conclude that the above language does not plainly waive the union’s right
of exclusivity or provide for the processing of grievances to arbitration by individual members absent PEA’s exercise of the section 447.401 proviso respective of non-union membership. Otherwise, PEA could not effectively represent the collective interests of its unit by declining to pursue grievances which it deems to be non-meritorious, as a unit employee could pursue any grievance to arbitration without the PEA. If anything, PEA’s effort to demonstrate how various clauses clarify or modify other sections of the contract reinforces our conclusion that the contractual terms are ambiguous. PEA did not attempt to provide any parol evidence supporting its asserted interpretation of the contract. Accordingly, exceptions six, eight and nine are denied.

In exceptions ten and eleven, PEA asserts that McDonald was specifically advised in Norman’s July 28 letter that the union was not representing him because he was a non-member and that PEA had no objection to McDonald pursuing his grievance to arbitration on his own. The hearing officer found Norman’s letter to be ambiguous because it failed to clearly state the grounds relied upon by PEA for declining to represent McDonald.

Based upon our review of the record, we disagree with the hearing officer that the terms of the July 28 letter from Norman to McDonald were ambiguous. Our reading of the letter indicates that PEA clearly notified McDonald that it was declining to represent him because of his non-membership. The reference in the letter to Norman’s opinion that the grievance suffered from procedural defects did not alter or modify the statement concerning McDonald’s membership status. Additionally, the PEA letter advised McDonald “that regardless of your membership status you should be granted an arbitration hearing at your own expense, if that is what you want.” We conclude that this language satisfies the requirement that PEA inform a unit member as to why it has chosen not to represent him, and that he can process his grievance individually. Weaver v. School District of Leon County, 12 FPER ¶ 17135 (1982). It was, therefore, incumbent upon McDonald to provide the School Board with the written acknowledgment from PEA that the union was declining to process his grievance. Accordingly, we grant exceptions ten and eleven and reverse the hearing officer’s conclusion that PEA committed an unfair labor practice under the facts of this case.

In exception five, PEA asserts that the hearing officer erred by relying, in part, upon provisions of the union’s policy manual in reaching his conclusion that the union retained the exclusive right to advance grievances to arbitration. Because we have determined that the collective bargaining agreement itself provides for the retention of the exclusive right to process grievances to arbitration, we find it unnecessary to decide whether the hearing officer inappropriately considered the PEA policy manual. Accordingly, exception five is denied.

In exception seven, PEA contends that the hearing officer wrongfully rejected the fourth sentence of its proposed finding of fact number 16 as argument. The record indicates that this sentence is a quote from McDonald’s September 18 letter which formed the basis for finding of fact number 45. Therefore, we grant this exception to the extent that the disputed sentence was written by McDonald and was not presented as argument by PEA.

In exception eleven, PEA challenges the hearing officer’s failure to make a finding that the pursuit of McDonald’s grievance in this case would be futile. Because we have determined that PEA satisfied its responsibility of informing McDonald that it was not processing his grievance due to his non-membership, and that he could individually proceed with his grievance, we conclude that it not necessary to decide the merits of McDonald’s grievance. Accordingly, this exception is denied.

In exception twelve, PEA contests the hearing officer’s decision not to award attorney’s fees. The hearing officer made his decision based upon his conclusion that PEA was not the prevailing party in the case. Based upon the issues in this case, we decline to award PEA attorney’s fees. The question of McDonald’s membership in PEA and the interpretation of the collective bargaining agreement were legal issues which presented legitimate areas of dispute. Accordingly, this exception is denied.

After reviewing the entire record, we conclude that the hearing officer’s findings of fact are supported by competent, substantial evidence and the proceedings upon which these findings are based comply with the essential requirements of law. Accordingly, we adopt the hearing officer’s factual findings. See § 120.57(1)(b) 10., Fla. Stat. (Supp. 1992). Furthermore, we are in agreement, except as noted above, with the hearing officer’s analysis of the dispositive legal issues. Therefore, the hearing officer’s recommended order, except as noted above, is adopted as the Commission’s final order. The unfair labor practice charge against PEA is DISMISSED. An award of attorney’s fees and costs of litigation is not appropriate.
This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within 30 days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in Sections 120.68 and 447.504, Florida Statutes, and Florida Rules of Appellate Procedure.

Alternatively, a motion for reconsideration may be filed. The motion must be received by the Commission within 15 days from the date of this order. The motion shall state the particular points of fact or law allegedly overlooked or misapprehended by the Commission, and shall not reargue the merits of the order. For further explanation, refer to Florida Administrative Code Rule 38D-15.005.

It is so ordered.

HORNE, Chairman, SLOAN and ANTHONY, Commissioners, concur.

**Hearing Officer’s Recommended Order**

SALMON, Hearing Officer.

On December 17, 1992, after due notice, a public hearing was conducted in Bartow.

**Statement of the Case**

On August 13, 1992, Edward McDonald filed an unfair labor practice charge contending that the Association had violated Section 447.501(2)(a), Florida Statutes. McDonald alleged that the Association violated its duty of fair representation by refusing to pursue arbitration of McDonald’s grievances or authorizing McDonald to proceed to arbitration. On August 28, for a variety of procedural and substantive reasons, the General Counsel summarily dismissed the charge with leave to refile.

On September 17, McDonald filed an amended charge renewing the same violations against the Association. The General Counsel found that the amended charge failed to state a prima facie case and again summarily dismissed it, with leave to refile.

On October 26, McDonald filed a second amended charge alleging the same violations against the Association. Upon review, the General Counsel found the second amended charge sufficient.

On November 23, the Association filed its answer. The Association denied that it had violated its duty of fair representation. Instead, it asserted the following affirmative defenses. First, McDonald’s grievance was untimely, procedurally defective, not arguably covered by the collective bargaining agreement, and rendered moot by his settlement agreement with the School District. Second, there was a rational reason for the Association to refuse to process McDonald’s grievance and there is no relief available to McDonald through the arbitration process because his annual employment contract had expired. Third, the Association denied any action or inaction which precluded McDonald, as an individual, from proceeding to arbitration. Fourth, McDonald’s own actions in refusing to meet with the Association and present it with the facts and circumstances underlying his grievance deprived it of its statutory right to screen meritless grievances. Finally, McDonald joined the Association after the incidents occurred which gave rise to his grievance. Under the Association’s rules, it was not obligated to represent him. On December 9, the Association relied on these same arguments when it filed a motion to dismiss the unfair labor practice charge.

On December 10, the Association filed a motion for attorney’s fees. That same day, the Association filed a motion to change the hearing location from Tampa to Bartow. Also on December 10, both parties filed their prehearing statements. The issues remained substantially the same.

Upon review of the Association’s motion to dismiss, the Commission concluded that it contained disputed issues of fact.
Consequently, on December 11, the Commission referred that motion to the undersigned for resolution.

On December 14, the undersigned denied the Association’s request for a change of the hearing location. The Association had not presented a proposed new hearing location or consulted with McDonald.

On December 15, McDonald filed a document which purported to be a joint motion to continue the hearing. However, the motion was not agreed to by the Association and it appeared to be a part of the parties’ settlement negotiations. I have not considered it for any purpose.

On December 16, the School District of Polk County (School Board) filed a motion for a limited protective order regarding certain subpoenaed documents. In addition, the School Board sought to substitute the Director of Employee Relations for the School Superintendent. Due to the late filing of this motion, it was not resolved until the hearing.

Also on December 16, the Association renewed its motion to change the hearing location. This time, the Association provided a new hearing location. According to the Association, McDonald opposed the change of location. Just before leaving for the hearing, I granted the request to change the location.

After I had left Tallahassee, McDonald filed a response in opposition to the change of location. McDonald feared that the witnesses would not appear, new subpoenas would have to be issued, and the hearing location was already prepared in Tampa. However, all subpoenaed witnesses were notified of this change and all other arrangements confirmed. At the hearing on December 17, all subpoenaed witnesses were present. Thus, the change of location did not prejudice McDonald. Furthermore, McDonald did not object to the new location during the hearing.

Also on December 16, after I had left for the hearing location, the Association filed a motion for a protective order, to quash a subpoena duces tecum, to continue the hearing, and for sanctions. At the hearing, the Association notified me of this motion.

McDonald had subpoenaed “a copy of all grievances for the period covered by the present contract in which the incident grieved is an action by the School Board.” Since all actions are taken by the School Board, I found this request to be overly broad and granted the Association’s request to quash. See LIUNA, Local 678 v. City of Kissimmee, 12 FPER 17065 (1986). Consequently, the motion for a protective order and motion to continue are denied as moot.

The Association also argued that McDonald’s actions, taken as a whole, violate Section 120.57(1)(b) 5., Florida Statutes, and that sanctions are warranted. In its affidavit supporting this motion, the Association asserts that on the day before the hearing McDonald misled it into believing that a settlement agreement had been reached and based upon that agreement, it was unprepared to proceed to hearing.

The Association was prepared for the hearing, as demonstrated by its other prehearing activities. Furthermore, the vast majority of this case involves written documentation, which the Association either jointly introduced into evidence with McDonald or introduced through testimony. Accordingly, the motion for continuance was denied.

While it is unfortunate that McDonald misled the Association about the status of the settlement negotiations, on the day before the hearing, I do not agree that sanctions are appropriate. Accordingly, the motion for sanctions is denied.

At the hearing we also resolved the School District’s motion for a limited protective order and request to substitute witnesses. In consideration of the Superintendent, I allowed the Employee Relations Director to testify as the custodian of the personnel records. Thus, the School Board’s motion was granted in part. Furthermore, I granted the School Board’s request to quash the subpoena for all referrals and reports to the Education Practices Commission as irrelevant. However, McDonald insisted that the Superintendent testify as to matters involving his personal knowledge. Thus, the motion was denied, in part, and the Superintendent was required to testify.

At the conclusion of the hearing the parties were given a choice of presenting a closing argument or filing post-hearing documents. The parties elected to file post-hearing documents.

On January 8, 1993, after an extension of time was granted, the Association and McDonald filed post-hearing documents,
including proposed findings of fact. Neither party filed a transcript. Furthermore, I did not order a transcript.

**Issue**

Whether the Association violated its duty of fair representation, when it simultaneously notified McDonald that it was not processing his grievances because he was a non-member and because the grievances lacked merit.

**Findings of Fact**

For purposes of clarity and stylistic preference, the stipulations of fact are included in this section. Based upon the exhibits, stipulations, testimony, and record as a whole, I make the following findings:

1. The Association is an employee organization and certified bargaining agent as defined by Section 447.203(11) and (12), Florida Statutes. Among other units, the Association is the certified bargaining representative for a unit of instructional employees employed by the School District of Polk County (School Board).

2. Edward McDonald was employed by the School Board as an instructional employee pursuant to an annual contract.

3. John Stewart is the elected School Superintendent in Polk County. He has the authority to suspend a teacher, with pay, between the time the suspension begins and the date that the next School Board meeting is conducted. Only the School Board has the authority to suspend a teacher without pay.

4. On April 23, Superintendent Stewart sent McDonald a letter notifying him that he would be suspended, with pay, effective April 24. McDonald was suspended based on “alleged abuse of a sexual nature involving a student.” (Association Ex. 14)

5. Beginning on May 5, McDonald and the School Board began written settlement negotiations regarding his suspension. (Association Exs. 15, 19, and 20) The School Board and McDonald did not reach a settlement agreement. (Charging Party Ex. 1)

6. On May 6, Superintendent Stewart notified McDonald that the School Board was scheduled to meet on May 12. At that meeting, Stewart would recommend a suspension without pay. (Association Ex. 16)

7. On May 13, Superintendent Stewart notified McDonald that the School Board had adopted his recommendation. That same day, McDonald’s suspension, without pay, became effective. (Association Ex. 17)

8. On May 26, McDonald filed a request with the School Board for a Chapter 120, Florida Statutes, hearing. (Joint Ex. 2) The subject matter of this request is unknown.

9. On June 1, McDonald filed a grievance with the School Board alleging that his suspension violated Articles 4.12, 4.13, and 10.7-1 of the collective bargaining agreement. (Joint Exs. 1 and 4)

10. Article 4.12 states:

Any annual contract teacher not rehired may appeal this decision through the three levels of (1) Area Superintendent, (2) Assistant Superintendent of Personnel (3) Superintendent or designee.

(Joint Ex. 4, pg. 7) McDonald argued that his reappointment should not be denied based on unsubstantiated allegations. (Joint Ex. 1)

11. Article 4.13 states:
11. Article 10.7-1 states:

When statements are made against a teacher by a student, parents, or persons outside the school system, no written copies or related materials will be placed in the teacher’s individual file nor any disciplinary action taken against a teacher until the matter is discussed with the teacher and the teacher has received a copy. If the principal finds that the statements or accusations are false, no record shall be maintained. Before disciplinary action is taken, the teacher shall be made aware of the person who is making the accusation and that teacher, at the discretion of the principal, shall be given opportunity to confront the accuser. The teacher may respond in writing to such complaints and have the same placed in his/her personnel file.

(Joint Ex. 4, pg. 17) McDonald stated that he had not received a complete, written, and signed copy of the allegations against him. (Joint Ex. 1)

12. Article 10.7-1 states:

When statements are made against a teacher by a student, parents, or persons outside the school system, no written copies or related materials will be placed in the teacher’s individual file nor any disciplinary action taken against a teacher until the matter is discussed with the teacher and the teacher has received a copy. If the principal finds that the statements or accusations are false, no record shall be maintained. Before disciplinary action is taken, the teacher shall be made aware of the person who is making the accusation and that teacher, at the discretion of the principal, shall be given opportunity to confront the accuser. The teacher may respond in writing to such complaints and have the same placed in his/her personnel file.

(Joint Ex. 4, pg. 17) McDonald stated that he had not received a complete, written, and signed copy of the allegations against him. (Joint Ex. 1)

13. In the remedy section of the June 1 grievance, McDonald sought to be paid, reappointed, and transferred to another school. (Joint Ex. 1)

14. McDonald also indicated that this grievance was being filed at “Step 1-2-3.” (Joint Exs. 1 and 4)

15. Article 28 of the collective bargaining agreement sets forth the grievance procedure. There is an informal procedure, followed by Steps I through IV. (Joint Ex. 4, pg. 44)

16. A grievant must initiate the informal procedure, with the immediate supervisor, within fifteen days after the grievant knew or should have known of the event giving rise to the grievance. If the grievance is not informally resolved, then the grievant must submit a written grievance, within ten days after the informal discussion, to the area superintendent or assistant superintendent. This is Step I.

17. Step II is an appeal to the Superintendent. Step III is an appeal to the School Board. Step IV is an appeal to an impartial arbitrator. (Joint Ex. 4, pgs. 44-5)

18. Pursuant to the Article 28.3(F), Grievance Procedure, the time limits for processing a grievance filed on or after June 1 are accelerated so that the grievance may be resolved prior to June 30. That is, the time limits for the informal procedure and Steps I and II are accelerated to a total of seven days. (Joint Ex. 4, pg. 43)

19. The School Board did not respond to McDonald’s grievance. Following Article 28.3(A) of the contract, if the School Board does not respond to a grievance, then the grievance immediately proceeds to the next step. (Joint Ex. 4, pg. 43)

20. Since Edwards filed his first grievance on June 1 and neither the Superintendent nor the appropriate members of his staff responded within seven days, then the grievance automatically advanced to Step III, the School Board.

21. On June 11, McDonald notified the School Board that its time for requesting a Section 120.57(1), Florida Statutes, hearing had expired. He reiterated his demand to the School Board for such a hearing. Again, McDonald did not set forth the subject matter for this request. (Joint Ex. 2)

22. In a letter dated June 12, Superintendent Stewart notified McDonald that he would make recommendations to the School Board, at the meeting scheduled for June 23, that would “bring closure to your employment.” That letter also states that the Superintendent would make the following recommendation:

1. Rescind suspension without pay approved by the School Board on May 12, 1992.
2. Continue suspension with pay for an additional 3.5 days (May 13, 14, 15, and one-half day on May 18, 1992).

3. Allow Mr. McDonald to use all accumulated sick leave time (17.5 days) to cover the remaining days of his contract.

(Association Ex. 19)

23. That same day, McDonald filed a second grievance. In this grievance, McDonald argued that the School Board had violated Articles 4.2, 4.4, and 4.5 of the collective bargaining agreement. Again, McDonald filed this grievance at “Step 1-2-3.” (Joint Ex. 2)

24. In his second grievance, McDonald argued that the School Board had violated Article 4.2 because it had failed to grant him a Chapter 120, Florida Statutes, hearing. Article 4.2 states:

The Board agrees that nothing contained herein shall be construed to deny any teacher all rights as guaranteed by the laws and Constitution of the State of Florida and the United States.

(Joint Ex. 4, pg. 5)

25. McDonald maintained that a violation of Article 4.4 occurred because the School Board denied him a contractual right to his salary without just cause. Article 4.4 states:

No teacher will be disciplined, reprimanded, suspended, terminated or otherwise deprived of fringe benefits or contractual rights during the term of his/her contract without just cause. No teacher shall be demoted from continuing contract/professional services contract to annual contract, nor be deprived of his/her contractual salary for the remainder of the contract year without just cause. Nor shall any teacher be relieved from a supplemental position during the term of that supplemental contract without just cause. Any teacher terminated during the term of his/her contract shall be entitled to a fair hearing based on due process.

Progressive discipline shall be followed, except in cases where unusual circumstances may justify immediate suspension or termination. Progressive discipline shall be administered in the following steps: (1) verbal warning in a conference with the teacher; (2) dated written reprimand following a conference; (3) suspension without pay for up to five days by the superintendent; (4) termination.

(Joint Ex. 4, pg. 5)

26. McDonald also contended that a violation of Article 4.5 occurred because he was denied a copy of the derogatory report(s) which were referenced in the Superintendent’s May 13 letter. Article 4.5 states:

Each teacher shall receive a copy of all evaluative, reprimanding, disciplinary, complimentary, and derogatory reports to be placed in his/her personnel files at the school, area, or District office. These reports shall be delivered in person and the teacher shall sign to acknowledge receipt thereof. Each teacher shall have the right to answer in writing all evaluative, reprimanding, disciplinary, complimentary and derogatory reports. These answers shall be delivered in person and the immediate supervisor shall sign to acknowledge receipt thereof and the responses will be placed in his/her personnel file. The teacher and/or the Association, upon written authorization from the teacher, may review and reproduce the contents, at his/her expense, or any of the same. The review shall be made in the presence of the administrator or his/her designee, responsible for the safekeeping of such file. The teacher may challenge, through the established grievance procedure, the maintenance of any document therein. At the written request of a teacher, any report in a teacher’s personnel file (school, department, area, district) excluding assessments or observations, that may be considered or construed by the teacher and/or Association to be reprimanding, disciplinary or derogatory will be placed in an envelope and labeled “confidential and not relevant for disciplinary purposes” and returned to the personnel file. This would be done only after three consecutive years of no serious reprimands or problems on record.

(Joint Ex. 4, pgs. 5-6)
27. In the remedy section of the June 12 grievance, McDonald requested a hearing pursuant to Chapter 120, Florida Statutes, reappointment, back pay, and a transfer to another school. (Joint Ex. 2)

28. Like the first grievance, neither the Superintendent nor the appropriate members of his staff responded to McDonald’s second grievance. Thus, at the end of the seventh day, the second grievance was automatically advanced to Step III, the School Board.

29. On June 18, McDonald wrote a letter to the Association. In that letter, he informed the Association, for the first time, that he was grieving an action taken by the School Board. Furthermore, he notified the Association that he had filed the grievance at Step III because, in his view, it would be futile to contest the School Board’s action at a lower step. While McDonald noted that he was not asking the Association to represent him, he did ask the Association to request arbitration [Step IV] on his behalf. (Joint Ex. 2)

30. On June 23, the School Board accepted the Superintendent’s recommendation. That is, McDonald’s annual contract was not renewed. That same day, McDonald filed a demand for arbitration with the American Arbitration Association (AAA) and the School Board. (Joint Ex. 2)

31. On June 24, Tex Norman, the Association’s Associate Director, responded to McDonald’s June 18 letter which had asked the Association to request arbitration on his behalf. Norman stated that he was unable to respond or take action because they had not previously discussed the matter. Norman requested that McDonald contact him and make an appointment to discuss the Association’s policies and procedures governing legal services and representation. (Association Ex. 7) McDonald did not contact or schedule an appointment with Norman.

32. According to the contract, the grievant has the unilateral authority to appeal the Steps I and II decisions. However, the Association retains the exclusive right to appeal the Steps III and IV decisions. (Joint Ex. 4, pg. 45) In addition to this contractual language, the Association’s policy manual states, in pertinent part:

That the Association maintains exclusive control over the administration of the contract and particularly the control over the grievance procedure at all steps beyond the initial stage.

(Association Ex. 21, Part VIII, Section F(1)(b), pg. 47)

33. The Association’s policy regarding the processing of grievances is set forth in Section 8, Grievance and Legal Services. That policy states, in pertinent part:

The Association shall, when necessary, employ the grievance procedure outlined in Article XVIII [sic] of the Collective Bargaining Agreement to maintain the integrity of the agreement and to protect and defend the rights of all members.

1. Any individual who has been a member in good standing for at least thirty (30) days shall be entitled to grievance representation as a benefit of membership. The 30-day requirement may be waived by the Grievance Committee under one or more of the following conditions: . . .

b.) In the judgment of the Grievance Committee, the grievant did not join the Association for the express purpose of obtaining representation in the pending grievance. . . .

(Association Ex. 21, pg. 44)

34. Prior to April 24, the effective date of his suspension with pay, McDonald was not a member of the Association. On April 24, McDonald filled out a dues deduction form which is also an application for membership with the Association. (Association Ex. 6)

35. On June 26, Superintendent Stewart notified McDonald that the School Board had accepted his recommendations at the June 23 School Board meeting. (Association Ex. 20)
36. On July 6, the AAA responded to McDonald’s request for arbitration. The AAA indicated that the arbitration clause in the contract was between the School Board and the Association. According to the AAA, the contract did not indicate that there was an agreement to arbitrate between individuals and the School Board. Thus, the AAA requested that McDonald provide it with either a letter of authorization from the Association or a letter of consent from the School Board. (Joint Ex. 1)

37. On July 8, McDonald wrote a letter to the AAA and the School Board requesting arbitration of his grievances pursuant to Section 9 of the Miscellaneous Provisions of Article 28 of the contract. McDonald asserted that, under the contract, he did not need the consent of either the School Board or the Association to proceed to arbitration. (Joint Ex. 1)

38. Section 9 of the Miscellaneous Provisions of Article 28, states:

9. The Association reserves the right to insure the proper use of the grievance procedure for the bargaining unit. If the Association has declined to process or further process any grievance presented to it, and if any employee or group of employees desire to process it or further process their own grievance through this procedure, the bargaining agent shall be sent copies of all written communications sent by the employer or the employee(s) involved. Further, nothing herein contained shall be construed to prevent any public employees from presenting, at any time, their own grievance in person or by legal counsel to the employer, and having such grievance(s) adjusted without the intervention of the bargaining agent, provided however, that the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and provided further that the bargaining agent has been given notice and reasonable opportunity to be present at any meeting called for the resolution of such grievance.

(Joint Ex. 4, pg. 46)

39. Section 4 of the Miscellaneous Provisions of the grievance procedure states:

4. If the Board refuses to arbitrate a grievance arising under this agreement, the arbitrator appointed according to the above grievance procedure shall proceed on an ex parte basis.

(Joint Ex. 4, Art. 28, pg. 45)

40. On July 16, McDonald wrote a letter to the AAA, the School Board, and the Association requesting an accelerated arbitration of his grievances. He also stated that he was willing to assume the costs normally paid by the Association. (Association Ex. 10; Joint Ex. 4, Art. 28, pg. 45)

41. That same day, the AAA responded to McDonald’s July 8 letter requesting arbitration. In that response, the AAA indicated that it could not proceed with McDonald’s request unless the School Board agreed. (Association Ex. 9) The School Board did not respond to McDonald’s letter.

42. On July 20, McDonald wrote another letter to the Association. In that letter, McDonald stated that the AAA had refused to process his grievance. McDonald again requested that the Association “move the issues grievances to arbitration.” McDonald reiterated that he agreed to pay the arbitration costs normally attributed to the Association. (Association Ex. 11)

43. In a July 28 letter, Norman responded to McDonald:

You will recall that I have asked you to come in and visit with me. I am sorry that you have never exercised your option to speak with me. I know very little about your employment problems, but it appears to me that this Association will be unable to provide you with the assistance you have requested.

The policies of the Polk Education governing Grievance Processing state:

The Association shall not be responsible for costs incurred, nor provide staff assistance, in cases where a grievance is not processed by the Association, or is not pursued according to the established procedures of the Polk Education Association and/or the Unified Legal Service Program. In the event a grievant elects not to utilize such procedures, this policy shall be
brought to his/her attention, and he/she shall be requested to affix his/her signature acknowledging receipt thereof.

It appears to me that your grievance was not filed within the timelines mandated by the negotiated agreement. In addition to this you filed Steps 1, 2, and 3 all at the same time which violates the grievance procedure. It is my opinion that even if you were granted an arbitration hearing the hearing officer would deny your claims. The negotiated agreement sets up parameters within which the hearing officer must operate. Violations of the negotiated agreement would end the hearing on technicalities and the merits of your case would never be considered.

It is also my understanding that you were not a member of PEA at the time your job-related problems occurred. This is a sort of “pre-existing” condition. Regulations at the local, state and national levels of this Association prevent us from providing you with representation, since you MUST have been a member BEFORE the incidents occurred. (emphasis in original)

I regret that I am not in a position to provide you with the assistance you request. I do feel that regardless of your membership status you should be granted an arbitration hearing at your expense, if that is what you want. I am returning your check along with a reimbursement for the one month’s dues deducted from your salary. Since you were not eligible for legal services at the time that dues deductions were made I feel we should return the money to you.

(Joint Ex. 3)

44. On August 25, the AAA sent McDonald a letter reiterating that the collective bargaining agreement is between the School Board and the Association. Thus, without an agreement by the School Board, the AAA could not proceed to arbitration. (Association Ex. 13)

45. On September 18, McDonald wrote a letter to the AAA, the School Board, and the Association. In that letter, he stated that the Association had refused to represent him. Thus, he was a non-union member proceeding to arbitration in accordance with the terms and conditions of the contract and Section 447.401, Florida Statutes. (Association Ex. 12)

Proposed Findings of Fact

In making my findings of fact, I have reviewed each of the proposed findings filed by McDonald and the Association. Those proposed findings not specifically rejected below have been incorporated, in substance, in my findings of fact.

I decline to make all or portions of the following findings proposed by the Association for the reasons stated:

Unnecessary: Number 3 (second sentence).

Unsupported by the record: Number 11, the date June 29.

Argument: Number 16 (fourth sentence).

I decline to make all or portions of the following findings proposed by McDonald for the reasons stated:

Unsupported by the record: Number 4, the date May 12, 1992.

Argument: Number 12, the phrase “. . . sought to purge his membership by a refund of one (1) month’s dues.”

Analysis

The first dispute between McDonald and the Association involves McDonald’s membership status. McDonald contends that after he joined the Association, it “purged” his membership so that it would not have to represent him in the grievance procedure. The Association denies that it “purged” his membership. Instead, the Association asserts that it has a policy...
against representing members with employment problems which “pre-exist” their membership.

The undisputed facts demonstrate that McDonald joined the Association on April 24, 1992. Thereafter, without the Association’s knowledge or assistance he filed grievances on June 1 and 12, 1992. He joined the Association after the events leading to his first grievance occurred. McDonald’s second grievance stems from events inextricably intertwined with his first grievance. Upon review of these events, the Association reimbursed McDonald’s dues for one month (April 1992) because it concluded that McDonald had become a member simply to avail himself of its representation.

The evidence demonstrates that this policy of not representing employees with “pre-existing” employment-related matters was in effect prior to McDonald’s request to join the Association. Equally important, this policy is facially reasonable and it allows the Association to exercise its discretion.

McDonald’s conduct is the type of behavior that the Association’s policy attempts to prohibit. That is, an individual does not become a member until that person needs representation in an employment-related matter. In applying its policy, there is no evidence that the Association treated McDonald in an arbitrary or discriminatory manner, or that it acted in bad faith.

Based on the foregoing, I conclude that the Association properly reimbursed McDonald for his membership dues for the month of April 1992. Thus, for the purpose of processing his June 1 and 12, 1992, grievances, McDonald was not a member of the Association.

The next question involves whether McDonald, as a non-member, could process his grievances through arbitration without the Association’s assistance or permission. McDonald and the Association contend that Article 28, Miscellaneous Provisions, Section 9, of the contract permitted McDonald to process his grievances through arbitration. I disagree.

If the parties to a collective bargaining contract agree, a certified bargaining representative may retain exclusive control over which grievances are processed through arbitration. See Heath v. School Board of Orange County, 5 FPER ¶ 10074 (1979). Here, Article 28 of the collective bargaining agreement and Section VIII of the Association’s policies demonstrate that the Association has retained exclusive control over which grievances may proceed to arbitration. Furthermore, Section 9 of the Miscellaneous Provisions specifically reserves to the Association the right to insure the proper use of the grievance procedure. It is only after the Association grants its authorization that an individual can process a grievance. Thus, McDonald did not have the right to process his grievance to arbitration without the Association’s consent.

The next question is whether the Association violated its duty of fair representation when it failed to process McDonald’s grievances or allow him to process the grievances through arbitration. Central to this dispute is Norman’s July 28, 1992, letter wherein the Association declined to represent McDonald.

On June 18, July 16, and July 20, 1992, McDonald requested that the Association invoke the arbitration provision of the collective bargaining agreement on his behalf. However, the Association did not honor that request. Instead, on July 28, the Association rejected processing McDonald’s grievances for two reasons. First, McDonald’s grievances lacked merit based on timeliness and procedural infirmities, and second, he was a non-member when the incidents leading to the grievances occurred.

The case law states that a union may reject processing a grievance for two mutually exclusive reasons. E.g., Ritecy v. School Board of Palm Beach County, 8 FPER ¶ 13282 at 498-500 (1982); Weaver v. Leon CTA, 12 FPER ¶ 17112 at 208 (1986); Cohen v. AFSCME, Florida Council 79, 16 FPER ¶ 21198 (1990). First, a union may refuse to process a grievance due to an employee’s non-membership. § 447.401, Fla. Stat. Second, the grievance may be rejected because the union concludes that the grievance lacks merit.

Simply put, it is an either/or situation. Either the grievance is rejected because of the grievant’s non-membership or the grievance is rejected because it lacks merit. Depending upon which reason is given by a union, the relief available to the non-member differs.2

Section 447.401, Florida Statutes, provides a unique procedure whereby a certified bargaining representative may choose not to represent a bargaining unit employee who, like McDonald, is not a member of the union. This is an exception to the...
concept of exclusive representation. When the certified employee representative relies upon the *Section 447.401, Florida Statutes*, proviso as its reason for not processing a non-member’s grievance, it no longer has a representational responsibility toward the grievant. *Florida PBA, Inc. and Neel v. State of Florida*, 8 FPER ¶ 13059 (1982); *Bartlett v. Hillsborough County Government Association, Inc.*, 11 FPER ¶ 16018 (1984). Therefore, when a union declines to represent a non-member for this reason, its duty of fair representation terminates. *See Rice v. School Board of Palm Beach County*, 8 FPER ¶ 13282 (1982). This does not mean that the non-member’s grievance will not be considered. Because the concept of exclusive representation is not applicable when the *Section 447.401, Florida Statutes*, proviso is invoked, the non-member may individually pursue a grievance through arbitration pursuant to the terms of the collective bargaining agreement.

The other type of relief available arises when a union chooses to represent a non-member during the grievance procedure. The Commission held in *Heath v. School Board of Orange County*, 5 FPER ¶ 10074 (1979), that an employee organization’s decision to represent a non-member precludes the individual from processing the grievance. *See also Lopez v. Orange County Public Schools*, 11 FPER ¶ 16082 (1985). Under these circumstances, representing a non-member subjects the union to the duty of fair representation just as if the grievant was a union member. Consequently, the union’s decision to cease processing a non-member’s grievance does not permit the non-member to independently pursue or adjust the grievance with the employer. Rather, any breach of the union’s duty to fairly represent all members and those non-members whom it chooses to represent in the processing of grievances is enforceable as an unfair labor practice under the provisions of *Section 447.501, Florida Statutes*. *In re Leon County School Board*, 7 FPER ¶ 12286 (1981).

Here, the July 28 letter from Norman to McDonald was not in an either/or format. To the contrary, Norman told McDonald that the Association would not request arbitration because of procedural errors in the grievances and because McDonald is not an Association member. Consequently, this precluded McDonald from individually processing his grievances through arbitration. Thus, the Association’s failure to clearly and unambiguously establish whether McDonald’s grievances were denied because of his non-membership or because they lacked merit is a violation of the Association’s duty of fair representation.

The remedy for this violation, in addition to posting a notice to employees, is to require the Association to notify McDonald whether it is refusing to process his grievances because he is a non-member or because his grievances lack merit. If the Association elects to not represent McDonald in the grievance procedure, then it must provide a letter of authorization to McDonald, the School Board, and the AAA so that McDonald may process his grievances to arbitration.

The Association has requested an award of attorney’s fees. However, it is not the prevailing party. Accordingly, the Association’s motion for attorney’s fees is denied.

**Conclusions of Law**

1. The Polk Education Association is an employee organization and a certified bargaining agent within the meaning of *Section 447.203(11) and (12), Florida Statutes*. The Association is the certified bargaining agent for the instructional employees employed by the School Board.

2. At all times pertinent to this appeal, Edward McDonald was an instructional employee of the School Board.

3. The Commission has jurisdiction of this unfair labor practice charge.

4. The Association violated its duty of fair representation when it simultaneously notified Edward McDonald that it was refusing to process his grievances through arbitration because of his non-membership and because they were procedurally defective.

5. Because it is not a prevailing respondent, the Association is not entitled to an award of attorney’s fees and costs.

**Recommendation**
I recommend that the Commission adopt this recommended order as its own and sustain the unfair labor practice charge. Therefore, to effectuate the purposes of Chapter 447, Part II, I recommend that the Commission, pursuant to Section 447.503(6)(a), Florida Statutes, issue an order requiring the Association to take the following action:

1. Cease and desist from:
   a. Notifying members of the bargaining unit that a grievance is not being processed because the grievant is not a member of the bargaining unit and because the grievance lacks merit.

2. Take the following affirmative action:
   a. Notify Edward McDonald that it is not processing his grievances through arbitration because he is a non-member or because his grievances lack merit.
   b. If the Association elects not to process McDonald’s grievances due to his non-membership status, then it shall furnish a letter of authorization to McDonald, the School District of Polk County, and the American Arbitration Association so that McDonald may proceed to arbitration in an individual capacity.
   c. Post immediately, in locations where notices to bargaining unit members are customarily posted, copies of a Notice to Employees furnished by the Commission stating that the Association will take the above-stated action. The Association shall ensure that these notices remain posted for sixty consecutive days and that the notices are not defaced or altered and are not covered by other material.
   d. Notify the Commission, in writing, within ten calendar days of the date of the issuance of the Commission’s order, of the steps that the Association has taken to comply with the Commission’s order.
   e. Notify the Commission of the Association’s compliance with the Commission’s order within ten days of the completion of the posting period.

Footnotes

1. See generally Alachua County PBA v. City of Gainesville, 11 FPER ¶ 16029 (1986), rev’d in part on other grounds, 493 So.2d 46 (Fla. 1st DCA 1986) (where a proposed finding of fact is adopted in substance, the hearing officer is not prohibited from recasting the statement for purposes of clarity and stylistic preference).

2. A union’s decision also impacts the employer. An employer is not obligated to process a non-member employee’s grievance if the bargaining agent’s refusal to process the employee’s grievance is so vague or ambiguous that the employer cannot reasonably determine that the grievant’s non-membership status is the reason for the rejection. See Ricey v. School Board of Palm Beach County, 8 FPER ¶ 13282 (1982); see also Weaver v. School District of Leon County, 12 FPER ¶ 17135 (1986). Thus, a vague or inconsistent letter, such as the July 28 letter from Norman, could subject the employer to an unfair labor practice charge. Here, McDonald filed an unfair labor practice charge against the School Board. McDonald v. Polk County School District, No. CA-92-085 (G.C. Summary Dismissal Oct. 10, 1992).