

MARY DAY,

Appellant

v.

HOWARD COUNTY EDUCATION  
ASSOCIATION & MARYLAND STATE  
TEACHERS ASSOCIATION,

Appellees

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-07

### OPINION

During the 2000-2001 school year, Mary Day was principal of Howard High School. She was also a member of the Howard County Education Association “HCEA” and the Maryland State Teachers Association “MSTA,” collectively referred to as “the Unions”. Day alleges that the Unions breached their statutory duty of fair representation and their contractual obligations to her (1) by assisting a group of union members, comprised of dissatisfied faculty and staff members of Howard High School, in a poll which was a “vote of confidence/no confidence” in Day as principal of the school and (2) by sharing the results of the poll with the local superintendent. Day maintains that the Unions failed to recognize the inherent conflict of interest that existed in representing teachers and supervisors in the same bargaining unit and chose to represent the interests of one group of union members at the expense of another union member.

As a remedy, Day requests reimbursement of her attorney’s fees, return of her union membership dues for the 2000-2001 school year, and reimbursement for time she spent preparing for the smooth closing of the 2000-2001 school year and opening of the 2001-2002 school year at Howard High School.

In response, the Unions maintain that they committed no breach of their duty of fair representation or contractual obligations to Day. The Unions further maintain that they were obligated to assist the approximately 20 members of the Howard High School staff and faculty who approached HCEA and asked for assistance in addressing their concerns about the working environment at the school.

### PROCEDURAL BACKGROUND

This matter comes before the State Board through an unusual procedural history. Mary Day initially sought damages against the Unions by filing suit in the Circuit Court for Howard County for breaches of the Unions’ duty of fair representation and contractual obligations to her. On July 23, 2003, the Circuit Court dismissed Day’s complaint on grounds that the local superintendent and the State Board had primary jurisdiction over this issue and, therefore, Day had not exhausted her administrative remedies prior to seeking redress from the Court.

Thereafter, Day filed her complaint with the State Board. The State Board advised that Day should first submit her complaint to the local superintendent and thereafter seek review if she was dissatisfied with the outcome at the local level. Day then filed her complaint with the local superintendent.

Meanwhile, Day appealed the Circuit Court decision to the Court of Special Appeals. The local superintendent stayed action on the complaint while this appeal was pending. On July 28, 2004, the Court of Special Appeals ruled that the Circuit Court correctly required Day to exhaust her administrative remedies before proceeding in court. The Court of Special Appeals stated as follows:

The fair representation claims asserted by Day arise from disputes over the proper administration of a county public school and relate to the proper representation of union members. As the Court of Appeals has explained, the proper administration of schools is a matter over which the Board and the Superintendent have primary jurisdiction. Similarly, the unions are a statutorily approved part of the educational system over which the Board and Superintendent preside. Any questions about the duties that HCEA and MSTA owed to Day, and whether these unions or their employees breached those duties by “taking sides” in a publicly waged campaign to oust Day, properly fall within the comprehensive expertise of the Board of the Superintendent. Whether the actions of the HCEA and MSTA or their agents constituted a violation of the statutory duty of fair representation was a matter clearly within the expertise and jurisdiction of these administrators.

Unreported Opinion at p. 19.

After the Court of Special Appeals ruled, the local superintendent requested that the State Board rule directly on the case, citing local sensitivity to the issues presented as a basis for bypassing consideration at the local level. The State Board agreed to the request and sent the matter to the Office of Administrative Hearings (“OAH”) for a hearing to determine whether the actions of the Unions constituted a violation of the duty of fair representation. Administrative Law Judge (ALJ), Steven J. Nichols, conducted a hearing on August 1, 2005 and issued a Proposed Decision on October 17, 2005.

The Unions filed exceptions to the ALJ’s Proposed Decision. This Board heard oral argument on the exceptions on February 28, 2006.

## ALJ'S PROPOSED DECISION

The ALJ found that the Unions owed Day a statutory duty of fair representation. *See* Md. Code Ann., Educ. §6-407(b). Citing *Vaca v. Snipes*, 386 U.S. 171 (1967), the ALJ held that, because of the duty of fair representation, the Unions were obligated to (1) serve the interests of all members of the designated unit without hostility or discrimination toward any; (2) exercise their discretion with complete good faith and honesty; and (3) avoid arbitrary conduct. *See* Proposed Decision at p. 15. The ALJ concluded that this duty is applicable to all union activity. *Id.* at p. 15.

The ALJ found that the Unions violated their duty of fair representation to Day by asserting a position uniquely and personally hostile to her employment interests in orchestrating the “vote of confidence/no confidence” poll and by sharing the results of the poll with the superintendent. The ALJ described these activities as “a campaign with potential adverse employment consequences for [Day].” *See* Proposed Decision at pp. 20 – 21. The ALJ explained that although Day did not suffer any form of adverse employment action from her employer, breach of the duty of fair representation does not require a showing of such “actual harm” where the union takes action uniquely and personally hostile towards one of its own members. *See Id.* at p. 22. The ALJ also found that the Unions breached their membership contract with Day based on their breach of the duty of fair representation. *Id.* at p. 32.

As for Day’s remedy, the ALJ held that Day was entitled to the return of the membership dues that she paid to the Unions in the amount of \$457.00 during the 2000-2001 school year based on her breach of contract claim. *See* Proposed Decision 32.

The ALJ did not find Day’s argument for reimbursement of \$39, 587.50 in attorney’s fees to be persuasive. The ALJ opined that Day would have been entitled to recover attorney’s fees had she incurred such fees based on the Unions’ failure to provide her with legal representation that they were required to provide, i.e., if the Unions failed to represent her in a grievance against her employer. But Day suffered no adverse employment action from her employer and required no legal representation from the Unions. Nor did Day ever request any type of representation from the Unions in connection with this incident. *See* Proposed Decision at pp. 23-24. In this case, the ALJ concluded that Day was not entitled to recover attorney’s fees because the fees were incurred by her for filing a lawsuit for damages against the Unions themselves. *See* Proposed Decision at pp. 29-30.

Nor did the ALJ find that Day should be compensated for the time she spent dealing with the “vote of confidence/no confidence” poll in order to satisfy the local superintendent’s request that she ensure a smooth closing and re-opening of the school year at Howard High School. Although Day requested that she be compensated for 400 hours of work time at her normal rate of pay, she provided no detail to explain the manner in which she arrived at this estimate and failed to persuade the ALJ that there was any merit to this portion of her claim for damages. *See* Proposed Decision at pp. 31-32.

Both parties have filed objections to the ALJ's Proposed Decision in this case. *See* discussion below.

## OBJECTIONS TO ALJ'S PROPOSED DECISION

### *Unions' Objections*

#### *1. Duty of Fair Representation*

- **The Unions argue that the ALJ erred by finding that the statutory duty of fair representation is applicable to activities other than the negotiation of a collective bargaining agreement and the enforcement and administration of that agreement.**

The issue of whether the duty of fair representation applies to the Unions' actions in assisting with the "vote or confidence/no confidence" poll and sharing those results with the local superintendent is a question of first impression for the State Board. While all of the cases cited by the parties and the ALJ examine this duty in relation to negotiations of collective bargaining agreements and the enforcement and administration of such agreements, there is no legal authority which would preclude applying the duty of fair representation to the circumstances set forth in this case. In fact, in *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 111 (1991), the Supreme Court opined that the duty of fair representation applies to all union activity. *Id.* at 67.

Here, the ALJ found a breach of the duty of fair representation in light of the conflict of interest presented in this situation and the actions pursued by the Unions. As the ALJ stated in his Proposed Decision,

It was not the HCEA's option to jeopardize the employment interests of one union member at the request of the other members in a manner not expressly authorized by the Master Agreement. Mr. Staub and Mr. Ambrose were indifferent to the employment interests of [Day] and grossly deficient in their conduct towards her in orchestrating a "Vote of Confidence/No Confidence" and sharing those documents and polling results with Superintendent O'Rourke."

The Unions' argument that the duty of fair representation applies only to negotiations and enforcement and administration of collective bargaining agreements suggests that the Unions can engage in any other activity that might jeopardize the employment interests of one union member to the benefit of another without consequence. Such a result seems unreasonable and contrary to law. Thus, we agree with the ALJ's conclusion that the actions of the Union failed to serve the interests of Day, a member of the designated bargaining unit, without hostility or discrimination and that the duty of fair representation applies to activities in this case.

- **The Unions disagree with the ALJ’s conclusion on pp. 19-20 of the Proposed Decision that the duty of fair representation owed to Day by the Unions would have been different and lesser in nature if the dispute had involved matters falling under the grievance procedure contained in the Master Agreement between HCEA and the local board.**

The Unions suggest that the ALJ found that the Unions owed Day a higher duty of fair representation under the circumstances here because the nature of the complaints against her did not fall under the contractual grievance procedure under which she would have had the opportunity to resolve the dispute before it went to her superior. The Unions contend that this ignores the other methods by which complaints against principals may be processed where the complaint is initially filed above the principal level, such as administrative appeals under §§2-205 and 4-205 of the Education Article, internal complaint procedures established by the local board (i.e. complaints of discrimination and harassment), and EEOC and MCHR complaints.

The Unions’ argument is not entirely clear. Nevertheless, in pp.19 – 20 of the Proposed Decision, the ALJ explains the differences between the Unions’ actions to enforce provisions of the collective bargaining agreement and the actions taken here which had nothing to do with enforcement of those provisions. The ALJ states that “[i]t was not the HCEA’s option to jeopardize the employment interests of one union member at the request of other members in a manner not expressly authorized by the Master Agreement.” Proposed Decision at p. 20. We do not read the ALJ’s conclusions as requiring a higher duty of fair representation under the circumstances here.

- **The Unions object to the ALJ’s conclusion on pp. 20-21 of the Proposed Decision that “[b]ecause of the statutory duty of fair representation, HCEA should have declined to assist the twenty-odd HCEA members in pursuing their concerns about [Day] through a ‘Vote of Confidence/No Confidence’” and “could have also advised the twenty faculty/staff members at the Howard High School of their option to proceed, as they best saw fit, without union involvement, as allowed under the Master Agreement.”**

The Unions argue that if HCEA had declined to assist the members that had asked for help regarding the situation at Howard High School they would have breached their duty of fair representation to those faculty members. The Unions maintain that in this situation, they were not required to disassociate themselves from both sides of the dispute and leave all parties to their own devices to sort out their problems.

As the ALJ points out, the Unions’ argument ignores the fact that Day was also a union member to which a duty of fair representation was owed. Given this duty, we agree with the ALJ that the Unions were obligated not to engage in activities which were hostile or discriminatory to Day’s interests.

- **The Unions object to the ALJ’s conclusion on p. 22 of the Proposed Decision that a “demonstration of actual harm is not needed as a prerequisite for a breach of the duty of fair representation where the union takes action uniquely and personally hostile towards one of its own members.”**

The Unions argue that relevant case law requires a demonstration of actual harm to establish a cause of action for breach of the duty of fair representation. They also argue that actual harm is an adverse personnel action. The ALJ found that Day was unable to show “actual harm,” in this instance, because Day did not suffer any form of adverse employment action. The ALJ reviewed the case law on this issue and, we believe, correctly concluded that the requirement for a demonstration of actual harm usually arises in the context of union participation in a grievance procedure on behalf of a union member, particularly where the union’s participation was inept or arbitrary.

The ALJ, however, distinguished this case from the usual ones. She stated:

Under the statutory duty of fair representation, there are “three separate standards,” . . . [e]ach of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.” *Griffin, supra*. In this case, the HCEA ignored its statutory duty and asserted a position uniquely and personally hostile to the employment interests of the Complainant, one of its own members. The actions of the HCEA, therefore, are qualitatively different from those type instances where actual harm is used as a gage to measure union culpability. A demonstration of actual harm is not needed as a prerequisite for a breach of the duty of fair representation where the union takes action uniquely and personally hostile towards one of its own members.

(Proposed Decision , p. 22).

We agree with the ALJ’s analysis but not with her conclusion that Ms. Day did not demonstrate “actual harm.” It is our opinion that the Unions’ actions of conducting the poll and sharing the results of the poll with the superintendent were improper on their face because they were contrary to Day’s employment interests. We do not need to look beyond these actions to determine whether actual harm occurred, even though Day did not suffer an adverse employment action. Unlike the unions’ failures to act, described in the usual cases, in this case the Unions’ actions themselves were the actual harm to Day. To this extent, we amend the Proposed Decision.

2. *Breach of Membership Contract*

- **The Unions object to the ALJ’s conclusion on p. 25 of the Proposed Decision that “[b]ecause the Respondents breached the statutory duty of fair representation, they also breached their membership contract with the Complainant.” Given that the Unions believe no breach of a membership contract occurred, they also maintain that the ALJ erred by granting Day a return of the dues she paid to the Unions for the 2000-2001 school year. In addition, the Unions argue that the State Board lacks jurisdiction to decide whether the Unions violated their alleged membership contracts.**

The Unions explain that there is no such document as a “written membership agreement.” The Unions argue therefore, that if a membership agreement was implicit under these circumstances, the ALJ made no findings as to the terms of such an implicit agreement which would be a prerequisite to finding a breach of the agreement and a prerequisite to an award of 2000-2001 membership dues to Day based on the breach.

On this point, the ALJ explained that the statutory duty of the Unions to fairly represent all of their members is implied by law in any membership contract and need not be expressly stated in writing. Thus, because the ALJ determined that the Unions violated the statutory duty of fair representation, the ALJ also found that they breached their membership contract with Day and therefore Day was entitled to return of her dues for the school year in question. *See* Proposed Decision at pp. 24-25.

The record contains no written membership contract because no such agreement exists. However, Day was a dues paying member of the Unions. We agree with the ALJ’s decision and order the Unions to refund Day her union dues for that school year.

Finally, we find no merit to the Unions’ argument that the State Board lacks jurisdiction to decide whether the Unions violated their contract with Day. The breach of contract allegations stem from the Unions’ alleged breach of their duty of fair representation. Thus, we view these two issues as being inextricably intertwined and within the State Board’s jurisdiction.

3. *Credibility Determinations*

- **The Unions contend that the ALJ erroneously concluded on p. 19 of the Proposed Decision that HCEA’s conduct of a “vote of confidence/no confidence” and the subsequent use of the polling results was part of “an attempt by the HCEA to have [Day] replaced as the principal at Howard High School.”**

The Proposed Decision states as follows, in pertinent part:

Disparaging comments regarding the Complainant’s

performance at the Howard High School accompanied the “Vote of Confidence/No Confidence” polling. A fair reading of the “Vote of Confidence/No Confidence” documents reveals questions are raised regarding the fitness of the Complainant as the principal at the Howard High School. Sharing those documents and polling results with Superintendent O’Rourke could have caused employment consequences for the Complainant. The HCEA asserts that it was simply attempting to ascertain how widespread was dissatisfaction with the Complainant through the “Vote of Confidence/No Confidence” poll. That assertion is disingenuous. The ALJ agrees with the Complainant that the “Vote of Confidence/No Confidence” poll and the subsequent use of the polling results was part of an attempt by the HCEA to have her replaced as the principal at the Howard High School.

(Proposed Decision, p. 19).

In the following paragraphs, the ALJ explains that the “vote of confidence/no confidence is unlike a grievance in that the principal of a school is made aware of the grievance and can address it before it comes to the attention of the principal’s supervisor. If the grievance remains unresolved at Step 1, it then proceeds to the attention of the principal’s supervisor. In addition, the purpose of a grievance is generally to enforce the terms of a collective bargaining agreement, unlike the “vote of confidence/no confidence” which asserts a position hostile to the employment interests of the principal. Proposed Decision at pp. 19-20.

The ALJ made a credibility determination when he concluded that the actions of HCEA were really an attempt to have Day replaced. Joseph Staub, President of HCEA, testified that HCEA never requested that action be taken against Day. He testified that HCEA requested that the superintendent conduct an investigation into the concerns and provide some team-building staff development activities for the entire staff of Howard High School. Tr. at pp. 121-124. *See also* 5/25/01 letter from Staub to O’Rourke (“Based upon the seriousness of the concerns shared by a large portion of the Howard High School staff, we would like to request, on their behalf, that you initiate an investigation of the concerns we shared with you. . . .”). The ALJ found Staub’s testimony that HCEA merely wanted the superintendent to investigate and conduct staff development activities to be disingenuous.

We defer to the ALJ’s credibility determination and agree that it is supported by the facts in the record.

- **The Unions object to the ALJ’s observation on p. 24 of the Proposed Decision that “HCEA determined to, figuratively, attack the Complainant . . .”, maintaining that there is no evidence in the record to support this conclusion.**



The Proposed Decision states as follows, in pertinent part:

Although the Respondents violated the statutory duty of fair representation by their activities, the ALJ does not agree with the Complainant's further argument as to what the Respondents were required to do in order to comply. Once the HCEA determined to, figuratively, attack the Complainant, neither advance notice nor an offer of some form of alternate representation would have shielded the Respondents from violating the statutory duty of fair representation.

(Proposed Decision, p. 24).

Here again the ALJ made a credibility determination when he concluded that HCEA waged an attack on Day in her position as principal of Howard High School. The testimony in this case states that the Unions responded to complaints from their members regarding Day and Howard High School and informed the superintendent of a situation that was brewing in one of his schools so that appropriate action take place, whatever that action might be. Tr. at pp. 110; 119-124; 138; 141-142. The ALJ viewed the actions of the Unions as an attack of Day in her position as principal of Howard High School and was not persuaded otherwise by the testimony.

We again defer to the ALJ's credibility determination and agree that it is supported by the facts in the record.

*Day's Objection to ALJ's Failure to Award Attorney Fees*

Mary Day objects to the ALJ's failure to award her attorney's fees for pursuing her claims against the Unions in the Circuit Court and the Court of Special Appeals given that the ALJ found that the Unions asserted a position uniquely and personally hostile to her employment interests and breached their statutory duty of fair representation. While Day acknowledges that she did not use legal counsel to protect her against an adverse employment action by her employer, she maintains that her use of legal counsel to file suit against the Unions probably protected her against adverse employment action and provided a means by which to clear her name.

The ALJ found that Day failed to establish that the Unions were statutorily or contractually obligated to pay her attorney's fees. Proposed Decision at p. 31. The ALJ explained that in order for Day to recover attorneys fees in this case she had to demonstrate that she had requested the Unions' representation in an adverse employment action by her employer, that the Unions failed to represent her, and that this failure to represent her necessitated that she hire private legal counsel to defend herself. Proposed Decision at p. 29.

Ms. Day did not ask for representation from the Unions. She did not trigger the process that might have required the Unions to provide counsel or hire outside counsel for her. If there were such a duty in this case, Ms. Day needed to make the request in order to invoke the duty.

The ALJ pointed out, we believe correctly, that Ms. Day provided no evidence that her court case, as filed against the Respondents, was the type of matter for which either HCEA or MSTTA was obligated to provide assistance or legal representation. (Proposed Decision at 30).

We concur with the ALJ's conclusion. Day did not hire legal counsel in response to the Unions' failure to provide her with representation in a grievance proceeding or a proceeding to defend against adverse employment action by her employer. Indeed, she did not hire counsel to stop the Unions from sending the results of the poll to the Superintendent. Rather, Day hired counsel voluntarily to pursue legal claims against the Unions for breaches of their duties to her as a union member. We agree with the ALJ that these are not the type of claims for which she is entitled to recover attorney's fees.

### CONCLUSION

Based on our review of the record in this matter and consideration of the arguments of the parties, we adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge except for the conclusion of law that Ms. Day did not demonstrate actual harm. To that extent only we amend the Proposed Decision and affirm.

Edward L. Root  
President

Dunbar Brooks  
Vice President

Lelia T. Allen

JoAnn T. Bell

DISSENT  
J. Henry Butta

DISSENT  
Beverly A. Cooper

Calvin D. Disney

Richard L. Goodall

DISSENT  
Karabelle Pizzigati

Maria C. Torres-Queral

David F. Tufaro

CONCURRING IN PART, DISSENTING IN PART

Three board members dissent in part to this Final Decision. Their dissents are set forth below.

I, Dr. Karabelle Pizzigati, concur with the majority finding that the Unions breached their duty of fair representation to Mary Day, in my view, based in sum on the actions taken by the Unions that failed to address the conflict of interest in this matter, in which the Unions represented both parties under the local agreement. At the same time, I believe such actions did not void the local agreement and the contractual obligation of the Unions to provide to Mary Day proper assistance, including representation as warranted and if requested. Mary Day had the opportunity and responsibility to ask for assistance from the Unions if she felt aggrieved. All parties agree that she did not ask for any assistance, nor was she prevented from doing so. For these reasons, I believe, like the majority, that she should not be awarded attorneys' fees. For these same reasons, I believe, contrary to the majority view, that her dues payment should not be refunded.

Karabelle Pizzigati

We, J. Henry Butta and Beverly A. Cooper, concur with the majority in this case except for the conclusion that Ms. Day is not entitled to attorneys' fees. We believe that when Ms. Day

paid her union dues a contract arose between Ms. Day and the Unions. The Unions did not honor or fulfill that contract. Unlike other members of the Board who assert that Ms. Day needed to ask for the Unions' legal assistance in order to be eligible for attorneys' fees, we believe that she was not required to ask for legal assistance to trigger the Unions' obligation to represent her.

We believe that because of the hostility that the Unions showed toward Ms. Day, she was not required to go through a sham process of requesting their legal representation. We do not believe that Ms. Day should be required to ask those who planned to cause her harm and caused her actual harm to defend her from their harmful actions or protect her from further adverse actions. We would award Ms. Day attorneys fees in full.

J. Henry Butta

Beverly A. Cooper

March 29, 2006