

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

JEFF FARSACI,

Complainant,

vs.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1107, AFL-CIO, CLC,

Respondent.

ITEM NO. 640A

CASE NO. A1-045871

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

For Complainant:

John Peter Lee, Esq.
Paul C. Ray, Esq.
John Peter Lee, LTD

For Respondent:

Kristina L. Hillman, Esq.
Weinberg, Roger & Rosenfeld

This matter having come on before the State of Nevada Local Government Employee Management Relations Board ("Board") for deliberations and decision, noticed pursuant to NRS and NAC Chapters 288, NRS Chapter 233B, as well as Nevada's Open Meeting Laws, the Board concludes, and orders as follows:

I. Procedural History

On or about October 10, 2005, Jeff Farsaci ("Farsaci") filed a complaint with the Board alleging that the Service Employees International Union, Local 1107, AFL-CIO ("Union") represented certain individuals employed at various local governmental entities, including the Water Reclamation District at which Farsaci is employed. Farsaci further claimed in the complaint that the Union's failure and refusal to represent him and protect his seniority rights was arbitrary, discriminatory, and/or in bad faith and a breach of the Union's duty of fair representation. The complaint's prayer requested the following relief: (1) that the Board enter an order enjoining the Union from such arbitrary, discriminatory, and bad faith actions; (2) that the Board issue an order directing the Union to represent Farsaci and pay all costs associated with

1 his representation; (3) for all damages, including attorneys' fees and costs, as well as punitive
2 damages; and (4) for such other and further relief that the Board deems appropriate.

3 An Answer was filed by the Union on or about October 31, 2005. Thereafter, the parties
4 filed their respective pre-hearing statements. This matter was noticed for hearing on September
5 17, 2006, and October 19, 2006. At the hearing, the following witnesses testified: Complainant
6 Jeff Farsaci, Daniel Grillett, and Marcus Hatcher. Post-hearing briefs were filed by the parties.

7 II. Statement of Facts/Discussion of Testimony & Exhibits

8 Jeff Farsaci was the first witness. He testified that he was a treatment plant operator II at
9 the Water Reclamation District ("District") and has held that position since 1996. Transcript of
10 hearing 9-17-06 ("TR I"), p. 26. He has been with the District for 24 years, and has been a Union
11 member for approximately 22 years. TR I p. 27. Prior to becoming an operator II in 1996,
12 Farsaci was an operator I. Id. Farsaci described the work of operators I and II as follows:
13 "Equipment maintenance, monitoring computer screens, that is where flow comes in, so we have
14 to constantly monitor that incoming flow, and it is a pretty intense area when it comes to
15 probabilities of anything going wrong, so you have to really keep a close eye on the equipment
16 because it can get ahead of you, then you are really in a bind, then you have a lot of work." Id. at
17 30. He estimated the flow at 90,000,000 to 100,000,000 gallons per day. Id. The monitoring
18 includes air flow as well. Id. at 31. With solid waste, Farsaci stated that it could be "quite labor
19 intensive" at times. Id. at 32.

20 Concerning his upgrade to an operator II, he stated that an audit was performed and that
21 certain employees were upgraded to be in conformity with similar workers in the area. Id. at 34.
22 Thus, due to his longevity, he was promoted to operator II. Id. Exhibit 2 was an arbitrator's
23 decision concerning this audit and upgrade of various workers. Exhibit 27 is a document
24 showing the workers' pay raise; and Farsaci stated that his "promotion to wastewater treatment
25 plant operator II [was retroactive at 4%] from 2/24/96 to 10/8/97." Id. at 41. He testified he
26 received this "retro" pay on February 8, 1999. Id. at 44. He further stated that the promotion
27 was not contingent upon his certification. Id. at 46.

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1 As for seniority in a shift bid, he stated that the formula to be used is found in Article 4²
2 of the Union's agreement. Id. at 47. He testified that Exhibit 1 listed him as "No. 3" in seniority
3 and that there were "[o]nly two guys ahead of me, so I had pretty much my pick of where I
4 wanted, what shift I wanted." Id. Farsaci further explained that there are two ten-hour shifts
5 (day and swing), and there are four different areas in which to work. Id. at 48. He stated that he
6 learned in March 2005 that the shift bid was to be changed and that his seniority was
7 misrepresented. Id. at 50. He stated he had experienced problems previously concerning his
8 seniority. Id. at 51. See Exhibit 6, letter regarding Farsaci's seniority. On February 20, 2005
9 Farsaci wrote the Union about the latest changes in the seniority ranking. Id. at 58; also Exhibit
10 11. He explained his latest problem with seniority as "[i]t took my seniority back to almost my
11 date of hire." Id. at 67. He stated in a letter that he intended to hire a "labor lawyer" to settle his
12 seniority issues if the Union did not rectify the problems. Id. at 70. He claims he did not hear
13 from the Union regarding his letter containing that remark. Id. at 71. Exhibit 10 was offered to
14 show that Farsaci was listed as 14th on the seniority list, when he had previously enjoyed the 3rd
15 place. Id. at 72. He claims the Union never talked to him about the seniority modification nor
16 assisted him regarding the same. Id. at 72. He claims, because of this modification, he no longer
17 received the shift he wanted and should have received. Id. at 74. Farsaci retained counsel, who
18 contacted the Union. Id. at 92; see Exhibit 16. Farsaci stated he began the grievance process
19 with the use of an outside attorney, rather than the Union, because of their lack of assistance. Id.
20 at 96; see also Exhibits 17 and 18. Steps 1 and 2 grievance meetings were held; and an
21 arbitration hearing was requested. Id. at 125. The arbitration hearing, however, did not go
22 forward, and Farsaci claims it did not go forward because the Union "saw no merit in" the case.
23 Id. at 126. See Exhibit 26, County's refusal to arbitrate. A complaint to compel arbitration was
24 filed in the local District Court. Id. at 129. The District Court, according to Farsaci, issued an
25 injunction to reinstate his seniority. Id. at 129-30; see also Exhibit 28, copy of injunction.
26 Until Farsaci received the letter that his case had "no merit," the Union had not expressed that
27 sentiment. Id. at 132. Farsaci is asking that the Board award him the attorneys' fees and costs he
28 has incurred since they did not represent him. Id.

1 On cross-examination, Farsaci stated he was mandated to obtain his certificate prior to
2 becoming an Operator II. Id. at 139. He also stated that he received a copy of the arbitrator's
3 decision from Tom Beatty. Id. at 140. He also admitted that prior to the 2003 Collective
4 Bargaining Agreement, the County and the Union did not have any "mechanism" in place for
5 bidding on shifts. Id. at 147. There was correspondence, however, between the Union and the
6 County that the "wording of the layoff clause was essentially the same as the wording and would
7 apply also to the shift bid clause." Id. This correspondence is Exhibit 9, and is dated June 16
8 2003, between Raymond Visconti, Deputy Director of Human Resources, and Tom Beatty,
9 Director of the Union. Id. at 150. Farsaci agreed, however, that the letter appeared to pertain to
10 employees at the Department of Aviation. Id. at 152. Upon questioning by the Board, Farsaci
11 stated that the language "any employee" who "experienced a classification change as a result of
12 the study" could include him and other employees at the wastewater treatment plant. Id. at 239.
13 Upon further cross-examination, Farsaci stated he sent the February 20, 2005 letter to the Union
14 because of the potential problem with his seniority and the shift bid. Id. at 159. In that
15 correspondence, Farsaci "vented" that he would not file a grievance over the seniority change
16 and that he would hire an outside labor lawyer. Id. at 161. He stated, he assumed the union
17 would "step up, maybe call management, set them straight" as to his seniority rights. Id. at 162.
18 He also answered that he did not feel he had "the support that I had [previously] at the union"
19 inasmuch as certain Union officials, such as Tom Beatty, were no longer with the Union. Id. at
20 163. Although he did not follow up with the Union regarding the letter, Farsaci stated he had
21 paid dues for 22 years and that "[a]nybody reading that letter would see that I was angry, fed up
22 with having to deal with somebody messing with my seniority. When you got 24 years on a job,
23 the last thing you do is mess with a guy's seniority." Id. at 166.

24 He further stated on cross-examination that his counsel contacted the Union as well via
25 telephone and email. Id. at 193. He further stated that his attorney asked the Union to represent
26 him (Farsaci). Id. at 194. He stated that he believes he "inquired as to whether the union would
27 be showing up or not [at the Step 1 grievance meeting] and I think we got a negative answer."
28 Id. at 198. As to the Step 2 meeting, he stated he was "told up till the day that the actual Step 2

1 meeting occurred that the union would be there." Id. at 199. Either Chuck Ethridge or
2 Visconti, both County employees, "assured" him that a union representative would be present
3 the Step 2 meeting. Id. He stated that his attorney requested that a Union representative
4 present for the Step 2 meeting. Id. at 200. The Step 2 meeting occurred without a Union
5 representative attending on behalf of Farsaci. Id. at 201.

6 Dan Grillett was the second witness. He is the Security Systems Coordinator for
7 Water Reclamation District. Id. at 262. Previously, he was a wastewater treatment operator
8 II. Id. He is also the Chief Stewart for the Union at the District. Id. He testified that Farsaci
9 not ask him to file any grievances against the county. Id. at 264. He did, however, have
10 informal discussions with a co-worker. Id. He testified that he attempted to participate in one of
11 the Step meetings, i.e., the April 11, 2005 meeting; however, he was told by Chuck Ethridge that
12 he was not necessary. Id. at 265-66. Later, he testified that it could have been Bridget
13 McNally who told him his appearance was not necessary. Id. at 267. When questioned if he
14 took "orders from Mr. Ethridge as to your job as a union steward," he replied "certainly not"
15 since Mr. Ethridge represented the employer. No one from the Union told him not to attend. Id.
16 at 267-68. He further testified that employees cannot file grievances, only the Union can do so.
17 Id. at 268. Grillett also testified that he may have moved ahead of Farsaci upon the modification
18 of the seniority list. Id. at 273. Exhibit 10 indicated that Grillett was ranked at 9th and Farsaci
19 was ranked at 14th on the seniority shift bidding document. Id. at 275. As pointed out by
20 Chairman Dicks, "a chief steward that might move ahead of the Complainant if a grievance was
21 not filed would seem to me to be relevant to the issue of whether there was some bias on the part
22 of that chief steward." Id.

23 Grillett was questioned by the Board as to why he walked away from the Step meeting,
24 and he replied simply that the employee had not asked him to be there. Id. at 284. He was
25 aware, however, at that point that Farsaci was having problems with regards to his seniority
26 ranking, and that he was having a meeting with his labor attorney present. Id. at 285-86.

27 Marcus Hatcher was the third, and final, witness. He is employed with the Union as the
28 Director of Representation. Id. at 293-94. Previously, he was employed by Clark County

1 Department of Aviation. Id. at 294. Hatcher testified that Farsaci did not contact him personally
2 or in writing concerning his concerns with the seniority ranking. Id. at 298-99. He further
3 testified that Article 42 was implemented because the old procedure would "create situations
4 where, to use an example, where a 20 year employee may not be able to - - 20 year county
5 employee may be able to outbid, promote for one year and be able to outbid an employee who
6 had been in that classification for seven years." Id. at 301. Prior to the collective bargaining
7 agreement, and Article 42, the union had not negotiated any system for shift bidding. Id.

8 Hatcher stated that another employee, Brad Ward, had talked to him about the seniority
9 bidding process. Id. at 302. He investigated Mr. Ward's complaint by reviewing the collective
10 bargaining agreement and discussing the issue with Mr. Stotik, his predecessor, and determined
11 that Operator I and Operator II are two different classifications. Id. at 304. Mr. Ward's
12 complaints were resolved without having a Step 1 meeting. Id. at 306. He claims that Mr. Ray
13 did contact him as Farsaci's counsel, asked for copies of certain documents, but never requested
14 that the Union represent Farsaci. Id. at 307. He further admitted to never having produced those
15 documents to Attorney Ray. Hatcher did ultimately talk with Mr. Visconti, Mr. Ethridge, and
16 Ms. McNally and determined that Farsaci should not be ranked at No. 3 based on his years as
17 Operator II. Id. at 310. He again contacted Mr. Stotik on this employee (Farsaci) as well. Id.

18 Referring to Exhibit 17, Hatcher stated that Farsaci and his attorney started the grievance
19 process without the Union's assistance. Id. at 311. Because of the number of Clark County
20 employees, Hatcher stated that it would be impossible for him to attend all Step 1 meetings
21 unless he had initiated the grievance; thus, he did not attend Farsaci's Step 1 meeting. Id. at 314.
22 He was not asked by Farsaci or Farsaci's attorney to personally attend the Step 2 meeting. Id. at
23 315. Whether to proceed to arbitration is a joint decision he makes with others in the Union
24 leadership. Id. at 315-16. The letter from Hatcher (Exhibit 24) was to put Attorney Ray on
25 notice that the Union considered the matter closed. Id. at 317. He also stated that Article 42 was
26 "meant to fairly distribute shift bids for seniority in class only." Id. at 319. He stated, after a
27 conversation with Tracy Preston to clarify the issue, "for layoff purposes, you would revert back
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1 to your time in the county. That should not carry over to Article 42, it was very separate, Ar
2 13 layoffs and Article 42 shift bids for that purpose." Id. at 319.

3 He stated that Farsaci did not name the Union as a party in the District Court action,
4 did Farsaci ask the Union for assistance in that litigation. Id. at 321. He stated that
5 Department of Aviation issues differed from Farsaci's issue because positions were "merged"
6 a new classification was created. Id. at 324. With the Farsaci issue, there were two dis
7 separate classifications already existing. Id. at 325. Hatcher did admit that he did not return
8 calls to Mr. Ray or respond to him in writing after a certain time (Id. at 350-51); and he st
9 that if a grievance is not timely filed, the employee may lose the right to do so. Id. at 352.

10 Hatcher continued to testify on October 17, 2006. References to the transcript of
11 proceeding will be referred to as Tr. II. Hatcher stated that he became aware of the Brad Ward
12 situation prior to learning of Farsaci's complaints. Tr. II, p. 20. Hatcher stated he believed
13 received the arbitration decision after his last letter to Farsaci's attorney. Id. at 23.

14 Hatcher was questioned why he did not think the "class and comp study" pertained to
15 seniority ranking. He agreed in some instances, the workers were "already doing the work of
16 reclassification, but they weren't getting the pay for it." Id. at 30. Hatcher agreed that the "class
17 and comp" study may pertain to the District and employees such as Farsaci. Id. at 31. He stated:

18 The way I understand it, is that their reclass was doing - - they had a I
19 classification, was an entry level classification, many employees did not promote
20 to a II classification because they didn't get the certifications. Why they didn't get
the certifications, I don't know, I can't answer. And I believe the class and comp
limited the amount of time that they could be in a I. That is my understanding.

21 Id. at 32. He reiterated, however, that the arbitration decision would not "have applied to
22 seniority because we didn't have seniority in the contract until 2003." Id. at 34. Mark Stotik is
23 the only person he personally spoke with concerning the "class and comp" study and how it
24 would apply to the District and Farsaci. Id. at 39. Concerning Exhibit 66, Hatcher stated he di
25 not investigate the reference in that exhibit that the seniority issue "is ripe for what th
26 grievance-arbitration is meant to adjudicate." Id. at 42. After reviewing Exhibit 27, Hatcher als
27 stated that he now knew that Farsaci's promotion date was February 24, 1996, based upon th
28 retroactive pay raise, rather than October 8, 1997, which was his certification date. Id. at 53. He

1 stated that in situations with retroactive promotion to a different classification, there is a
2 "reason" that seniority would not be based upon that retroactive promotion date. Id. at 60.

3 No employee other than Farsaci approached Hatcher after the 2005 revision to the
4 seniority list for shift bids pursuant to Article 42 of the CBA. Id. at 95. Upon questioning by the
5 Board, Hatcher replied that at no time during his investigation of the Farsaci issue did he "ever"
6 call him and say anything." Id. at 139.

7 **FINDINGS OF FACT**

8 1. That Farsaci was a member of the Union for a lengthy period of time.

9 2. That Farsaci was employed by the District since approximately 1982 (Tr. I, p. 8).

10 3. That Farsaci received the Operator II certification on October 8, 1997, but received
11 retroactive pay as an Operator II from February 24, 1996 through October 8, 1997; and that
12 "retro" pay was received by Farsaci on February 8, 1999.

13 4. That Farsaci wrote a letter to the Union on February 20, 2005, regarding a proposed
14 change in the seniority ranking as it pertains to shift bidding. In that correspondence, Farsaci
15 expressed his frustration and the continuing problems he has experienced with respect to his
16 seniority listing. He testified at the hearing that the letter indicated that he would hire a labor
17 lawyer if the Union did not rectify the problem as they did previously. The previous Union
18 officials with whom Farsaci worked well have since left the Union.

19 5. It is undisputed that the Union did not reply to this correspondence either
20 telephonically or in writing.

21 6. It is undisputed that Farsaci hired an outside attorney to represent him in his dispute
22 over the seniority issue. This outside attorney notified the Union that Farsaci wanted the Union's
23 assistance, and assistance was still not forthcoming.

24 7. It is undisputed that the seniority lists pertaining to shift bidding changed Farsaci's
25 status from #3 to #14.

26 8. It is undisputed that Farsaci participated in Step 1 and Step 2 grievance meetings with
27 his outside attorney; and that an arbitration hearing did not commence thereafter as the Union
28 wrote a letter that it did not believe that Mr. Farsaci's claim had "merit."

1 9. It is undisputed that Farsaci filed an action in District Court against Clark County, and
2 that the Union was not a party to that action. An injunction was entered by the District Court
3 against the County.

4 10. It is undisputed that prior to the 2003 collective bargaining agreement between the
5 parties to this matter, the agreement did not contain a clause pertaining to shift bidding based
6 upon seniority. The 2003 agreement did contain such a clause, i.e., Article 42.

7 11. It is undisputed that the Union representative, Grillett, did not attend the Step 1
8 meeting, after being told to attend; and that it was a County official and/or employee that told
9 him he did not need to attend. It is also undisputed that Grillett advanced ahead of Farsaci in the
10 seniority listing; thus, he personally benefited by not appearing at the Step 1 meeting on behalf
11 of Farsaci.

12 12. That the Union's duty to the covered employees include representation and
13 protection; and at the minimum, the Union representatives should have taken the initiative and
14 contacted Farsaci about his frustration and attempted to resolve his issues. In his post-hearing
15 brief, Farsaci cited Banks v. Bethlehem Steel Corp., 870 F.2d 1438, 1444 (9th Cir. 1989), for the
16 proposition that before a Union assesses the merits of a grievance, the Union must have a
17 basis upon which to make such an assessment. In the present matter, the Union acted arbitrarily
18 and capriciously as it determined not to pursue a grievance for Farsaci without any consideration,
19 without any investigation, and without any contact with Farsaci or his attorney. See also Vaca
20 v. Sipes, 386 U.S. 171 (1967), and District 1 MEBA (Mormac Marine Transport), 312 NLRB
21 944 (1993) (a breach of the duty of fair representation includes union conduct which is arbitrary,
22 discriminatory and/or in bad faith). These cases are applicable to the matter now before this
23 Board.

24 13. Should any finding of fact be more properly construed as a conclusion of law, may it
25 be so deemed.

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1 **CONCLUSIONS OF LAW**

2 1. The Local Government Employee-Management Relations Board ("Board") has
3 jurisdiction over the parties and the subject matters of the complaint on file herein pursuant to the
4 provisions of NRS Chapter 288.

5 2. The Water Reclamation District ("District") is a local government employer as defined
6 in NRS 288.060.

7 3. The Service Employees International Union, Local 1107, AFL-CIO ("Union") is an
8 employee organization as defined by NRS 288.040.

9 4. Farsaci is an employee as defined by NRS 288.050, and was a longtime member of the
10 Union.

11 5. Farsaci had previously experienced problems with his seniority status; and the
12 previous Union representatives resolved the issues. Those representatives are no longer with the
13 Union.

14 6. When Farsaci learned that his seniority would be changed again, he wrote the Union
15 that he intended to hire a labor lawyer to resolve this issue if the issue was not rectified by the
16 Union. It was obvious from the correspondence that Farsaci was frustrated. The Union did not
17 respond to Farsaci either in writing or verbally; yet, it had a duty of fair representation of Farsaci
18 as a union member. That fair representation included, but is not limited to, a duty to investigate
19 the allegations and pursue any alleged violation of the existing collective bargaining agreement
20 for the employee. Because it did not do either, the Union thus breached its duty of fair
21 representation.

22 7. Farsaci's attorney also contacted the Union; and the Union again acted arbitrarily and
23 capriciously in its failure to investigate the allegations and its lack of response to Farsaci's
24 attorney.

25 8. Further acts of arbitrary and capricious conduct includes the Union representative
26 appearing for the Step 1 meeting, being told to leave the meeting by an employer representative
27 and the Union representative leaving accordingly. This Union representative benefited by his
28 departure and failure to represent Farsaci by advancing in the seniority list over and above

1 Farsaci. It was improper for the Union representative to leave the Step 1 meeting at the urging of
2 the employer representative, and the departure may have been based upon the Union
3 representative being biased and/or prejudiced in light of the improvement of his own status on
4 the seniority list.

5 9. Farsaci could have mitigated his losses, however, by calming down and making
6 further attempts to contact the Union, e.g., telephonically or in person, in attempts to obtain
7 Union assistance.

8 10. Should any conclusion be more properly construed as a finding of fact, may it be so
9 deemed.

10 **DECISION AND ORDER**

11 Based upon the above, the Board hereby orders as follows:

12 1. IT IS HEREBY ORDERED that (a) the Union acted arbitrarily, capriciously, and in
13 bad faith in handling the incident with Farsaci, and such is a breach of its duty of fair
14 representation of Farsaci; (b) the Union is hereby enjoined from further arbitrary, capricious,
15 and/or discriminatory acts; (c) Farsaci is hereby awarded attorneys' fees and costs, which award
16 shall be reduced due to Farsaci's failure to mitigate his losses upon review by the Board; and
17 Farsaci shall file a detailed and comprehensive motion for fees and costs within 20 days from the
18 date of service of this Order, and the Union shall have 10 days thereafter to oppose the motion;
19 and (e) the Union shall post a Notice prepared by the Commissioner pertaining to this breach of
20 duty of fair representation for a period of 90 days in conspicuous places as approved to by the
21 Commissioner.

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1 2. IT IS FURTHER ORDERED that no punitive damages are awarded as such would
2 exceed this Board's authority.

3 DATED this 13th day of March, 2007.

4 LOCAL GOVERNMENT EMPLOYEE-
5 MANAGEMENT RELATIONS BOARD

6 BY:

JOHN E. DICKS, ESQ., Chairman

7 BY:

JANET TROST, ESQ., Vice-Chairman

8 BY:

JAMES E. WILKERSON, SR., Board Member