

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

86-044 JS

In the Matter of  
State Employment Relations Board,

Complainant,

and

Gallia-Jackson-Vinton Joint Vocational School District  
Board of Education,

Respondent,

and

Norman L. Stewart,

Charging Party.

CASE NUMBER: 84-UR-07-1644

ORDER  
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix;  
November 6, 1986.

Norman L. Stewart (Charging Party) filed an unfair labor practice charge against the Gallia-Jackson-Vinton Joint Vocational School District Board of Education (Respondent). Pursuant to Ohio Revised Code Section 4117.12, the Board investigated the charge and found probable cause to believe that an unfair labor practice had been committed. Subsequently, the Board issued a complaint alleging that Respondent had violated Ohio Revised Code Section 4117.11(A)(1) and (A)(3). The matter was heard by a Board hearing officer.

The Board has reviewed the record, the hearing officer's report, exceptions, cross-exceptions, and responses. For the reasons set forth in the attached opinion, incorporated by reference, the Board approves the hearing officer's findings of fact, conclusions of law, amends Recommendation 3.a. to read:

3. order the Respondent to:
  - a. Issue Norman Stewart a continuing contract of employment with the Gallia-Jackson-Vinton Joint Vocational School District as a Senior Level Heating and Air Conditioning Instructor commencing with the 1984-85 School year; and

and adopts the recommendations as amended.

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The Board orders the Respondent to:

A. Cease and desist from:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Chapter 4117, or discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1) and (A)(3).

B. Take the following affirmative action:

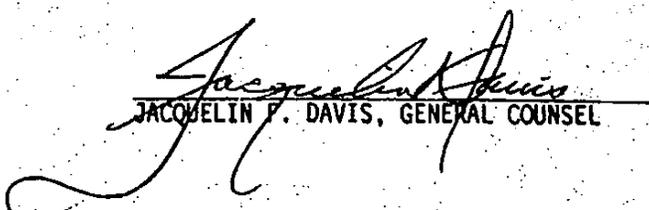
- (1) Post for 60 days in all Gallia-Jackson-Vinton Joint Vocational School District Board of Education facilities the Notice to Employees furnished by the Board stating that the District Board of Education shall cease and desist from the actions set forth in Paragraph (A) and shall take the affirmative action set forth in Paragraph (B);
- (2) Issue Norman Stewart a continuing contract of employment with the Gallia-Jackson-Vinton Joint Vocational School District as a Senior Level Heating and Air Conditioning Instructor retroactive to and commencing with the 1984-85 school year; and
- (3) Pay Norman Stewart back pay minus any mitigating earnings since leaving this employment with the Gallia-Jackson-Vinton Joint Vocational School District at the end of the school year in 1984.

It is so ordered.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.

  
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JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 13<sup>th</sup> day of November, 1986.

  
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JACQUELIN P. DAVIS, GENERAL COUNSEL

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STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Employee Organization,  
and

Gallia-Jackson-Vinton School District,  
Board of Education,

Employer.

CASE NUMBER: 84-UR-07-1644

OPINION

Day, Chairman:

The issues for disposition in this case are (1) whether the Gallia-Jackson-Vinton Joint Vocational School District Board of Education (respondent or employer) interfered with, restrained or coerced its employee, Norman L. Stewart (intervenor, charging party or Stewart) in the exercise of rights guaranteed by Chapter 4117 of the Revised Code and (2) whether the Respondent discriminated against Stewart with regard to his tenure or any term or condition of his employment because he exercised rights guaranteed by Chapter 4117 of the Revised Code.

If the answer to (1) is "yes", Respondent violated Section 4117.11(A)(1) of the Revised Code. If the answer to (2) is "Yes", Respondent violated Section 4117.11(A)(3) of the Revised Code.<sup>1</sup>

The answers to these questions turn on factual and credibility determinations. Such determinations have been made, expressly or implicitly, by the hearing officer and are entitled to great weight. For he

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<sup>1</sup>See p. 3 of the hearing officer's proposed order.

heard the witnesses, observed their demeanor and reviewed any documentary and tangible evidence.

The hearing officer has concluded that both questions require affirmative answers. The State Employment Relations Board (SERB or Board) has reviewed his conclusions, recommendations and proposed order, the supporting findings and conclusions, and the parties' exceptions, cross-exceptions and replies to cross-exceptions. SERB amends the findings of fact and recommendations and adopts them as amended.

However, the burden of proof rationale applied in reaching this decision has an importance beyond the immediate case and warrants an explanation. The opinion will be confined to an exposition of the principles utilized by SERB to reach burden-of-proof conclusions in unfair labor practice matters. The principles are applied in the instant case.

I

The evidence reflected in the hearing officer's findings of fact are sufficient to support a reasonable person in reaching the legal conclusion that the respondent violated rights of Norman Stewart protected by R.C. 4117.11(A)(1) and (3).<sup>2</sup>

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<sup>2</sup> R.C. 4117.11.:

"(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

"(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;  
\* \* \*

"(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code."

Without undertaking to summarize all the evidential material in the admissions, stipulations, and one hundred and thirty one findings of fact,<sup>3</sup> enough of the factual data will be noted to demonstrate the basis and the method for concluding both that a prima facie case was established and that the respondent's rebuttal was inadequate. The evidence was evaluated in the light of the employer's claims in support of non-retention of the charged party.

II.

Norman L. Stewart was an active member of the Buckeye Hills Teachers Association (BHTR or union) negotiating team, and president of the union. He was employed by the respondent at all times relevant to the issues in this case.<sup>4</sup> His union status was well known to the respondent.<sup>5</sup> And, if Stewart's employment had not been terminated, he would have been eligible for a continuing teaching contract beginning in the 1984-85 school year. Respondent did not renew his contract.<sup>6</sup>

A principal assigned reason for Stewart's non-renewal was a lack of minimum enrollment. Ten other teachers were not renewed for the same reason but at least nine were rehired prior to the beginning of the 1984-85 school

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<sup>3</sup>Finding of Fact (FF) 124 has eight subsections. Prolix is hardly an adequate adjective to describe the writing generated on all sides by this single discharge case.

<sup>4</sup>Admissions 2, 5, 6, and 8; Stipulation 2.

<sup>5</sup>Admission 9; Stipulation 2.

<sup>6</sup>Admission 10; Stewart began his employment with the respondent as an instructor of air conditioning in the spring of 1976, Stipulation 1.

year.<sup>7</sup> Enrollment in Stewart's class was two short of the necessary minimum.

The employer's policy was to combine under-enrolled two-year class programs to reach the minimum in order to retain senior teachers. However, the policy was not applied in Stewart's case; nor was he allowed to participate in recruiting efforts for the heating and air conditioning programs as he had formerly done.

Stewart led the BHTA in securing a temporary restraining order to prevent the respondent from holding a representation election (after its withdrawal of recognition from BHTA) between BHTA and Vocational Educators of America (VEA), a rival union.<sup>8</sup> When the election was ultimately held, BHTA won.<sup>9</sup>

At the first negotiating session after the recognition election,<sup>10</sup> negotiations were characterized by an observer as antagonistic, hostile, and harassing.<sup>11</sup> And, during a caucus in the midst of negotiations, the counsel/spokesperson for respondent indicated to respondent's negotiating team that "Stewart's got to go."<sup>12</sup>

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<sup>7</sup>FF 95-97; see also 116-121.

<sup>8</sup>FF 22-26.

<sup>9</sup>FF 26, 27.

<sup>10</sup>FF 28. Stewart was on the union team. Id.

<sup>11</sup>FF 30.

<sup>12</sup>FF 28.

When a Stewart grievance was presented, the respondent's president indicated to the BHTA grievance chairman that he could discuss the grievance but the matter had already been decided.<sup>13</sup>

The employer handled prospects for Stewart's classes in a manner suggestive of manipulation. For example, two students, denied admission to Stewart's class while registration was down, were later admitted. And a district policy permitting failures to repeat was not applied to enhance enrollment in Stewart's heating and air-conditioning program.<sup>14</sup> In addition, extra precautions were taken to keep enrollment data secret.<sup>15</sup>

A further significant fact is stipulated:

"There are no official reprimands in Mr. Stewart's personnel file."<sup>16</sup>

This brief summation does not exhaust the record but it clearly supports a connection between the charging party's termination and his protected activity.<sup>17</sup>

The same facts rebut the employer's contention that its legitimate reason for terminating the charging party was insufficient enrollment.<sup>18</sup>

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<sup>13</sup>FF 64-67.

<sup>14</sup>FF 95-97; 98-99; 102-103; 112-114; 115; 118-119; see especially FF 116-119.

<sup>15</sup>The extra care (FF 116-117) is unexplained by respondent except to characterize it as a "justified precaution" given the possibility that Stewart "might challenge Respondent's Actions." Respondent's Exceptions p. 87.

<sup>16</sup>Stipulation 3; FF 131.

<sup>17</sup>For additional evidence see FF 1-30; 62-63; 68; 88-130.

<sup>18</sup>This contention is central and crucial to the employer's case. Its importance may account for the volume of the employer's exceptions; see especially pp. 73-90.

Under the rule, elaborated in the next section, a discharge motivated even partially by an anti-union ingredient is not offset by other reasons which might be sufficient if untainted and standing alone.

### III

The Board's approach to burden of proof issues in unfair labor practice cases is orthodox.

The quantum of proof is a preponderance of the evidence. The party with the burden of persuasion (the proponent) must adduce enough evidence to make a prima facie case. That is, the proponent must prove the necessary elements of its case by preponderating evidence if the proponent is to prevail.

The existence of a prima facie case has two basic consequences. First, an un rebutted prima facie case will result in a decision in favor of the party with the burden of persuasion. Second, when a prima facie case has been established, the burden of going forward shifts to the party against whom the prima facie case is made.

Once a prima facie case is established, the party with the burden of going forward loses unless it introduces evidence at least sufficient to counter balance the evidence supporting the proponent's proof. Thus, the minimal proof requisite, if a party with the burden of going forward is to avoid defeat, is proof sufficient to reduce the prima facie case to evidential equipoise. If that equation is achieved and the proponent cannot rebut the response or adduce additional evidence sufficient to restore the preponderance, the proponent has not made a case and cannot prevail.

IV

Respondent here claims that the actions it took affecting Stewart would have been the same regardless of any anti-union bias. In effect, the respondent argues that the proof establishes an affirmative defense absolving it from illicit conduct even were one to concede that part of the motivation for discharge was anti-union.

If Wright Line, Inc. v. NLRB, 105 LRRM 1169 (1980) were followed by SERB, the respondent would be correct. However SERB is neither bound, nor persuaded, by Wright Line. To the contrary, SERB's view is that any anti-union bias pollutes the proof beyond redemption. Of course, pristine compliance with the law will eliminate the redemption issue.

V

The employer believes that if any corrective action were to be taken with respect to the charging party's contract, it should be restricted to the two-year limited contract contemplated by R.C. 3319.11.<sup>18</sup> However, that section is largely permissive and does not limit SERB's responsibility

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<sup>18</sup>Respondent's Reply to the Cross-Exceptions of Intervenor, p. 6. The employer relies on a portion of R.C. 3319.11. That section is designed to regulate the discretion of school superintendents and school boards in the management of contractual commitments to teaching personnel. The present employer relies on this language in .11:

"The superintendent may recommend re-employment of such teacher, if continuous service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher...."

Perspective on the permissive impact of this portion of the statute is gained when considered in context. R.C. 3319.11 permits an alternative to a continuing service contract in some circumstances. But the statute does not impose a limit on the remedial power and responsibility of SERB.

to "take such affirmative action...as well effectuate the policies of Chapter 4117 of the Revised Code."<sup>20</sup> Indeed, so far as R.C. 3319.11 is concerned, there appears to be no more stricture on the SERB's power to order a continuing contract than its power to compel limited contract which the respondent employer apparently concedes.<sup>21</sup> Indeed, SERB's powers are not addressed either specifically or by implication.

The un rebutted prima facie case indicates that the employer has violated Sections 11(A)(1) and (3) of Chapter 4117 of the Revised Code. Remedial action is required. The employer's actions have been sufficiently flagrant to require the imposition of a continuing contract to protect the rights which Chapter 4117 vouchsafe the charging party and thus effectuate the policy objectives of Chapter 4117.

#### VI

The hearing officer has made recommendations to cure the unfair labor practices committed by the respondent. The Board agrees with his proposed order except for paragraph 3.a. That paragraph in the order is amended by the Board to:

- "3. Order the Respondent to:  
"a. Issue Norman Stewart a continuing contract of employment with the Gallia-Jackson-Vinton Joint Vocational School District as a Senior Level Heating and Air Conditioning Instructor commencing with the 1984-85 school year; and"

In all other respects the Board adopts the hearing officer's recommendations.

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<sup>20</sup>R.C. 4117.12(B)(3).

<sup>21</sup>Respondent's Reply to the Cross-Exceptions of Intervenor, p. 6.

The respondent is to correct its misconduct as proposed in the hearing officer's recommended order as amended by the change propounded by SERB for paragraph 3.a.

Sheehan, Vice Chairman, and Fix, Board Member, concur.

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