

SEED OPINION 81

142

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

v.

Ohio Department of Transportation,
Respondent.

CASE NUMBER: 85-UR-10-4444

87-020

ORDER
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Latané;
September 3, 1987.

On October 15, 1985, the Communications Workers of America, Council of Public Workers, AFL-CIO (Charging Party) filed an unfair labor practice charge against the Ohio Department of Transportation (Respondent) alleging that the Respondent had violated Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (3) by terminating Vicki L. Vincent's employment because of her exercising rights guaranteed by O.R.C. Chapter 4117. Pursuant to O.R.C. §4117.12 the Board conducted an investigation and found probable cause to believe that an unfair labor practice had been committed. Subsequently, a complaint was issued and the case was heard by a Board hearing officer.

The Board has reviewed the record, the Hearing Officer's Proposed Order, Exceptions, Cross-Exceptions, and Responses. The Board amends the last sentence of Finding of Fact No. 10 to read: "Ogden was driving and Vincent, Watkins, and Arlen Anderson were sitting inside the truck."

For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Findings of Fact as amended, adopts the Conclusions of Law, amends the Recommendations by striking Recommendation No. 4, remands the case to hearing to determine back pay, and adopts the Recommendation as amended. The Board does not adopt the hearing officer's analysis and discussion.

The Respondent is ordered to:

- a. Cease and desist from:

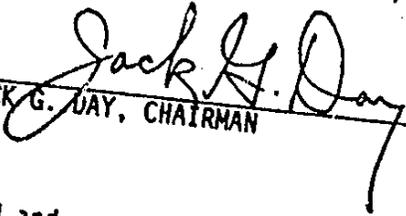
- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117, or discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code, and from otherwise violating Ohio Revised Code §4117.11(A)(1) and (3).
- b. Take the following affirmative action:
- (1) Post for 60 days in all Clark County ODOT buildings where the employees work the Notice to Employees furnished by the Board stating that ODOT shall cease and desist from the actions set forth in Paragraph (a) and shall take the affirmative action set forth in Paragraph (b).
 - (2) Immediately offer reinstatement to Vicki L. Vincent as a Highway Worker I with certified status. If she refuses reinstatement, add a statement to her personnel file that she resigned this position voluntarily.
 - (3) Expunge from Vicki L. Vincent's personnel file the evaluation dated August 22, 1985, by Tirey, as well as any other documents referring to her removal or poor performance while a probationary employee for ODOT during the period of June 17, 1985, to October 11, 1985.
 - (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the issuance of the Order of the steps that have been taken to comply therewith.

This case is remanded to hearing for the sole purpose of taking evidence to determine how much back pay, if any, is due Vincent after calculating her salary from the date of discharge to reinstatement, establishing offsetting amounts due to unemployment compensation, or any income from other employment, and developing the facts pertinent to Vincent's effort to secure employment to mitigate her losses during any uncompensated interval between discharge and reinstatement.

ORDER
CASE NO. 85-UR-10-4444
SEPTEMBER 3, 1987
PAGE 3 OF 3

It is so ordered.

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


JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party
on this 8th day of October, 1987.


JACQUELINE F. DAVIS, EXECUTIVE DIRECTOR

LSI:d1b/18020

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

v.

Ohio Department of Transportation,
Respondent.

CASE NUMBER: 85-UR-10-4444

OPINION

Day, Chairman:

This case involves the discharge of the Charging Party (Vincent) at the end of her probation period. A principal concern is the application of Chapter 4117 to an employee in probationary status.

The State Employment Relations Board (SERB or Board) adopts the conclusions of the Hearing Officer that an unfair labor practice has been committed by the Ohio Department of Transportation (ODOT or Employer),¹ amends the remedy recommended by the Hearing Officer and then adopts the remedy as amended. However, the Board differs so profoundly with the Hearing Officer's analysis of the proper basis for a finding of an illegal discipline motivation that this opinion is necessary to again emphasize SERB

¹SERB adopts and incorporates, as though rewritten in this opinion, the admissions and findings of fact (pp. 2-11) in the Hearing Officer's Procedural Order with the exception of Finding of Fact #10 which (according to the Hearing Officer's own amendment) showed "Ogden was driving and Vincent, Watkins and Arlen Anderson were sitting inside the truck." With this amendment Finding of Fact No. 10 is also adopted.

policy. Other matters of importance - the status of probationary employees under Chapter 4117 and whether Vincent engaged in protected concerted activity - will be discussed also.

I
Turning first to the status of probationary employees, a preliminary inquiry is the evidential question whether a decision of the referee for the Unemployment Compensation Board of Review was admissible in the present proceeding. That Referee held that Vincent's discharge was without just cause.

It is elemental that an adjudication without jurisdiction is a nullity. The Unemployment Compensation Board of Review (UCBR) had no authority to determine an unfair labor practice (ULP) and did not undertake to do so. It simply decided that Vincent's separation was unjust. More would have exceeded its jurisdictional ambit.² SERB has exclusive jurisdiction of unfair labor practices in Ohio's public sector. Therefore, the decision that the discharge was unjust has neither relevance nor effect on SERB's ULP responsibility. Since this is so, the admission of the UCBR determination by the Hearing Officer is immaterial.³ SERB authority to control unfair labor practices extends to "any person holding a position by appointment or employment in the service of a public

²The scope of the Unemployment Compensation Board of Review's remedial authority is not an issue for SERB. For the latter to do more than decide its own exclusive jurisdiction is beyond its competence.

³The unusual application of the "prior consistent statement" theory of admission, adopted by the Hearing Officer, unexampled or not, need not be addressed. Whatever the rationale for the admission of the UCBR decision, its use was unnecessary. For it is not relevant to any issue that SERB need decide.

employer."⁴ For such a person is a public employee,⁵ and public employees have the rights vouchsafed by R.C. 4117.03(A)(1)-(5). These rights are safeguarded in turn by R.C. 4117.11 from infringement by either employers or employee organizations. Thus all public employees have the protections of Chapter 4117 whether they are probational or non-probational.

II

Assuming coverage, the question arises whether the activity (claimed to be the basis of the unfair labor practice for which remedy is sought) is concerted activity within Chapter 4117 protection.

R.C. 4117.03 provides in pertinent part that:

"(A) Public employees have the right to:

* * *

(2) Engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In the present instance Vincent, the charging party, was not a member of the union and was a probationary employee. Nevertheless, she was protected by the Act. And when engaged in "concerted activities for the purpose of ... mutual aid or protection" was immune to employer retribution for those activities.

Vincent joined with other employees in making a complaint alleging a lapse in safety procedures by her immediate superior. The objection was not lodged with the supervisor. This was neither surprising nor improper. It would be unrealistic to expect the alleged culprit to inculcate himself. In

⁴R.C. 4117.01(B).

⁵Id.

any event, the complaint was taken by Vincent and others to the next level of supervision, the Highway Maintenance Superintendent for the District. This was the logical avenue for complaint given the fact that the immediate supervisor was the target. More important to the current issue, the complaint involved claimed safety misconduct. This category of complaint is a classic example of an action properly within the contemplation of "mutual aid or protection."

The remaining issue is whether the discharge of Vincent was motivated in whole or in any part by her participation in this protected concerted action.

III

The Board finds a mixed motive for the disciplinary action in this case. The facts will support the implication that at least part of the disposition to discipline rests upon Vincent's concerted activity.⁶ This conclusion coupled with the "in part" principle adopted and followed in SERB v. Gallia-Jackson-Vinton JVS District Board of Education⁷ (Gallia-Jackson-Vinton) compels the conclusion that the discharge of Vincent was illegal.

The Hearing Officer's report discusses other tests for mixed motive discipline of employees in a union setting. These include the "but for" test (discipline would not have occurred but for an illegal motive) and the "dominant motive" test (illegal bias is the principal basis for discipline). SERB is told that most, if not all, jurisdictions which have

⁶Finding of Fact Nos. 10(as corrected)-13, 16-18, 20-22, 26-27, 31-36.

⁷Case No. 84-UR-07-1644(1986). The "in part" concept is that, if any part of a disposition to discipline is motivated by unlawful discrimination against an employee for engaging in a protected activity, the punishment is illicit. Legality is not saved by the fact that another part of the justification, even a principal part, is a legitimate business consideration.

considered the matter have rejected the "in part" test. This conclusion is accompanied by encouragement to SERB to join the reputed majority and adopt the "but for" standard.⁸ Assuming the Hearing Officer's recital of the array of authority is theologically accurate, SERB does not abandon the "in part" test.⁹ The logic projected by marshalling majority versus minority views is more the logic of arithmetic than persuasion. Superior authority may compel even when reasoning (better or worse) does not persuade. But that generalization is not pertinent here. For SERB has considered mixed motive conclusions reached by other responsible agencies. It has not been persuaded. And, so far, no superior authority has ordered any contrary course.

The Gallia-Jackson-Vinton principle is reaffirmed and followed.

IV

The back pay issue in this case requires further hearing to develop the facts necessary to an accurate and fair determination of the charging party's loss. Apparently, she received unemployment compensation. Apart from this she may have received pay from other employment she sought and was required to seek.

The Hearing Officer's Recommendation No. 4 is amended to strike all reference to payments and the case is remanded for the taking of evidence to determine how much back pay, if any, is due Vincent after calculating her salary from the date of discharge to reinstatement and establishing

⁸See Hearing Officer's Proposed Order (HOPO), pp. 15-24.

⁹The Board considers that R.C. 4117.12(B)(4) sanctions the "in part" test by implication rather than a codification of the "but for" standard. Cf. HOPO at p. 21.

offsetting amounts due to unemployment compensation, or any income from other employment. The Hearing Officer also must develop the facts pertinent to Vincent's effort to secure employment to mitigate her losses during any uncompensated interval between discharge and reinstatement. Apart from this amendment, the Hearing Officer's remedial recommendations are adopted. His reasoning, legal analysis and conclusions of law in conflict (directly or by implication) with this opinion are not.

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

0331B:d/b:9/25/87:f