

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEPB OPINION 88

In the Matter of
State Employment Relations Board,
Complainant,

88-014

and
Corrections, Law Enforcement and Safety Employees of Ohio,
Teamsters Local Union No. 740,
Intervenor,

v.

Warren County Sheriff,
Respondent.

CASE NUMBER: 84-UR-08-1774

ORDER
(Opinion Attached)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latane;
May 26, 1988, and September 22, 1988.

On August 15, 1985, the Corrections, Law Enforcement and Safety
Employees of Ohio, Teamsters Local Union No. 740 filed an unfair labor
practice charge against the Warren County Sheriff ("Respondent"). On
October 9, 1986, the Board found probable cause to believe that the
Respondent had violated O.R.C. §4117.11(A)(1) and (3). Pursuant to O.R.C.
§4117.12, a complaint was issued. After a full hearing and briefing of all
issues by the parties, the hearing officer on January 26, 1988, issued a
report and recommendation. Exceptions and a response thereto were filed.

After reviewing the hearing officer's report and recommendation, the
exceptions, response, and the record, the Board, for the reasons stated in
the attached opinion, pursuant to the vote taken on May 26, 1988, adopts the
Hearing Officer's Recommendations and Conclusions of Law and finds that the
Respondent committed an unfair labor practice in violation of O.R.C.
§4117.11(A)(1) and (3) by discriminating against and constructively
discharging Deputy William Sulfsted. The Board also adopts the Findings of
Fact, with one modification. Pursuant to the vote taken on September 22,
1988, the Board modifies Finding of Fact #43 as reflected on page 6 of the
attached opinion. The Board also adopts the analysis set forth in Section C
and D of the Hearing Officer's Report and Recommendation.

ORDER

Case No. 84-UR-08-1774

May 26, 1988

Page 2 of 3

Pursuant to O.R.C. §4117.12(B)(3), the Board hereby orders the Respondent to:

A. Cease and desist from:

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 Warren County Sheriff Department buildings where employees work the Notice to Employees furnished by the Board stating that Respondent 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 William Sulfsted to the position he formerly held.
- (3) Pay William Sulfsted back pay from January 18, 1985, until the effective date of the offer of reinstatement, together with interest at the rate payable on such awards in the courts of Ohio, less any unemployment compensation benefits and any other earnings which were or reasonably should have been earned as mitigation of damages.*
- (4) Make this employee whole in seniority, pension contributions and other benefits which would have accrued to him in the ordinary course had he remained continuously employed since January 18, 1985, to the effective date of the offer of reinstatement.
- (5) Expunge from William Sulfsted's employee file all record of disciplinary actions taken against him by Respondent from May of 1984, through January of 1985, together with the evaluation for the year 1984.

*In case the parties cannot agree on the amounts or items to be included under paragraph 2(b)(3) or (4), the Board should order the case remanded to the Hearing Officer for a hearing to resolve these issues.

(6) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

William P. Sheehan
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 28 day of September, 1988.

Cynthia V. Spanski
CYNTHIA V. SPANSKI, CLERK

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Issued
Report



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

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).

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

- (i) Post for 60 days in all Warren County Sheriff Department buildings where employees work the Notice to Employees furnished by the Board stating that Respondent shall cease and desist from the actions set forth in Paragraph (a) and shall take the affirmative action set forth in Paragraph (b).
- (ii) Immediately offer reinstatement to William Sulsted to the position he formerly held.
- (iii) Pay William Sulsted back pay from January 18, 1985, until the effective date of the offer of reinstatement, together with interest at the rate payable on such awards in the courts of Ohio, less any unemployment compensation benefits and any other earnings which were or reasonably should have been earned as mitigation of damages.
- (iv) Make this employee whole in seniority, pension contributions and other benefits which would have accrued to him in the ordinary course had he remained continuously employed since January 18, 1985, to the effective date of the offer of reinstatement.
- (v) Expunge from William Sulsted's employee file all record of disciplinary actions taken against him by Respondent from May of 1984, through January of 1985, together with the evaluation for the year 1984.

Warren County Sheriff
84-UR-08-1774

DATE _____ BY _____ TITLE _____
THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board.

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

and

Corrections, Law Enforcement and Safety Employees of Ohio,
Teamsters Local Union No. 740,
Intervenor,

v.

Warren County Sheriff,
Respondent.

CASE NUMBER: 84-UR-08-1774

OPINION

Davis, Vice Chairman:

The unfair labor practice complaint in this case alleges that the Warren County Sheriff ("Respondent," "Employer," or "Sheriff Dalton") engaged in discriminatory conduct in violation of Ohio Revised Code ("O.R.C.") §4117.11(A)(1) and (3) when he and his agents took certain actions against Deputy William Sulfsted ("Sulfsted"), an active supporter of the Corrections, Law Enforcement, and Safety Employees of Ohio, Teamsters Local #740 ("Teamsters"), the Intervenor.

I. FACTS

Chief of Hearings Michael Hall issued a report containing extensive findings of fact and a thorough analysis of the law. Pursuant to O.R.C. §4117.12(B)(2) and Ohio Administrative Code ("O.A.C.") Rule 4117-1-13, the Respondent timely filed exceptions to the hearing officer's report. In addition to objections to the hearing officer's recommended conclusions of law, the Respondent raises exceptions to 29 of the hearing officer's 56 findings of fact. The Board has reviewed these exceptions, has examined the

The Respondent's exceptions do not conform to the requirements of O.A.C. Rule 4117-1-02(E). The Board on February 18, 1988, granted Respondent's motion for leave to exceed the limitation imposed by O.A.C. Rule 4117-1-02(D) that documents not exceed fifteen pages. However, O.A.C. Rule 4117-1-02(E) requires that whenever a document exceeds fifteen pages, it "shall contain a summary and a table of contents." The Respondent's exceptions, which are 36 pages in length, contain neither.

record, and concludes that the hearing officer evaluated and presented the facts in a thorough, straight-forward, and objective manner. For reasons more specifically addressed below, the findings of fact as recommended by the hearing officer, with one modification, are adopted by the Board and incorporated herein by reference.

In dealing with exceptions to fact, O.R.C. §4117.12(B)(2) dictates that only if substantial issues are raised must the Board provide review. Although the Respondent's exceptions are numerous, only one raises a substantial issue of fact. Most of the Respondent's exceptions to individual findings of fact raise arguments that are not appropriate bases for objection, do not raise substantial issues, and, therefore, do not require review. Nonetheless, the Board has chosen to examine each of the exceptions and to review the record to ensure that the Respondent's contentions are accorded the fullest consideration. The exceptions to the facts are of six general types, in which the Respondent urges the Board to: 1) state the same findings but in a different tone; 2) choose wording different from the terminology used by the hearing officer; 3) derive conclusions that are not supported by the record; 4) delete findings because they give the "wrong impressions"; 5) change the order in which facts are presented; or 6) reject the hearing officer's credibility determinations. Because the exceptions can be so categorized, the Board's treatment of the exceptions to fact is organized by the general nature of the exceptions rather than by the specific findings attacked.

A. Tone

As to the exceptions in which the Respondent simply opposes the tone of the finding or is dissatisfied with the hearing officer's phraseology, the Board notes that it is unlikely and undesirable for a neutral hearing officer to couch facts in the same argumentative terms as would a party. The Respondent seeks to have the Board present facts as they would be expressed in a partisan brief, playing down points problematic to the Respondent, using euphemisms, and stating conclusions that cannot be drawn from the facts. For example, Finding of Fact #6 states, in part, that:

[The sheriff] felt a union would be acceptable but he was particularly opposed to the Teamsters being associated with a law enforcement agency since he had heard that the Teamsters were mobsters and gangsters.

The Respondent argues that the finding should be worded as follows:

The sheriff felt a union would be acceptable and personally and unofficially preferred the Ohio Brotherhood of Deputy Sheriffs over the FOP and Teamsters. Dalton never took any action to publish or disseminate his personal, unofficial views. Unofficial comment among the employees indicated that Dalton disliked the Teamsters' image and that he had serious reservations about the propriety of Teamster involvement in a law enforcement agency.

Respondent's Exceptions, filed March 4, 1988, page 4. A study of the relevant portions of the record reveals that the hearing officer's finding of fact, as stated, is fully supported by the transcript and is neutrally presented.

Similarly, Respondent's complaint regarding Finding of Fact #42 is that "it suggests that Sulfsted took the initiative in mending fences following his reinstatement." Respondent's Exceptions, page 14. The hearing officer stated that "on the advice of counsel, Sulfsted sought and obtained written permission from Chief Deputy Collins to wear his own brand of body armor (i.e. bullet-proof vest) and to work as an instructor at the martial arts school." The hearing officer's finding does not imply an attempt to "mend fences." It is a straight-forward and unadorned statement of fact.

The exceptions to Findings of Fact #10, #23, #30, and #39 present similar arguments in which the Respondent expresses dissatisfaction with the tone of the findings. The Board has examined the record and determines that the findings are appropriate and in need of no revision or elaboration.

B. Word Choice

With regard to the hearing officer's choice of words, the Respondent, for example, objects to the use of the term "improper" in describing Sulfsted's act of voting in the precinct of his previous residence. (Finding of Fact #11; Respondent's Exceptions, page 5.) The Respondent prefers the term "illegal." The hearing officer, however, was correct in his terminology. No enforcement body issued a conviction or a finding of illegality. (Finding of Fact #17.) This Board is not empowered to adjudicate alleged violations of O.R.C. §3599.12. The use of the term "illegal" would have been unacceptable.

In the exception to Finding of Fact #4, the Respondent argues that the term "spearheaded" is misleading as a description of Sulfsted's leadership role in organizing for the Teamsters. Respondent asserts that several other employees participated in organizational efforts within their respective divisions. (Respondent's Exceptions, page 1.) In this finding, the hearing officer used the very word employed by Sheriff Dalton to describe Sulfsted's role in the Teamsters' effort. The Sheriff stated, "...I guess Deputy Sulfsted spearheaded the drive for the Teamsters." (Deposition of Dalton, taken September 23, 1988, admitted pursuant to stipulation of the parties, Transcript pages 817-819; Hearing Officer's Report, page 3.)

C. Facts Not In Evidence

The Respondent takes exception to Findings of Fact #27 and #28, contending that the hearing officer did not deduce that Respondent actually had been advancing what Respondent calls a "hidden agenda" in taking disciplinary actions taken against Sulfsted for unbecoming conduct and insubordination. Respondent's Exceptions, page 11. In these findings, the hearing officer stated the direct facts as supported by the record: a memorandum requesting discipline was issued by Chief of Detectives Wilson

and a pre-disciplinary hearing was held by Chief Deputy Collins regarding conduct unbecoming an officer during the incident involving Sulfsted's efforts to vote in the primary election. Nothing in the record supports the Respondent's argument that these actions were taken to advance unarticulated goals. Respondent contends that Wilson had a "hidden agenda" to vent his anger over a previous incident, and that Sheriff Dalton and Collins shared a "hidden agenda" to provide the punishment that they felt Sulfsted had "escaped" when the Board of Elections determined not to pursue the voting issue. Respondent's Exceptions, page 11. There is no evidence to support Respondent's theory of motivation and "hidden agendas." A party may not supplement the record by presenting new assertions of fact in the exceptions.

In its exception to Finding of Fact #21, the Respondent again tries to add to the record through exceptions. The Respondent argues that the Board should make an additional finding as to practices of other sheriff departments. (Respondent's Exceptions, page 7.) No evidence of this nature is present in the record.

Exceptions to Findings of Fact #18, #30, and #31 also are inappropriate in that they involve requests by the Respondent that the Board add information and conclusions that are not apparent from the record.

D. Deletion of Facts

Respondent objects to the inclusion of certain facts because, according to the Respondent, they are misleading. For example, Respondent urges the Board to delete the finding that Chief of Detectives Wilson, a major player in the events relevant to this case, was present at a meeting held by the employers to consider various labor organizations. (Finding of Fact #7; Respondent's Exceptions, pages 4 and 5.) The Respondent argues that, by innuendo, the finding suggests that Wilson had an ulterior motive. No such suggestion is made by the hearing officer or the Board. Wilson's appearance, however, is relevant to the issue of knowledge of Sulfsted's support for the Teamsters.

In the exceptions to Finding of Fact #10, dealing with the question of Sulfsted's efforts to vote in the primary election, the Respondent seeks to have the Board delete the finding that Sulfsted "voted [only] once in the primary." Respondent argues that "[t]his statement is misleading in that it suggests Sulfsted was innocent of any wrongdoing." (Respondent's Exceptions, page 5.) While Respondent correctly notes that the issue of Sulfsted's voting was tied to the use of his previous residential address, the facts as stated properly present a complete scenario of the voting incident. No conclusion as to Sulfsted's guilt or innocence is advanced by the statement. (See also the discussion of Respondent's exception to Finding of Fact #11, supra, page 3.)

E. Order of Facts

In exceptions to Findings of Fact #9, #16, #38, #41, #50, and #52, the Respondent objects to the order in which the facts are presented, arguing

that they should be rearranged to reflect the proper or more desirable chronology. The facts as relayed by the hearing officer, in the order presented, are logical and easy to follow. The Respondent's preference that the facts be organized differently is not an adequate basis for rejection of, or reorganization of, the findings of fact. Moreover, in its objection to Finding of Fact #50, the Respondent argues that, had the facts been presented in a different order, one could draw an inference as to why Sulfsted's schedule had been changed and why the Sheriff wanted a report on the Hopkinsville robbery case by "about" November 2, 1988. Respondent's Exceptions, page 17. Again, the Respondent is attempting to advance facts that could have been submitted in evidence but were not. Rearrangement of the findings will not create facts that are not in evidence.

F. Credibility Issues

Other arguments raised by the Respondent relate to credibility. In response to most of the credibility determinations made by the hearing officer, the Respondent cites contradictory testimony but does not offer sufficient argument to warrant the Board's reversal of a credibility determination made by the hearing officer who actually conducted the hearing and was intimately familiar with all issues of fact and evidence. Such exceptions are raised with regard to findings of Fact #14, #26, #45, #47, and #48. The hearing officer's conclusions of credibility have been rationally and judiciously made and will not be disturbed by the Board.

G. Meritorious Exception

The Board finds merit in the Respondent's exception to Finding of Fact #43 regarding the hearing officer's statement that Sulfsted "radioed for backup assistance." As noted by Respondent, testimony indicates that Sulfsted did not expressly request backup assistance. (Transcript, pages 146-152.) The remainder of that finding of fact, however, is fully accurate. That Sulfsted did not expressly request backup with regard to the outcome of the case and to the conclusions drawn from established Sulfsted's concerns about backup support. Sulfsted radioed sufficient information that, in keeping with undisputed testimony regarding established Department practice, backup automatically would have been provided. The available watch commander should have begun moving in the direction of Sulfsted's patrol. The watch commander did not. Instead, he radioed to the dispatcher that he was leaving his cruiser to purchase donuts. Given the facts surrounding the threats that necessary backup assistance might be unavailable to Sulfsted if he continued to support the Teamsters, this alteration of the finding of fact does not affect the outcome of the case. The Respondent's exception, however, is granted, and Finding of Fact #43 is modified as follows:

The sentence "He radioed for backup assistance," is deleted and replaced with this sentence: "Sulfsted radioed sufficient information that would have warranted backup assistance."

II. ISSUES

This action presents several issues of law. Those dealing with the timeliness of allegations raised in the complaint and the relevance of the action taken by the Personnel Board of Review need no elaboration beyond the analysis and recommendations offered in the hearing officer's report. With regard to the determination of whether Respondent engaged in discriminatory conduct violative of O.B.C. §4117.11(A)(1) and (3), the hearing officer's analysis is especially cogent. The Board finds the Respondent's exceptions to the hearing officer's approach to be without merit. In fact, the Board would be hard-pressed to improve or elaborate upon Chief of Hearings Hall's application of the relevant law to the facts of this case. Therefore, the Board expressly adopts the analysis set forth in Sections C and D of the hearing officer's report and incorporates the analysis as if fully reprinted herein, with minor editorial changes. Pursuant to O.A.C. Rule 4117-1-15(B), this analysis may be cited as precedent and carries the same authoritative significance as an opinion drafted by a member of the Board.

As to the elements of constructive discharge and a statement of the proper standard to be applied, a presentation of the Board's analysis is necessary and is set forth below.

III. CONSTRUCTIVE DISCHARGE

Complainant and Intervenor argue that the Employer's course of illegal conduct left Sulfsted with no option but resignation. They contend, therefore, that Sulfsted's resignation was not voluntary and that he was "constructively discharged" by the Employer. Complainant and Intervenor argue that the conclusion and remedy in this case should be the same as if the Respondent had directly terminated Sulfsted's employment. The hearing officer concurred in this analysis and concluded that Sulfsted had been constructively discharged and was entitled to reinstatement with back wages. The Board agrees.

A. The Standard

In the ~~applicability~~ ^{applicability} of the concept of "constructive discharge" under O.R.C. Chapter 4117 is an issue of first impression for the Board. Therefore, in reaching its conclusion, the Board considers the instructive value of the approaches used by the federal courts, Ohio courts, and the National Labor Relations Board ("NLRB") in applying similar statutory provisions. It is clear from these sources that the concept of constructive discharge is well-accepted both under federal labor statutes and under other Ohio employment laws. As the United States Supreme Court noted in applying comparable unfair labor practice provisions of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3):

The [National Labor Relations] Board, with the approval of lower courts, has long held that an employer violates this provision not only when, for the purpose of discouraging union activity, it directly dismisses an employee, but also when it purposefully creates working conditions so intolerable that the employee has no option but to resign -- a so-called "constructive discharge."

Sure Tan, Inc. v. NLRB, 467 US 883, 116 LRRM 2857, at 2862 (1984). See also NLRB v. Holly Bra of California, Inc., 405 F.2d 870, 70 LRRM 2301, 2302 (CA 9, 1969); NLRB v. Haberman Construction, 641 F.2d 351, 106 LRRM 2998 (CA 5 1981) (en banc); Cartwright Hardware Co. v. NLRB, 600 F.2d 268, 101 LRRM 2652 (CA10, 1979); and Crystal Princeton Refining Co., 222 NLRB 1068, 91 LRRM 1302 (1976).

In Ohio, state and federal courts also have employed the concept of constructive discharge in employment benefit actions, such as Holf v. Westinghouse Electric Corp., Case No. 8-83-21, slip opinion at page 5 (Ct. App. Logan, opinion issued November 8, 1984), and in civil rights actions such as Rimedio v. Revlon, Inc., 528 F.Supp. 1380, 1389 (S.D. Ohio 1982), wherein the court stated, "When an employer makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has effected a constructive discharge." (Citations omitted.)

In the preceding cases, the standards may differ in precise terminology, but an amalgamation of common factors emerges. From these common and accepted approaches, the Board shapes this standard: When an employer's course of discriminatory conduct, motivated in whole or in part by anti-union sentiment or other intent to discriminate against the exercise of protected rights, creates working conditions that are so intolerable that a reasonable person would resign from employment, the employer is considered to have discharged the employee. Stated more schematically, the required components of a constructive discharge that would constitute a violation of O.R.C. §4117.11(1) and (3) are:

- 1) The employer has imposed or knowingly allowed intolerable working conditions;²

²Actual intent to induce a resignation is not required. Unlike the standard enunciated in some of the National Labor Relations Board's constructive discharge cases, the standard set forth by this Board does not include specific intent to induce a resignation as a requisite component of constructive discharge. This approach is consistent with the standard employed by numerous federal courts. See, e.g., NLRB v. Holly Bra of California, Inc., 405 F.2d 870, 70 LRRM 2301, 2302 (CA 9, 1969) and NLRB v. Haberman Construction, 641 F.2d 351, 106 LRRM 2998 (CA 5 1981) (en banc). Specific intent is a difficult factor to evaluate and, in a case such as this, evidence of intent to induce a resignation is not essential to the principle being pursued. When the employer's actions are motivated by anti-union animus, the presence or absence of specific intent to induce a resignation does not alter the damage done to protected rights. Often, an employer's anti-union actions may not be specifically formulated to effect a single result; the employer's unlawful desires may be satisfied equally well by a termination supported by a discrimination-tainted process, by a resignation induced by the same or different discriminatory process, or by the employee's cessation of union activity. The actual intended result is not relevant.

- 2) The employer's conduct was motivated at least in part by anti-union animus or other intent to discriminate against an employee for exercise of rights guaranteed by O.R.C. Chapter 4117; and
- 3) A reasonable person subjected to such circumstances would have resigned.

It must be noted that constructive discharge will be found in only the extraordinary case. O.R.C. §§4117.11 and 4117.12 provide the desired course of action through which an employee may seek redress of prohibited employer action. Employees faced with discriminatory conduct by an employer should, if at all possible, resort to the legal remedies available through O.R.C. Chapter 4117 and should avoid a self-help resignation in anticipation of a subsequent finding of constructive discharge.

B. Did Respondent Impose Intolerable Working Conditions?

In establishing the first element of this standard, the Board is aware of the numerous ways in which other jurisdictions have stated this requirement. The National Labor Relations Board, for example, has required "a change in [the employee's] working conditions so difficult or unpleasant as to force [the employee] to resign." Crystal Princeton Refining Co., 222 NLRB 1068, 1069, 91 LRRM 1302 (1976). Ohio courts have looked for "coercion or heavy-handed conduct," Mosley v. Board of Review, Case No. 51405 (Cuyahoga Ct. App. January 15, 1987), or "intolerable working conditions, harassment or disparate treatment...." Wolf v. Westinghouse Electric Corp., supra, at 5. Although described differently from jurisdiction to jurisdiction, all have looked for what basically can be summarized as intolerable working conditions. That intolerability may be generated by any variety of specific actions. Therefore, the Board does not attempt to enumerate the possible types of employer behavior that could give rise to constructive discharge beyond the guidelines stated in the elements outlined above. Intolerability of working conditions as a general standard will suffice. Mere unpleasantness, uneasiness, or irritation will not.³

³The Respondent argues, without citation, that "NLRB cases" resulted in constructive discharge when discriminatory disciplinary actions taken by an employer "in and of themselves were unfair labor practices." Respondent's Exceptions, page 34. The Respondent, however, does not identify to which "NLRB cases" this argument refers. Thus, it is impossible to determine whether the Respondent is correct as to the facts of any particular case. It is clear, however, that the Respondent is grossly incorrect in suggesting that a part of the NLRB's constructive discharge standard that the actions giving rise to the intolerable working conditions must constitute independent unfair labor practices. This is not an element under the NLRB standard, and it is not an element of the standard stated by this Board or any of the jurisdictions cited. However, as will be apparent from the development of the case that follows, the disciplinary and other discriminatory actions taken against Sulfsted would have been "in and of themselves," unfair labor practices.

In the instant case, the working conditions imposed and tolerated by the Respondent without question created the requisite intolerability. The course of Respondent's unlawful conduct outlined by the hearing officer in Sections C and D of his recommendation (pages 23-32) amply reflects the intolerable conditions under which Sulfsted was working. Briefly summarized below are the key factors that constitute the core of the circumstances -- discriminatory conduct, harassment, hostility, and life endangerment -- that gave rise to the intolerable working conditions warranting Sulfsted's resignation:

Sulfsted was subjected to a discriminatory campaign of serious discipline for minor technical violations, for disparately applied requirements, and for matters that were not fully or fairly investigated. (See Hearing Officer's Report, pages 23-32, and Findings of Fact #14, #17, #18, and #21 through #55.) This campaign commenced immediately after Sulfsted began active organizing efforts on behalf of the Teamsters and continued into January 1985, when Sulfsted resigned. There is no evidence that, prior to this time, Sulfsted had ever been subject to discipline or even a poor evaluation during his nearly six years of employment as a Warren County deputy sheriff. (See also Findings of Fact #30 and #49; Joint Exhibit G.) The investigation of incidents giving rise to discipline, the recommendation of discipline, and the meting out of discipline in several instances involved Chief of Detectives Wilson who had openly stated to Sulfsted his and the Sheriff's negative attitude toward the Teamsters and who had tried to induce Sulfsted to discontinue his support for the Teamsters. (Findings of Fact #23, #24, #25, #26, #41, #46, #47, #48, #50 and #52; see also #14.)

Comments were made by the Sheriff and Chief of Detectives Wilson that the Sheriff did not want the Teamsters and that Sulfsted could ease the pressure being placed on him by abandoning his organizing efforts. (Findings of Fact #14, #15, and #26.)

Chief of Detectives Wilson threatened Sulfsted that if Sulfsted's support of the Teamsters continued, in high-risk situations requiring backup deputy support, such backup might not be available. (Finding of Fact #26.) Sulfsted was troubled by the comment and discussed the problem with his wife and also with at least one other deputy. (Finding of Fact #54; Transcript pages 445, 446.) Sheriff Dalton, aware that Sulfsted had received such a threat, "informally advised the dispatchers (who send backup) that Wilson could not speak for Dalton on backup." (Finding of Fact #16.) Yet Sheriff Dalton, who was sufficiently troubled by the reported threat to express his concern to the

dispatchers, made no effort to reassure Sulfsted or to allay Sulfsted's fears in any way. (Finding of Fact #26.)

The Sheriff publicly expressed to Sulfsted his hostility and his unwillingness to strive for a peaceful relationship when, after agreeing to reinstate Sulfsted due to a settlement of civil service issues, he announced that, "The only way I'll ever bury the hatchet [with Sulfsted] is in the back of Bill Sulfsted's neck." (Finding of Fact #39.) As noted by the hearing officer, this comment is the equivalent of telling an employee that his "days are numbered."

Immediately upon reinstatement, Sulfsted was assigned to handle the controversial Hopkinsville robbery case, under the direct supervision of Chief of Detectives Hilson, who, as noted above, had been involved in the disciplinary steps, the threat of no backup, and comments of anti-Teamsters sentiment. (Finding of Fact #41.)

In overseeing Sulfsted's work on this case, Hilson admitted to "hounding" Sulfsted for reports that generally were not required. Ultimately, Hilson, Chief Deputy Collins, and the Sheriff demanded a report in an unrealistically short period of time, given Sulfsted's illness and the unavailability of witnesses. Hilson pursued yet another request for disciplinary action against Sulfsted for that event. (Finding of Fact #50 and #52.) This request for discipline occurred immediately prior to Sulfsted's resignation.

In November 1984, Sulfsted experienced an incident in which he anticipated backup support from his watch commander, but that backup assistance never arrived. Under the circumstances relayed in his radio report, Sulfsted justifiably expected that the watch commander should have begun driving in Sulfsted's direction to provide backup assistance. Instead, the watch commander had left his cruiser to purchase donuts. (Finding of Fact #43 and #44.) Shortly after this incident, Sulfsted took medically documented leave for stress-related illness. (Finding of Fact #48.)³

³The foregoing outline is not an exhaustive chronicle of the relevant events. Rather, it is a summary to be read in conjunction with the hearing officer's report. References to individual findings of fact, to the transcript, or to exhibits do not indicate that such references are the sole support in the record for the statements presented.

The actions committed or permitted by the Respondent created intolerable working conditions for Sulfsted. In addition to the life-threatening risk and actual occurrence of inadequate backup, the continuous barrage of discipline and harassment based upon minor episodes created an environment that fulfills the standard of intolerable working conditions.

C. Was Respondent Motivated By Anti-Union Animus?

That the Respondent's actions were motivated in part by anti-union animus also is thoroughly developed by the hearing officer.⁵ Other motives also were present; personal and political factors were relevant and have been conceded by the Respondent. Nonetheless, a preponderance of the evidence establishes that significant anti-union sentiments also were operational and motivated the Respondent's conduct. See the hearing officer's analysis of the elements required under this Board's decision in SERB v. Gallia-Jackson-Vinton Joint Vocational School District Board of Education, SERB 86-044 (November 13, 1986). As noted in Gallia-Jackson-Vinton and reaffirmed in Ohio Department of Transportation, SERB 87-020 (October 8, 1987), an action "motivated even partially by an anti-union ingredient is not offset by other reasons which might be sufficient if untainted and standing alone." Gallia-Jackson-Vinton, SERB 86-044 at 340. Thus, even if among Respondent's several motives there had been a desire to enforce rules--which is not apparent from the record--such an otherwise legitimate motive would not immunize Respondent from responsibility for retaliating against Sulfsted for his protected activity. "Any anti-union bias pollutes the proof beyond redemption." Id. at 341.

The Respondent has invited the Board to revisit this "in part" approach to mixed-motive cases. The Board declines to do so. It is the Board's continuing position that effective implementation of the rights and protections established by O.R.C. Chapter 4117 can be achieved only by strict adherence to the terms of the statute. Free exercise of the employees' statutory guarantees cannot be ensured if employers are able to seize upon permissible issues to serve discriminatory purposes. While the Board's approach as articulated in Gallia-Jackson-Vinton and Ohio Department of Transportation may differ from the current position of the NLRB, it is in keeping with the standards applied by the NLRB in the past and by numerous federal courts: See, e.g., NLRB v. Gogin, 575 F.2d 596, 98 LRRM 2250, 2253 (CA7, 1978); NLRB v. Great Eastern Color Lithographic Corporation, 309 F.2d

⁵The Respondent possessed negative sentiments toward one particular employee organization, not to all unions or to the concept of collective bargaining representation. Anti-union animus, however, need not be directed to all employee organizations. An attempt by an employer to promote one union over another by discriminatory means is as improper as undifferentiated anti-union discrimination. The employees are entitled not only to the free and uncoerced choice of whether to be represented but to the choice of which representative as well. Thus, in the instant case, "anti-Teamsters animus" is as indefensible as general anti-union animus.

352, 355, 51 LRRM 2410 (CA 1962); and M.S.P. Industries, Inc. v. NLRB, 568 F.2d 166, 97 LRRM 2403, 2408 (CA 10, 1977) As stated by the United States Court of Appeals for the Sixth Circuit in NLRB v. Westside Carpet Cleaning Company, 329 F.2d 758, 55 LRRM 2809, 2811 (CA6 1964), other legitimate reasons for employer action "could not be legally used to effectuate a companion motive to rid the company of a union protagonist." Although Ohio courts have yet to address the issue, the Ohio Supreme Court has approved an "in part" test in applying comparable statutory provisions prohibiting discrimination under the Ohio Civil Rights Act, O.R.C. Chapter 4112. In Board of Education of Lordstown v. Ohio Civil Rights Commission, 66 Ohio St. 2d 240, 244 (1981), the Court approved the Civil Rights Commission's finding that unlawful discrimination occurred because sex was "a factor" in an adverse employment decision.

D. Would A Reasonable Person Have Resigned?

A case of constructive discharge will not be made out when the employee who resigns does so because of unusual sensibilities. If all other elements are present, a resignation will constitute a constructive discharge only if a reasonable person in the employee's situation would be unable for physical or emotional reasons to continue employment. The harassment and disciplinary campaign promoted by Respondent and his officers would take a significant toll on a reasonable individual, but that alone might not have risen to the level necessary to prompt a reasonable person to quit. In this case, however, the discriminatory and hostile actions were combined with what Sulfsted perceived as the very real potential for life endangerment. While law enforcement by nature is a dangerous occupation, the employer is responsible for mitigating the potential for danger by, among other means, ensuring backup to deputies who are in high-risk situations. Sulfsted felt that he would be forced to engage in high-risk law enforcement actions alone, with no assurance of additional patrol support in the event of an emergency. At no time while Sulfsted was struggling with the fears associated with such potential did Sheriff Dalton attempt to allay Sulfsted's concerns. The record shows that Sulfsted carefully evaluated the risk and, after an incident in which the risk became real, decided not to take the chance that sentiments within the department might result in a situation of extreme danger. Under the combined effect of the steady press of discriminatory actions and the risk of inadequate backup, a reasonable person would have resigned.

E. Conclusion

The facts of this case, analyzed in light of the applicable law and relevant standards, establish by a preponderance of the evidence that Respondent has engaged in discrimination and constructive discharge in violation of O.R.C. §§4117.11(A)(1) and (3). When an employee has been constructively discharged, the remedy is no different from a case in which an employer has overtly and directly effectuated a discriminatorily motivated discharge. Thus, the remedies recommended by the hearing officer pursuant to O.R.C. §4117.12(B)(4) are appropriate and are adopted by the

Board, as are the hearing officer's remaining recommendations and conclusions of law.

Sheehan, Chairman, and Latane, Board Member, concur.

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In Reply, Please Refer to