

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

89-012

and
Trotwood-Madison Education Association,
Intervenor,

v.
Trotwood-Madison City School District Board of Education,
Respondent.

CASE NUMBER: 87-ULP-G4-0165

ORDER
(Opinions Attached)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
July 14, 1988.

On April 14, 1987, Trotwood-Madison Education Association (Charging Party) filed an unfair labor practice charge against the Trotwood-Madison City School District (Respondent).

Pursuant to Ohio Revised Code (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 alleging that the Respondent had violated O.R.C. §4117.11(A)(1) by refusing to permit an employee to have a union representative present in a meeting to discuss job performance and by suggesting that an employee change his choice of union agent to represent him.

The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions, and response.

The Board adopts the hearing officer's Admissions and Findings of Fact; amends Conclusions of Law Nos. 3 and 4 by deleting the word "not" from each; adopts the Conclusions of Law as amended; deletes Recommendation No. 2; and adopts Recommendation No. 1.

The Respondent is ordered to:

- A. Cease and desist from:

Order
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Interfering with, restraining, or coercing employees in the exercise of their right to representation by an employee organization as guaranteed in O.R.C. §4117.03(A)(3); interfering with, restraining, or coercing employees in the exercise of other rights guaranteed in O.R.C. Chapter 4117; and from otherwise violating O.R.C. §4117.11(A)(1).

- B. Take the following affirmative action:
Post for sixty (60) days in all Trotwood-Madison City School District buildings where employees work the Notice to Employees furnished by the Board stating that the Trotwood-Madison City School District shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative action set forth in Paragraph B.

It is so ordered.

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

William P. Sheehan
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 19th day of May, 1989.

Cynthia I. Spanski
CYNTHIA I. SPANSKI, CLERK

0439B:LSI/jlb

STATE OF OHIO
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SERB OPINION 89-012

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OPINION

Davis, Vice Chairman:

This case poses the question of employees' rights to union representation during certain employer-employee meetings. The issue is one of first impression and presents this Board with the opportunity to address an express right established by the Ohio Collective Bargaining Act, Ohio Revised Code ("O.R.C.") Chapter 4117.

FACTS

The facts of this matter have been fully developed by the hearing officer, are adopted by the Board, and are incorporated herein by reference. The central facts are briefly summarized here for the convenience of the reader.

On separate occasions two employees of the Trotwood-Madison City School District Board of Education ("Respondent" or "Employer") each requested meetings with management to discuss their concerns regarding job performance. These employees also requested that an agent of their exclusive representative, the Trotwood-Madison Education Association ("Union" or "Employee Organization" or "TMEA"), be permitted to attend the meetings. In both instances, the Respondent denied the employees' requests.

In one instance, a food service worker recently had received her performance evaluation from her immediate supervisor. Although the employee had signed the evaluation and understood that the process had been completed, she was troubled because she had received some negative ratings; in the employee's eleven years of service with the Respondent, her evaluations had never before reflected negative marks. She therefore sought a meeting with her second-level supervisor to discuss the evaluation. (Transcript ["T."], pages 11-13 and 32; Finding of Fact #2). The collective bargaining agreement

between the Employee Organization and the Respondent provided no process for evaluation review. It did, however, establish that an employee could file a written one-page response and could grieve procedural elements of the evaluation. (Respondent's Exhibit #1).

In the second occurrence, a custodian who had experienced a series of disciplinary actions requested a meeting with his supervisors and the principal to discuss improvement of his job performance and ways in which future problems could be avoided. (Findings of Fact #10 and #11). A grievance was pending regarding the employee's most recent disciplinary suspension, but the union representative and the principal agreed that the grievance would not be discussed at the meeting. (Finding of Fact #12). Prior to refusing to conduct the meeting with any union representative in attendance, the principal had suggested to the employee that it would be preferable to meet with a union agent other than the individual whom the employee had identified as his choice to attend the meeting. (Finding of Fact #14).

In both instances, the Respondent, after some confusion within its ranks regarding the propriety of allowing union representatives to attend such meetings, refused to conduct the requested meetings if the union representative were present.

ISSUES

- I. Whether, by refusing to permit an employee to have a union representative present in an employee-requested meeting to discuss job performance, the Respondent interfered with rights guaranteed by O.R.C. Chapter 4117, thus violating O.R.C. §4117.11(A)(1); and
- II. Whether, by suggesting that an employee change his choice of union agent to represent him in a meeting with the employer, the Respondent interfered with Chapter 4117 rights and thus violated O.R.C. §4117.11(A)(1).

DISCUSSION

I. Denial of Union Representation

The Complainant and the Employee Organization contend that the Respondent's refusal to allow the two employees to have a union representative present at the requested meetings constituted a violation of O.R.C. §4117.11(A)(1). That provision makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117..." For the reasons that follow, the Board finds that the Respondent's actions did constitute interference with a basic right bestowed upon public employees by O.R.C. §4117.03.

A. Inapplicability of Weingarten Analysis

The Respondent's case focuses largely upon the limitations of the so-called "Weingarten rule" as established by the National Labor Relations Board ("NLRB") and as affirmed by the United States Supreme Court in *NLRB v.*

Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). In that case, the Court upheld the NLRB's decision that an employee, upon his or her request, is entitled to the presence of a union representative at an investigatory interview which the employee reasonably believes could lead to discipline.

While we are in no way bound by the precedents developed by other jurisdictions, we often derive guidance from the approaches used by the NLRB and our sister states when these jurisdictions have applied and interpreted comparable statutory provisions.¹ In the instant case, however, any attempt to engraft NLRB precedent upon Ohio law is fruitless. The representational right articulated in Weingarten arose from the National Labor Relations Act's "Section 7" protection of concerted activity.² While O.R.C. Chapter 4117 does list among the protected rights the right to engage in "concerted activities," our analysis in the instant case is based not upon this theory of concerted action but, rather, upon a different protected right set forth in O.R.C. §4117.03(A)(3): the right to "representation by an employee organization." This express right has no parallel in the protected rights enumerated in Section 7 of the National Labor Relations Act or the statutes of other states. Hence, because our analysis turns upon this express statutory language, Weingarten principles offer no guidance. Our approach to the instant question, like the statutory provision itself, is unique to Ohio.³

¹See, City of Wauseon, SERB 88-019, at 3-114 (December 23, 1988); Warren County Sheriff, SERB 88-014 at 3-77 (September 28, 1988), affirmed, SERB v. Warren County Sheriff, Case No. 47312, 1989 SERB 4-7 (Common Pleas, Warren Cty. January 13, 1989); Cuyahoga Community College, SERB 86-043, at 333 (October 22, 1986); and Mad River-Green Local School District, SERB 86-029, at 303 (July 31, 1986).

²Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities....

³An argument perhaps could be advanced that the theory of concerted action could be expanded to reach beyond the boundaries of Weingarten. Indeed, the United States Supreme Court's decision in Weingarten need not be construed as prohibiting a broader application of the theory of concerted activity. In Weingarten, the Supreme Court simply reviewed the NLRB approach and approved it, stating that the NLRB's holding "in no wise exceeds the reach of §7" of the NLRA. Weingarten, *supra*, page 265. However, because the instant case turns upon a different and unique statutory provision, we need not address the question of whether the employees' requests in this case constitute concerted activity.

B. The Meaning of the "Right to Representation"

O.R.C. §4117.03(A) guarantees public employees the following rights to:

(1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in Chapter 4117. of the Revised Code, any employee organization of their own choosing;

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

(3) Representation by an employee organization;

(4) Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements;

(5) Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.

The "right to representation by an employee organization" set forth in O.R.C. §4117.03(A)(3) receives no specific statutory definition. Its meaning, however, becomes clear from the context of the provision itself.

The "right to representation" is included among a list of other rights, each of which has specific and common meaning within the field of labor relations. The "right to representation" must be construed as a provision with independent effect that is distinct from the other four rights enumerated in O.R.C. §4117.03(A). Such a reading is dictated by this fundamental maxim of statutory construction: each provision in a statute must be given independent meaning and significance. Every word of a statute is designed to have some effect, and, in interpreting a statutory section, we are bound to give meaning to each and every word, phrase, clause, or provision. Schlueter v. Cleveland Board of Education, 40 O.O.2d 427, 432, 12 Ohio Misc. 189 (Common Pleas, Cuyahoga Cty. 1960). As stated by the Ohio Supreme Court:

It is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided.

Travelers Insurance Co. v. Myers, 59 Ohio St. 332, 334 (Sup. Ct. 1898), quoting Bloom v. Richards, 2 Ohio St. 387, 402 (Sup. Ct. 1853). See

Dugan v. Kline, 81 Ohio St. 371, 380 (Sup. Ct. 1910), Underwood v. Bellefontaine, 64 Ohio App. 205, 28 N.E. 2d 663, 18 O.O. 70, 74 (Court of Appeals, Logan Cty. 1939), Motor Cargo, Inc. v. Board of Township Trustees, 67 Ohio L. Abs. 315, 52 O.O. 257, 259, 117 N.E.2d 224 (Common Pleas, Summit Cty. 1953). See also, O.R.C. §1.47. Thus, the "right to representation" is distinct from--and reaches beyond--the representational rights inherent in collective bargaining, concerted activity for mutual aid and protection, participation in an employee organization, and the presentation of grievances. To hold otherwise would reduce the provisions of O.R.C. §4117.03(A)(3) to a mere repetition of rights articulated elsewhere in the section.

Certainly, such an entitlement to on-the-job representation has limitations. An employer must have the opportunity to pursue without impediment or interruption the day-to-day direction of the nature and quality of an employee's work. O.R.C. §4117.03(A)(3) cannot be applied so as to give rise to representational rights every time there is communication between employees and their supervisors. Nor can the employer be required to engage in ad hoc collective bargaining with the union in meetings where the union's function is that of representing an individual employee. Thus, we must strike a proper balance between the employer's need to manage and our obligation to give effect to the employee's statutory guarantee of representation. Accordingly, we construe the statute as providing that an employee is entitled to have an agent of the exclusive representative assist, accompany, or speak on the employee's behalf in discussions with management that: (a) are relevant to the employer-employee relationship and (b) are not routine supervisory, instructional, or directory encounters.

This application of the representational right advances the statutory goal of promoting orderly and constructive relations between employees and employers, enunciated in O.R.C. §4117.22. Indeed, a short-coming of the more restrictive Weingarten doctrine is that the opportunity for representation is triggered only when the employee fears disciplinary action. O.R.C. §4117.03(A)(3), by contrast, recognizes that union representation may serve valuable and effective purposes in situations other than those that are confrontational and negative. When employees such as the two involved in the instant case seek to obtain the assistance of the union in pursuing positive goals such as discerning how they might improve job performance, understand their employer's expectations, or avoid future problems, there is a significant opportunity for productive labor-management results from union representation.

The presence of a union representative may serve a variety of valuable purposes. An inarticulate employee or an employee easily intimidated by the presence of management may need a spokesperson to help convey his or her concerns. Under such circumstances, representation may benefit both the employee and the employer by enhancing the clarity of communication. Similarly, a frustrated or emotional employee may profit from a union representative's more dispassionate perspective and understanding of the circumstance. An experienced union representative may help a confused or unreasonable employee see an employer's point more clearly, thus resulting in an early resolution of what otherwise could grow into a serious problem. In

addition, the union may gain a greater first-hand familiarity with employee-employer situations so that, if a matter does develop into a disciplinary or grievance situation, the employee organization may be better equipped with a full understanding of both sides of the problem and the development of the issues.

Finally, for many employees, a meeting with management is of no small moment. Such encounters may be accompanied by anxiety and trepidation, even when, as in the case at bar, the meeting is initiated at the employee's request. In such instances, the mere presence of a union representative can serve to equalize the inherent imbalance of power between the lone employee and the employer, giving the employee an enhanced sense of workplace fairness or simply providing the employee with the peace of mind of having a witness.

C. Application of O.R.C. §4117.03(A)(3) to the Instant Case

In applying O.R.C. §4117.03(A)(3) to the instant case, it is clear that the employees were attempting to exercise their rights to "representation by an employee organization." The episodes at issue do not fall within the day-to-day management processes outlined above. The food service employee was not seeking representation at her actual evaluation session; all witnesses agreed that the evaluation process itself had been completed. Rather, this employee sought to discuss the evaluation to better understand the source of the negative ratings. A comment made by the employee in the course of her testimony illustrates one of the needs that is served by the guarantee of representation:

It's a fear for me as an employee that my words would not necessarily be the words that went on record. It's not unusual to have an employee's words twisted. There would have been two of them, two supervisors in that meeting against I alone. And it would have been two of their words against mine.

(T., page 36).

Similarly, the custodian sought a meeting in which he and his superiors could discuss what must be done to improve his job performance to avoid the disciplinary problems he had been experiencing. In this instance, the employee's testimony reflects that although he had had informal conversations with management prior to requesting the meeting, he remained confused about the employer's dissatisfaction with his performance. Again, this is a situation which highlights the value of permitting representation for an employee who, after attempting to discuss a problem himself, seeks the assistance of a union agent who may have been able to enhance the employee's understanding of the nature of the problems and may have assisted the employee in conveying his thoughts and questions.

Although both the union agent and the Respondent had agreed that, had the meeting come to pass, the pending grievance would not be discussed, the principal testified that he ultimately denied the custodian's request because he was "uneasy about meeting with the employee and the union agent with the

grievance pending." (Finding of Fact #13). Such a concern is not alleviated by denying representation. In fact, the presence of the union representative may have helped ensure that the conversation remained within the agreed-upon boundaries. The contractual grievance mechanism is a tool belonging to the union as well as the employer. The union agent understood, as evinced by his willingness to agree that the grievance would not be discussed, that there was a proper procedure to be followed with regard to resolution of pending grievances. Thus, the representation sought by the employee could have helped steer the course of the discussion, again serving a useful purpose beyond that of assisting the employee.

The foregoing review of the circumstances of this case serves to illustrate the purposes that may be served by the right to representation. Regardless of whether these values are obvious, however, this fact in this case is clear: the right to representation was present, and the Respondent denied the employees the opportunity to exercise this statutory guarantee. Accordingly, the Board finds that Respondent committed an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and orders Respondent to cease and desist from such unlawful conduct and to comply with the terms of this Board's order, attached hereto and incorporated by reference.

II. Attempt to Influence the Employee's Choice of Representative

The Complainant and Intervenor further allege that Respondent committed an additional violation of O.R.C. §4117.11(A)(1) by attempting to influence the custodial employee's choice of the individual union agent to accompany him to the requested meeting.

As established above, the employee had a right to union representation at the meeting, and the Employer was prohibited from interfering with that right. It is inherent in the right that the selection of the particular union agent to accompany the employee is a matter to be determined by the employee and his exclusive representative, without interference by the employer. Thus, any attempt to dissuade an employee from pursuing representation by the selected agent constitutes interference with a protected right in violation of O.R.C. §4117.11(A)(1), which prohibits an employer from "interfere[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Chapter 4117..." By attempting to condition an employee's exercise of a statutory guarantee upon the selection of a different agent, the Respondent was interfering with the employee's exercise of protected rights. In taking such action, the Respondent thus violated O.R.C. §4117.11(A)(1), and is ordered to cease and desist from such conduct and to comply with the terms of this Board's order, attached hereto and incorporated herein by reference.

Sheehan, Chairman, concurs.

O.R.C. §4117.11(A)(1) further prohibits employers from "interfere[ing] with, restrain[ing], or coerc[ing]...an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances." Facts have not been presented to demonstrate a violation of this component of O.R.C. §4117.11(A)(1).

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 89-012

In the Matter of
State Employment Relations Board,
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Respondent.

CASE NUMBER: 8 -ULP-04-0165

DISSENTING OPINION

Latane, Board Member:

I respectfully dissent from the majority decision in this case which finds that the Trotwood-Madison City School District Board of Education did violate O.R.C. Sec. 4117.11(A)(1) by denying union representation in the incidents at issue and by refusing to allow a union representative to attend the meetings requested by school board employees.

Extending the meaning of Sec. 4117.03(A)(3): "Public employees have the right to...Representation by an employee organization" to include the right to representation at a non-disciplinary meeting initiated by the employee removes the inherent right of the employer to engage in normal day to day discussions with employees. Granting bargaining unit employees the right to union representation in self-initiated non-disciplinary meetings carries representation rights to an untenable, unnecessary and unworkable degree. This expansion is unnecessary to protect the employment interests which the collective bargaining act was designed to protect and in addition could significantly increase costs of administration of a contract for both the employee organization and for the employer.

The hearing officer's analysis and discussion is a thorough examination of employee representation rights under Chapter 4117 in the case at hand and is incorporated by reference into this dissent. I support the hearing officer's conclusions of law and find that no violations of Sec. 4117.11(1)(A)(1) occurred.

0440B:JL/jlb:5/19/89:f



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. WE WILL CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of their right to representation by an employee organization as guaranteed in O.R.C. §4117.03(A)(3); interfering with, restraining, or coercing employees in the exercise of other rights guaranteed in O.R.C. Chapter 4117; and from otherwise violating O.R.C. §4117.11(A)(1).

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. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

Post for sixty (60) days in all Trotwood-Madison City School District buildings where employees work the Notice to Employees furnished by the Board stating that the Trotwood-Madison City School District shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative action set forth in Paragraph B.

Trotwood-Madison City School District
Board of Education
87-ULP-04-0165

DATE _____

BY _____

TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

EPB 2017

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.

2060b:LS1/17b