

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEBB OPINION 89-013

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In the Matter of
State Employment Relations Board,
Complainant,
v.
Cleveland City School District Board of Education,
Respondent.

CASE NUMBER: 86-ULP-04-0121

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
December 22, 1988.

On April 14, 1986, Timothy McPhillips (Charging Party) filed an unfair labor practice charge against the Cleveland City School District Board of Education (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) and (A)(3) by discharging Timothy McPhillips.

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.

On December 5, 1988, the Complainant filed a motion to dismiss the Respondent's cross-exceptions. This motion is denied. The Board grants the Respondent's cross-exceptions insofar as it accepts into the record attachments A-1 and A-2 (identified in Respondent's motion to the hearing officer dated March 18, 1988, for leave to supplement Substitute Exhibit R-6). The remainder of the Respondent's cross-exceptions are denied.

The Board adopts the Admissions, Findings of Fact, amends Conclusions of Law Nos. 4 and 5 by deleting the word "not" from them and adopts them as amended, and dismisses Conclusions of Law Nos. 6 and 7.

The Respondent is ordered to:

A. Cease and desist from:

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1. Interfering with, restraining or coercing employees in the exercise of the 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 sixty (60) days in all Cleveland City School District buildings where the employees work the Notice to Employees furnished by the Board stating that the Cleveland 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.
 - (2) Immediately offer reinstatement to Timothy McPhillips as a garage mechanic. If he refuses reinstatement, add a statement to his personnel file that he resigned this position voluntarily.
 3. Pay Timothy McPhillips back pay from March 14, 1986, 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 March 14, 1986, to the effective date of the offer of reinstatement.
 - (5) Expunge from Timothy McPhillips' personnel file the negative probation report, as well as any other documents referring to his removal or bad attitude, while a probationary employee for the Cleveland City School District during the period of December 16, 1985, to March 14, 1986.
 - (6) 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.

It is so ordered.

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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 19th day of May, 1989.

Cynthia L. Spanski

CYNTHIA L. SPANSKI, CLERK

2041b:LSI/j1b



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:

WE WILL 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).

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.

WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Immediately offer reinstatement to Timothy McPhillips as a garage mechanic. If he refuses reinstatement, add a statement to his personnel file that he resigned this position voluntarily.
- (2) Pay Timothy McPhillips back pay from March 14, 1986, 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.
- (3) 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 March 14, 1986, to the effective date of the offer of reinstatement.
- (4) Pay Timothy McPhillips back pay from March 14, 1986, 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.

Cleveland City School District Board of Education
86-ULP-04-0121

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.

2059b:LSI/jlb

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

v.

Cleveland City School District Board of Education,
Respondent.

Case Number: 86-ULP-04-0121

Latane, Board Member:

OPINION

I.

The issues in the instant case arose when Timothy McPhillips (Charging Party) was discharged from employment as a garage mechanic for the Cleveland City School District Board of Education (Respondent) during the second half of his 90 day probationary period.

Mr. McPhillips was hired by Respondent on December 16, 1985 as a temporary garage mechanic. The employees in the bargaining unit which includes the classification of garage mechanics were represented by members of Local #100 of the International Brotherhood of Firemen and Oilers, AFL-CIO. When McPhillips began his employment, his regular hours were seven a.m. to three-thirty p.m. Although the Director of Transportation told him that overtime was voluntary, the Assistant Maintenance Manager put him on a "start-up" crew, which had a shift of four thirty to seven a.m. Thus, Mr. McPhillips was assigned to overtime from mid January until March 14, 1986, when he was terminated.

While on the "start-up" crew, Mr. McPhillips experienced great difficulty in carrying out orders because he began to receive contradictory instructions from the senior mechanics and the Assistant Maintenance Manager. Additionally, the Assistant Depot Manager often went directly to the mechanics with orders instead of relaying them through the direct supervisor.

Findings of Fact (F.F.) 1 and 5.
F.F. 3 and 9.
F.F. 3 and 11.

For example, within a very short period of time he was told by the Assistant Maintenance Manager to go to the garage after the buses were started and rolling even if the start up shift had not ended, but when the Acting Assistant Depot Manager complained he was told to stay on the lot during the whole start up shift. Shortly thereafter two of his direct supervisors told him he was to remain on the lot until the buses were started and rolling and then to report to the garage, even if it was before the start up shift ended.⁴

Mr. McPhillips was told to perform mirror and seat adjustments and add oil and other fluids by the Assistant Depot Managers after having been told by one of his direct supervisors that these duties were to be handled by the bus drivers.⁵

In mid February 1986 a meeting of several mechanics, including McPhillips, and their supervisors was convened in order to discuss general staff communications problems. During this meeting Mr. McPhillips complained that he was receiving often contradictory orders from too many people during his start-up work shift. James Sewell, the Assistant Maintenance Manager, told Mr. McPhillips to follow all the instructions given to him, even if they were in conflict with each other.⁶

Mr. McPhillips then requested that he be taken off the start-up shift, which being overtime, was supposed to be voluntary. Mr. Sewell responded in a sarcastic manner that led Mr. McPhillips to believe that he would be disciplined if he refused to work the start-up shift. At this point, to clarify his obligation to stay in the start-up shift, Mr. McPhillips asked that a union representative be brought into the meeting. He was told by Mr. Sewell that no representative was available. Mr. McPhillips then asked to see a copy of the union contract and the rule book, and was told by Mr. Sewell that he had no right to have such documents until the completion of his probationary period.⁷

Mr. McPhillips then stated that he would have grieved the question of working the start-up shift once his probationary period had ended. Everyone present at the meeting except Mr. Sewell later testified that Mr. McPhillips had complained about the communications problems and further, had requested both the presence of a union representative and a copy of the union contract and the work rules. After the meeting ended Mr. Sewell stated to Barney

⁴F.F. 12.

⁵F.F. 13.

⁶F.F. 15.

⁷F.F. 16.

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Godfrey, the lead mechanic, that "If I'm going to have to contend with the problem after the ninety days, I don't need it."

The senior mechanic, Dan Sheets, testified that Mr. McPhillips never had a problem with his work or with the other mechanics. The lead mechanic tried to prevent his discharge. In spite of this, he was terminated on March 14, 1986 after the Assistant Maintenance Manager prepared a negative probationary report and recommended termination stating bad attitude as the reason. Prior to his termination, McPhillips had never been disciplined or counseled concerning his work relationship with other employees.⁹

II

The issue in this case is whether the Respondent discharged Timothy McPhillips in violation of O.R.C. §§4117.11(A)(1) and (A)(3).

O.R.C. §4117.11(A)(1) and (A)(3) provide in pertinent part:

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, or 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...

The facts in this case support the conclusion that McPhillips was terminated at least in part because he asked for union representation, for a written statement of his rights and for threatening that once he finished his ninety day probationary period he would file a grievance.

Thus the determinative question is: whether the requests and threat of Mr. McPhillips constitute "protected activities," i.e., whether they are rights of public employees guaranteed in Chapter 4117. If the answer to this question is in the affirmative then the Respondent did violate R.C. §4117.11(A)(1) and (A)(3) by terminating Mr. McPhillips.¹⁰ But if the answer is in the negative, no violation of Chapter 4117 occurred.

⁹F.F. 16.

¹⁰F.F. 17 and 19.

¹¹In re Gallia-Jackson-Vinton Joint Vocational School Dist Bd of Ed, SERB 86-044 (11-13-86).

For the reasons adduced below, the Board finds that Timothy McPhillips was discharged for exercising rights guaranteed in Chapter 4117 and thus in violation of R.C. §4117.11(A)(1) and (A)(3).

O.R.C. §4117.03 states in pertinent part:

(A) Public employees have the right 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;

* * *

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.

"Public employees" for the purpose of this section are those employees who fall under the definition of "public employee" in O.R.C. §4117.01(C). In *re* ODOT, SERB 87-020 (10-8-87), The Board has ruled that a probationary employee is a "public employee" pursuant to O.R.C. §4117.01(C) and has all the O.R.C. §4117.03 rights of public employees. Thus, the Respondent's argument that being a probationary employee McPhillips had no right to engage in protected activities has no merit.

At the outset, two comments should be made.

First, the term concerted activity as it appears in O.R.C. §4117.03(A)(2) may apply to an individual employee acting alone and does not necessarily refer to a situation which must include two or more employees. O.R.C. §4117.03 itself defines both joining and assisting employee organizations, activities in which a single employee can engage, as concerted activities. This approach is well supported in federal law, as in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 115 LRRM 3193 (1984)

City Disposal upheld the "Interboro doctrine" which recognized as concerted activity an individual employee's reasonable invocation of a right provided for in his collective bargaining contract. In *Interboro*

Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1531 (1966), enforced, 388 F.2d 495, 67 LRRM 2083 (2nd Cir., 1967)

Contractors, Inc. the NLRB reasoned that the single employee's invocation of a contractual right affected all the employees covered by the contract. Therefore, the generalized effect was enough to bring the actions of the individual within the "mutual aid or protection" standard. The effect of the invocation of an individual contractual right was found to be appropriate even if the employee had his or her individual interests primarily in mind when the complaint was made.

Also, the requirement that an activity be concerted relates to the ends, not to the means. NLRB v. Sencore, Inc., 558 F. 2d 433, 95 LRRM 2865 (8th Cir., 1977) citing Ethan Allen, Inc. v. NLRB, 513 F. 2d 706, 708; 89 LRRM 2013 (1st Cir., 1975).

In summary, what determines whether a certain activity is concerted activity, pursuant to O.R.C. §4117.03, does not hinge on whether it was done by an individual employee or a group of employees, but rather whether the end to be served by the activity at issue is a "concerted" one for the employees "mutual aid or protection," and affects all employees.¹²

Second, the protection of Chapter 4117 for concerted activities and other specifically enumerated employees' rights is not dependent upon the merit or lack thereof of the specific activity. For example, if filing a grievance is a protected activity, an employer commits an unfair labor practice by discharging an employee for filing a grievance, even if the grievance is without merit. A grievance without merit can be denied, but the activity of filing it is as protected as the filing of a meritorious grievance. (Prescott Industrial Products Co., 205 NLRB No. 15, 83 LRRM 1501 (1973, and cases cited therein.)

What is left now to determine is whether McPhillips' request for union representation, for a written statement of his rights and his threat to file a grievance, are protected activities pursuant to O.R.C. §4117.03.

1. Request for union representation

Union representation is probably the quintessence of protected activity under Chapter 4117 as this chapter can be described as establishing the right of certain public employees in Ohio to be represented by an employee organization. Moreover, O.R.C. §4117.03(A)(3) specifically enumerates union representation as a protected employees' right. Again, whether in this case, McPhillips was entitled to have union representation is irrelevant since the protection under Chapter 4117 for this activity is not dependent upon its merit. If McPhillips were not entitled to have union representation under the

¹²"Protected activity" is a general term which refers to any and all activities protected by Chapter 4117. "Concerted activities" is a narrower term which refers to specific kinds of activities included in the general term of "protected activities." "Concerted activities," pursuant to O.R.C. §4117.03(A)(2), includes the §4117.03(A)(1) activities and other activities as analyzed above.

circumstances of this case, the employer could have denied his request. However, the activity of requesting union representation is protected and employees cannot be punished for engaging in this protected activity.

2. Requesting a written statement of his rights.

According to the facts in this case, McPhillips requested to see the collective bargaining agreement, presumably in order to learn what rights he had under the contract and so that he would know whether he had the right to file a grievance. The assertion of a right by an individual employee contained in a collective bargaining agreement is concerted activity and thus protected. As the United State Supreme Court analyzed this issue in ILRB v. City Disposal Systems, Inc., supra:

The invocation of a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process - beginning with the organization of a union, continuing into the negotiation of a collective bargaining agreement, and extending through the enforcement of the agreement - is a single collective activity. . . . A lone employee's invocation of a right grounded in his collective bargaining agreement is, therefore, a concerted activity in a very real sense.

But §4117.03(A)(2) expressly provides that employees are protected, not only in collective bargaining activities, but "in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." (Emphasis added.) Thus, conduct which, in its end result will benefit other employees in their status as employees, qualifies as "concerted activity" even in the absence of a collective bargaining agreement or of union representation. Keokuk Gas Service Co. v. NLRB, 580 F. 2d 328, 98 LRRM 3332 (8th Cir. 1978); Dreis & Crump Manufacturing Co. v. NLRB, 544 F. 2d 320, 93 LRRM 2739 (7th Cir. 1976); Vic Tanny International v. NLRB, 622 F. 2d 237, 104 LRRM 2395 (6th Cir. 1980). Hence, even for nonorganized employees, any invocation of a rule or procedure by an individual employee contained in a manual or employee's rules of any kind is "concerted activity," because the end result of this activity is interpretation and implementation of rules and procedures which affect all employees.

3. The threat to file a grievance.

The filing of a grievance whether meritorious or not, and whether pursuant to a collective bargaining agreement or in the absence of such, is concerted activity under O.R.C. §4117.03(A)(1) and (A)(2), as well as a protected activity under (A)(5). Clearly, if the exercise of the right to present grievances is to be guaranteed, the threat of its exercise must be equally protected. (Keokuk Gas Service Co. v. NLRB, supra.) Obviously, a right will not be protected if expressing an intention to exercise it is allowed to be sanctioned.

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In summary, all the activities for the exercise of which McPhillips was discharged are protected activities. Thus, by discharging McPhillips in whole or in part for engaging in protected activities, the employer violated O.R.C. §4117.11(A)(1) and (A)(3).

Sheehan, Chairman, and Davis, Vice Chairman, concur.

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