

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,

Complainant,

and

Adena Education Association,

Intervenor,

v.

Adena Local School District Board of Education,

Respondent.

CASE NUMBER: 86-ULP-06-0236

ORDER AND OPINION

Before Vice Chairman Davis and Board Member Latané; January 12, 1989.

Davis, Vice Chairman:

Facts

On June 30, 1986, the Adena Education Association ("Charging Party" or "AEA") filed an unfair labor practice charge alleging that the Adena Local School District Board of Education ("Employer" or "Respondent") had violated Ohio Revised Code ("O.R.C.") §4117.11(A)(1) and (3) by denying renewal of a teaching contract held by Daniel Kelley. Pursuant to O.R.C. §4117.12(B), an investigation was conducted, and this Board found probable cause to believe that an unfair labor practice had been committed. On August 14, 1987, a complaint was issued and a hearing was scheduled for August 24, 1987. Respondent sought and received from the hearing officer a continuance of the hearing until October 26, 1987. Respondent filed its answer to the complaint on October 23, 1987, the same day as the pre-hearing conference. At hearing, Complainant moved that, pursuant to Ohio Administrative Code ("O.A.C.") Rule 4117-7-04, the answer be found untimely and that all allegations be deemed admitted. The hearing officer granted the motion and conducted the hearing with the understanding that all factual allegations in the complaint were accepted as admissions.

Given this procedural context, the following facts are derived from the admissions and from the relevant evidence adduced at the limited hearing.

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Daniel Kelley was employed by Respondent as a vocational education teacher from 1976 to 1986. (Admission #6, as set forth in hearing officer's report.) In 1984, Kelley became eligible for a continuing contract (i.e., tenure). The principal of Adena High School, Kenneth Putnam, however, recommended to the superintendent that Kelley be granted only a two-year probationary contract. (Admission #7 and Complainant's Exhibit #17.) According to the Respondent's superintendent, Principal Putnam's two reasons for this recommendation were that Kelley:

1. ... did not follow instructions from Mr. Putnam's office and [the superintendent's] office upon recommendation of [Kelley's] State Supervisor, Robert Freeze, to provide an accurate daily work schedule for [his] extended service days; and
2. ... did not meet the above-mentioned schedule if and when provided with no prior notice served to Mr. Putnam that the schedule had to be changed.

Complainant's Exhibit #17, page 1.

The superintendent sent Kelley a letter stating that, pursuant to Principal Putnam's recommendation, Kelley would be granted only a probationary contract. In the letter, the superintendent explained that Kelley would be evaluated at the end of the two-year contractual period to determine if he then would receive either a continuing contract or no contract, in accordance with O.R.C. §3319.11. The letter specified these items upon which Kelley's ultimate evaluation (and eligibility for a continuing contract) would be based:

1. Your providing [Principal] Putnam with an accurate daily work schedule for your extended service days and time spent outside of the classroom to meet [Principal] Putnam's approval.
2. The fact that you will meet the above-mentioned schedule when provided unless prior notice is served to [Principal] Putnam that you have to make changes.
3. The fact that you will follow through and meet the obligations of any or all above-mentioned schedule changes to the satisfaction of [Principal] Putnam.

Complainant's Exhibit #17, page 1.

On June 5, 1984, Kelley filed a grievance seeking a continuing rather than a probationary contract and objecting to the inclusion of unattributed survey results in his personnel file. On June 12, 1984, Principal Putnam denied the grievance. (Admission #8, Complainant's Exhibit #18.) On December 11, 1984, an arbitration hearing was conducted. The arbitrator's

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award, issued on May 24, 1985, stated that the arbitrator was "not empowered to substitute [himself] for School Boards which have the obligation" to confer or deny tenure. (Complainant's Exhibit #21.) The arbitrator did, however, rule in favor of Kelley regarding the documents and ordered Putnam to remove the materials from Kelley's personnel file. In the award, the arbitrator criticized Principal Putnam's handling of the documents. (Complainant's Exhibit #21.)

In 1986, Kelley's performance evaluation was completed by Jack Grooms, who had become the principal of Adena High School when former-principal Putnam was elevated to the position of superintendent. The evaluation reflected ratings of "effective" in all of the 22 categories. Grooms' comment in response to the topic of "teacher's performance other than classroom" was that Kelley "has been willing to assist in any manner." Under the heading of "suggested areas of improvement," Principal Grooms stated, "None at this time." (Complainant's Exhibit #15.)

On February 20, 1986, Principal Grooms submitted to Superintendent Putnam the recommendation that Kelley be granted a continuing contract. (Complainant's Exhibit #30.) Seven days later, Putnam disregarded the principal's recommendation and concluded that Kelley's contract should not be renewed. Putnam submitted to the Respondent School Board a memorandum setting forth this decision. In the memorandum, Putnam did not address Principal Grooms' recommendation for tenure, nor did he acknowledge Kelley's excellent evaluation. Rather, the reason Putnam advanced for non-renewal was that "accurate daily work schedules have not been kept." (Complainant's Exhibit #25.) Respondent, however, has admitted that Kelley fulfilled all of the requirements that had been established for the extension of a continuing contract, including the requirement that Kelley maintain accurate daily work schedules. (Admission #9.) Nonetheless, in accordance with Superintendent Putnam's recommendation, Kelley was denied a continuing contract, and his employment relationship with the Respondent was terminated.

As stated above, because the facts alleged in the complaint have been accepted as true, the Respondent was not permitted to introduce evidence relating to those facts. Respondent did, however, seek to produce evidence relating to Kelley's prior performance throughout his ten years of service. Although Complainant and Intervenor objected to the introduction of such evidence, it was allowed, based upon Respondent's contention that it would be used to rebut the contention that Respondent's action was based upon improper motivation. The evidence demonstrated that Kelley had had difficulty maintaining accurate logs and work schedules and was "a non-conformist...in the areas of record keeping and accountability." (Hearing Officer's report, page 7.) Respondent contends that these facts demonstrate that their motivation stemmed from a pattern of dissatisfaction with Kelley's performance, but yet Respondent produced no evidence that they had taken any effort to discipline Kelley for this behavior, beyond simple letters to Kelley expressing displeasure with certain conduct.

Based upon the foregoing facts, the hearing officer recommended that the Board find that Respondent violated O.R.C. §4117.11(A)(1) and (3) by denying Kelley a continuing contract because of an intent to retaliate against

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Kelley for exercise of grievance rights under the collective bargaining agreement. Respondent filed exceptions to this finding, to which Complainant and the AEA timely submitted responses.

Issue #1

The first point with which Respondent takes issue is one of procedure, dealing with the question of whether Respondent's answer was filed timely.

As noted above, the complaint in this action was served upon Respondent on August 14, 1987. A hearing was scheduled for August 24, 1987, but Respondent sought and was granted a continuance until October 26, 1987. On October 23, 1987, the day of the pre-hearing conference, Respondent filed its answer--three days prior to the hearing. Complainant contended that under O.R.C. §4117.12 and O.A.C. Rule 4117-7-04, the answer had been due on or about August 26, 1987, and, therefore, was untimely by two months. Complainant moved that the hearing officer deem the allegations of the complaint admitted as a result of Respondent's failure to file a timely answer. The hearing officer granted Complainant's motion.

Respondent has taken exception to this ruling, raising for the Board's consideration the interpretation and proper application of O.R.C. §4117.12 and O.A.C. Rule 4117-7-04. Thus, we turn to this issue of procedure.

Analysis of Issue #1

On the whole, O.R.C. Chapter 4117 presents a carefully designed, effectively written collective bargaining system. This Board has observed that Chapter 4117 is a successful amalgamation of concepts and terminology borrowed from productive collective bargaining statutes of other, more experienced, jurisdictions. AFSCME Local 2312, SERB 89-029 (10-16-89). Unfortunately, not all provisions of Chapter 4117 are exemplars of fine statutory draftsmanship. The section with which we now deal, O.R.C. §4117.12, has been a wellspring of confusion because of the imprecise and incompatible use of technical terms and provisions. The issue at hand stems from one such problematic interplay of terms.

Under O.R.C. §4117.12, if the Board finds probable cause to believe that an unfair labor practice has been committed, it must issue a complaint and must schedule a hearing to be held "within ten days after service of the complaint." (Emphasis added.) That section further provides that the respondent to such an action "shall within ten days from receipt of the complaint ..., file an answer to the complaint...." (Emphasis added.)

O.A.C. Rule 4117-1-02(C) states that: "Service may be made by mail or by personal service including hand delivery or by leaving a copy at the principal office or personal residence of the party or representative required to be served. Service by mail shall be deemed complete upon mailing."

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Because the ten-day hearing deadline is calculated from service of the complaint, whereas the ten-day answer deadline is calculated from receipt of that same document, there is tension between these two statutory provisions.

The answer deadline, being measured from "receipt" of the complaint, technically could arise after the commencement of the hearing.² For example, consider a complaint that is served (e.g., mailed) on July 1 and relates to a hearing set for July 11--the latest date for hearing under the ten-day limitation of O.R.C. §4117.12(B)(1). It is reasonable to expect that the complaint would be received by the respondent (verified by the certified mail return receipt) on July 3. Under a technical construction of §4117.12, the respondent would not have to file its answer until July 13--two days after the hearing. Hence, the Board sought to rectify this procedural dilemma by offering clarification through O.A.C. Rule 4117-7-04, which provides, in part, that:

A respondent's answer to an unfair labor practice complaint shall be filed within ten days from receipt of the complaint ... but in no event later than the commencement of the hearing.

This provision was promulgated with the intention of eliminating the potentially ridiculous outcome described above. It is designated to ensure that answers are filed by the time the hearing begins. Indeed, it is imperative that the hearing officer and the complaining parties receive an answer prior to the hearing. The very purpose of an answer is to frame the issues in dispute, thus delineating matters that a complainant must prove and legal questions that must be resolved. These purposes cannot be served by a post-hearing answer. It would be illogical to commence a hearing prior to receipt of the answer; there would be no way to identify the issues in dispute or to determine if, in fact, a hearing is required.³

²As a practical matter, hearings are seldom held within the ten-day limitation set forth in the statute. The general occurrence is that one party requests a continuance, to which the other party or parties agree. Of late, hearings have been scheduled within a more realistic time frame and, absent an express demand by a party for a hearing within ten days, waiver of the deadline is presumed. Nonetheless, strict adherence to the statutory language would result in a hearing taking place on or before the tenth day following service of the complaint.

³Admittedly, O.R.C. §4117.12(B)(1)'s ten-day time span between service of the complaint and the date of hearing does not provide abundant time for preparation. While the Board can clarify and interpret the limitations of O.R.C. §4117.12 to avoid obviously absurd results such as the filing of an answer after the hearing, we cannot alter unambiguous statutory requisites. Flexibility may be achieved by action of the parties (through waiver or continuances), but the Board cannot use its rule-making powers to change the actual statutory deadlines.

O.A.C. Rule 4117-7-04 does not state--and was not designed to state--that a respondent may have more than ten days in which to answer a complaint (absent appropriate extensions as may be granted by the hearing officer). The proviso in this rule simply addresses the potential situation in which the technical ten-day answer deadline would fall after the commencement of the hearing.

Accordingly, the hearing officer was correct in ruling that the Respondent's answer, filed two months after receipt of the complaint, was untimely. Pursuant to O.A.C. Rule 4117-7-04(B) and Findlay City School District Board of Education, SERB 87-031 (12/17/87), aff'd., Case No. 88-2-M, 1988 SERB 4-54 (CP, Hancock 5-11-88), the factual allegations set forth in the complaint appropriately were deemed admitted.

Issue #2

Did Respondent violate O.R.C. §4117.11(A)(1) and (3) when it did not renew Kelley's teaching contract?

Analysis of Issue #2

A. Applicable Law

O.R.C. §4117.11(A)(3) forbids employers from "discriminat[ing] in regard to hire or tenure of employment on the basis of the exercise of rights guaranteed by Chapter 4117." Thus, for a violation to be found, there generally must be proof of several elements: the public employee must have exercised or attempted to exercise protected rights; the employer must have had knowledge or imputed knowledge of the protected activity; the employer must have taken or allowed adverse action against the employee; and the adverse action must have been motivated, at least in part, by the employer's anti-union or anti-rights bias.*

In unfair labor practice cases alleging a violation of O.R.C. §4117.11(A)(3), there often is little dispute as to the elements of protected activity, knowledge, and adverse action. The component of the employer's improper motivation, however, frequently is an issue upon which much litigation turns. The assessment of whether an action was based upon

*The shorthand terminology for such motivation often is "anti-union motivation" or "union animus." As this Board has stated, however, the scope of improper motive under O.R.C. §4117.11(B) is not limited to anti-union sentiment. The law prohibits discriminatory treatment emanating in response to any type of protected activity. Warren County Sheriff, SERB 88-014 (9-28-88), aff'd., Case No. 47312, 1989 SERB 4-7 (CP, Warren, 1-13-89).

In cases where an employer's conduct is "inherently destructive" of protected rights, proof of motivation may not be required.

Illicit bias can be a difficult call. Indeed, proof of improper motive is seldom direct. Overt statements of illicit intent are rare. Rather, the proof often centers upon a number of circumstances and inferences drawn therefrom. One such inferential indication of motive is present when the employer's stated reasons for adverse employment action are shown to be pretextual, and the employer's action appears to be, in fact, a response to the employee's exercise of protected rights. When an employer's stated basis for adverse employment action is shown to be unwarranted, illogical, or contradictory, the facts may support a conclusion that, because the stated basis is illegitimate, the true reason was one of discrimination on the basis of protected activity, and the employer's stated reason was a mere pretext.

Such cases of pretext should be distinguished from "mixed-motive" cases in which the proof establishes that the employer was operating from more than one impetus, one of which was anti-union or anti-rights. The Board has addressed the standard to be applied in such cases and has determined that if the employer is motivated "in part" by illicit intent, a violation will be found. Gallia-Jackson-Vinton Joint Vocational School Dist. Bd. of Ed., SERB 86-044 (11-13-86), aff'd., Case No. 86-CL-414, 1989 SERB 4-6 (CP, Gallia 12-30-88).⁵

⁵This approach to mixed-motive cases differs from the standard currently used by the National Labor Relations Board ("NLRB"). While this Board has held that "any anti-union bias taints" the employer's actions, the NLRB has moved to a different standard through its decision in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), enf'd., 662 F. 2d 899, 108 LRRM 2513 (1st Cir. Ct. App. 1981), cert. den., 455 U.S. 989, 109 LRRM 2779 (1982). The NLRB, presented with evidence of mixed motives, now places the burden on the employer to prove, as an affirmative defense, that its action would have been the same even in the absence of protected activity.

In its exceptions to the hearing officer's recommendations, Respondent urges the Board to retreat from the "in part" test enunciated in Gallia-Jackson and to adopt a test more similar to (although not the same as) Wright Line, releasing an employer from liability if its "dominant motive" was proper, even if a partial but less compelling motive was anti-rights bias. Respondent's Exceptions, filed November 21, 1988, page 9. Respondent's argument is not relevant because, as will be developed below, the instant case presents the issue of pretext rather than mixed motive. Thus, the Gallia-Jackson standard is inapplicable. Nonetheless, a brief response to the Respondent's argument is in order.

In Ohio Dept. of Transportation, SERB 87-020 (10-8-87), aff'd., Case No. 87CV-10-6794, 1988 SERB 4-56 (CP, Franklin 6-3-88), and again in Warren County Sheriff, SERB 88-014 (9-28-88), aff'd., 1989 SERB 4-7 (CP, Warren 1-13-89), we have reaffirmed our commitment to the propriety of the "in part" standard. We are not persuaded that the NLRB's new approach is preferable or proper under O.R.C. §4117.11(A)(3). Indeed, as Respondent noted in its exceptions, "for a number of years, the NLRB also applied the 'in part' test..." Respondent's Exceptions, filed November 21, 1988, page 9. This Board continues to adhere to its own precedent and is unwilling and certainly not bound to attempt to mirror the NLRB's undulating line of analyses.

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A case of pretext differs. The argument in such a case is not that there were several reasons upon which the employer based its action. Rather, the contention is that the true--and only--motive was anti-rights, and any other justification is merely an effort to mask the actual, unlawful reason for the employer's conduct. Unlike the concept of mixed motive, with regard to which there has been debate and divergence over time and between jurisdictions as to the proper standard, the approach to pretext is fairly consistent throughout the various labor jurisdictions. In fact, in Wright Line, Inc., in which the NLRB altered its standard for mixed-motive cases, it offered this cogent explanation of pretext:

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate activities engaging in union or other protected asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by definition, no dual motive.

Wright Line, Inc., 251 NLRB 1083, 1083-1084 (1980), 105 LRRM 1169 (1980), en'd., 662 F. 2d 899, 108 LRRM 2513 (1st Cir. Ct. App. 1981), cert. denied, 455 U.S. 989, 109 LRRM 2779 (1982). Similarly, the United States Court of Appeals for the Third Circuit in Hugh H. Wilson Corp. v. NLRB, 414 F. 2d 1345 at 1352 (3rd Cir. 1969), cert. denied, 397 U.S. 935, observed:

It may be that neither [discharged employee] was an ideal or even acceptable employee, but the policy and protection provided by the National Labor Relations Act does not allow the employer to substitute "good" reasons for "real" reasons when the purpose of the discharge is to retaliate for an employee's concerted activities.

Hugh H. Wilson v. NLRB, id., at 1352. See also, Xilas v. Pennsylvania Labor Relations Bd., 441 A. 2d 513 (Pa. Cmwh. Ct. 1982); Balsbaugh v. Zech, 500 A. 2d 208 (Pa. Cmwh. Ct. 1985), appeal granted, 511 Pa. 365, 513 A.2d 1382 (Pa. Sup. Ct. 1986), and appeal dismissed as improvidently granted, 519 Pa. 318, 548 A.2d 25 (Pa. Sup. Ct. 1988); Town of Middlesex, Case No. MUP-2946 (Mass. Labor Relations Com., 1981); County of Middlesex, 7 NJPER 412037 (1-21-81) and 6 NJPER 111295 (10-31-80) (New Jersey Public Employment Relations Commission); Cape May City Board of Education, 6 NJPER 11022 at 46 (New Jersey Public Employment Relations Commission 1-18-80); Marin

Community College Dist., Calif. PER 11198 (Calif. Public Employment Relations Bd., 1980).

It is the element of motivation and the contention of pretext that are pivotal concerns in the instant case.

B. Merits of the Instant Case

The preliminary elements of a violation in this action are readily apparent. Kelley engaged in protected activity when he exercised his right to file a grievance regarding the denial of a continuing contract and the treatment of certain documents. This right was guaranteed and protected not only by the parties' collective bargaining agreement, but also by O.R.C. §4117.03(A)(2), (3) and (5) and, by implication, O.R.C. §4117.09 and §4117.11(A)(1) and (5). The Respondent's knowledge of the protected action is obvious; by processing the grievance and participating in arbitration, the Respondent clearly knew of the protected activity. Thus, the only issue in need of substantial development is that of motivation.

As stated in the preceding treatment of the applicable standard, one method of proving intent is by demonstrating that the employer's justification for an action was a pretext. The instant case presents a textbook example of pretext. When the Employer in 1984, at then-Principal Putnam's urging, denied Kelley a continuing contract and provided instead a probationary contract, it specified two areas of inadequate performance and committed to provide Kelley with a continuing contract if he performed adequately in the three designated areas.

The record establishes that Kelley corrected his performance in each of the three areas.⁶ Based upon the performance standard established by Respondent and Kelley's fulfillment of those requirements, only a new and previously unaddressed problem could justify denial of tenure. Respondent presented no such evidence. Respondent had stated an intention to grant tenure if specific performance corrections were made; those specific corrections were made, and no new performance problems were present. Thus, in accordance with Respondent's representations made in 1984, Kelley should have received a continuing contract in 1986. Respondent, however, denied Kelley the contract renewal, basing its determination upon reasoning that is directly contrary to the facts. Superintendent Putnam stated that denial of a continuing contract was based upon the same reasons as the denial of

⁶The fulfillment of these performance expectations is evinced by: the Respondent's admission of paragraph 9 of the complaint; Principal Grooms' evaluation reflecting Kelley's "effective" performance in all areas, including the targeted factors (Complainant's Exhibit 15); and the principal's recommendation that Kelley receive a continuing contract (Complainant's Exhibit 30).

tenure in 1984, yet the record establishes that Kelley corrected his performance in all such areas.'

The record shows by a preponderance of the evidence that the Respondent's stated reason for denial of tenure--Kelley's alleged lack of improvement in the specified areas--is illogical and contrary to the facts and, therefore, invalid. The stated justification must be discounted as being a pretext for some other motivation. The question then turns to whether that "other" motivation was anti-rights bias, thus giving rise to a violation of O.R.C. §4117.11(A)(3).

Respondent notes that there is no overt evidence in this case of anti-rights sentiment by the Employer or its agents. Indeed, there is no indication beyond general employee perception that exercise of contractual or other protected rights was discouraged by Respondent. As stated above, however, anti-rights motivation is seldom openly declared by an employer. The Board must deduce from the circumstances whether such bias was operative. The facts in this case lead the Board to a finding that there was anti-rights motivation.

The Respondent's stated justifications have been shown to be invalid, and no other possible motivation has been argued or shown by Respondent. Kelley's receipt of a continuing contract was conditioned upon specific areas of improvement. Kelley fulfilled each area but was still denied tenure. The only intervening factor that could have deterred Respondent from its original commitment was Kelley's exercise of his contractual right to press a grievance. Kelley's action resulted in an arbitration award that was critical of Superintendent (then-Principal) Putnam's handling of certain sensitive documents. It was Putnam who, contrary to Principal Groom's recommendation, effectively made the decision to deny Kelley renewal even though Kelley had demonstrated acceptable improvement in each required area. To rebut the conclusion drawn from these facts, Respondent has attempted to offer evidence of long-term inadequacies in Kelley's performance, but such matters were not the reasons cited by Respondent at the time the decision was made and, in fact, were tolerated for years prior to Kelley's exercise of protected activity.

At hearing, Respondent attempted to demonstrate its freedom from illicit motivation by introducing evidence that Kelley, throughout his ten-year service, had experienced difficulty in the targeted area of record keeping and the more general area of "accountability." Rather than supporting the Respondent's defense, this information weakens it, because Respondent had never taken steps to discipline Kelley for shortcomings which, it now contends, were serious enough to warrant the denial of a continuing contract and which, once brought pointedly to Kelley's attention, were rectified.

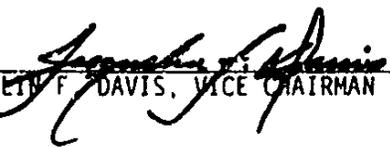
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From the facts and circumstances of this action, the Board concludes that the preponderance of the evidence supports the conclusion that Putnam's stated reason for not renewing Kelley's contract was a pretextual cover for an intent to retaliate for Kelley's exercise of his protected contractual grievance rights.

For these reasons, the Board affirms the recommendations offered by the hearing officer and concludes that Respondent has committed an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (3) by denying Kelley a continuing contract. The Respondent is ordered to cease and desist from such unlawful activity and to offer Kelley a continuing contract. Respondent is further ordered to provide to Kelley any back wages lost as a result of Respondent's conduct. Of course, during the pendency of this action, Kelley had an obligation to seek other employment in order to mitigate damages available in this action, and the assessment of back wages will be reduced by any employment earnings or unemployment benefits received by Kelley during the interim. Respondent also is ordered to post the appropriate Board-provided notice in accordance with the recommendation of the hearing officer. Within twenty (20) days of issuance of this order, Respondent shall notify the Board, in writing, of the steps it has taken to comply with these remedies.

It is so ordered.

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


JACQUELIN F. DAVIS, VICE CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and common pleas court in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the Board's order.

I certify that this document was filed and a copy served upon each party on this 29th day of December, 1989.


CYNTHIA L. SPANSKI, CLERK

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 of the Revised Code 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 O.R.C. §4117.11(A)(1) and (A)(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 Daniel Kelley as a Vocational Education teacher with tenure effective the commencement of school year 1986-87 at the rate and with the benefits to which he would be entitled.
2. Compensate Daniel Kelley for the period from the commencement of school year 1986-87 to the present minus unemployment compensation or any income from other employment.
3. 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.

ADENA LOCAL SCHOOL DISTRICT BOARD OF
EDUCATION
89-REP-11-0240

DATE

BY

TITLE

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award, issued on May 24, 1985, stated that the arbitrator was "not empowered to substitute [himself] for School Boards which have the obligation" to confer or deny tenure. (Complainant's Exhibit #21.) The arbitrator did, however, rule in favor of Kelley regarding the documents and ordered Putnam to remove the materials from Kelley's personnel file. In the award, the arbitrator criticized Principal Putnam's handling of the documents. (Complainant's Exhibit #21.)

In 1986, Kelley's performance evaluation was completed by Jack Grooms, who had become the principal of Adena High School when former-principal Putnam was elevated to the position of superintendent. The evaluation reflected ratings of "effective" in all of the 22 categories. Grooms' comment in response to the topic of "teacher's performance other than classroom" was that Kelley "has been willing to assist in any manner." Under the heading of "suggested areas of improvement," Principal Grooms stated, "None at this time." (Complainant's Exhibit #15.)

On February 20, 1986, Principal Grooms submitted to Superintendent Putnam the recommendation that Kelley be granted a continuing contract. (Complainant's Exhibit #30.) Seven days later, Putnam disregarded the principal's recommendation and concluded that Kelley's contract should not be renewed. Putnam submitted to the Respondent School Board a memorandum setting forth this decision. In the memorandum, Putnam did not address Principal Grooms' recommendation for tenure, nor did he acknowledge Kelley's excellent evaluation. Rather, the reason Putnam advanced for non-renewal was that "accurate daily work schedules have not been kept." (Complainant's Exhibit #25.) Respondent, however, has admitted that Kelley fulfilled all of the requirements that had been established for the extension of a continuing contract, including the requirement that Kelley maintain accurate daily work schedules. (Admission #9.) Nonetheless, in accordance with Superintendent Putnam's recommendation, Kelley was denied a continuing contract, and his employment relationship with the Respondent was terminated.

As stated above, because the facts alleged in the complaint have been accepted as true, the Respondent was not permitted to introduce evidence relating to those facts. Respondent did, however, seek to produce evidence relating to Kelley's prior performance throughout his ten years of service. Although Complainant and Intervenor objected to the introduction of such evidence, it was allowed, based upon Respondent's contention that it would be used to rebut the contention that Respondent's action was based upon improper motivation. The evidence demonstrated that Kelley had had difficulty maintaining accurate logs and work schedules and was "a non-conformist...in the areas of record keeping and accountability." (Hearing Officer's report, page 7.) Respondent contends that these facts demonstrate that their motivation stemmed from a pattern of dissatisfaction with Kelley's performance, but yet Respondent produced no evidence that they had taken any effort to discipline Kelley for this behavior, beyond simple letters to Kelley expressing displeasure with certain conduct.

Based upon the foregoing facts, the hearing officer recommended that the Board find that Respondent violated O.R.C. §4117.11(A)(1) and (3) by denying Kelley a continuing contract because of an intent to retaliate against

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Kelley for exercise of grievance rights under the collective bargaining agreement. Respondent filed exceptions to this finding, to which Complainant and the AEA timely submitted responses.

Issue #1

The first point with which Respondent takes issue is one of procedure, dealing with the question of whether Respondent's answer was filed timely.

As noted above, the complaint in this action was served upon Respondent on August 14, 1987. A hearing was scheduled for August 24, 1987, but Respondent sought and was granted a continuance until October 26, 1987. On October 23, 1987, the day of the pre-hearing conference, Respondent filed its answer--three days prior to the hearing. Complainant contended that under O.R.C. §4117.12 and O.A.C. Rule 4117-7-04, the answer had been due on or about August 26, 1987, and, therefore, was untimely by two months. Complainant moved that the hearing officer deem the allegations of the complaint admitted as a result of Respondent's failure to file a timely answer. The hearing officer granted Complainant's motion.

Respondent has taken exception to this ruling, raising for the Board's consideration the interpretation and proper application of O.R.C. §4117.12 and O.A.C. Rule 4117-7-04. Thus, we turn to this issue of procedure.

Analysis of Issue #1

On the whole, O.R.C. Chapter 4117 presents a carefully designed, effectively written collective bargaining system. This Board has observed that Chapter 4117 is a successful amalgamation of concepts and terminology borrowed from productive collective bargaining statutes of other, more experienced, jurisdictions. AFSCME Local 2312, SERB 89-029 (10-16-89), Unfortunately, not all provisions of Chapter 4117 are exemplars of fine statutory draftsmanship. The section with which we now deal, O.R.C. §4117.12, has been a wellspring of confusion because of the imprecise and incompatible use of technical terms and provisions. The issue at hand stems from one such problematic interplay of terms.

Under O.R.C. §4117.12, if the Board finds probable cause to believe that an unfair labor practice has been committed, it must issue a complaint and must schedule a hearing to be held "within ten days after service of the complaint." (Emphasis added.) That section further provides that the respondent to such an action "shall within ten days from receipt of the complaint ..., file an answer to the complaint...." (Emphasis added.)

O.A.C. Rule 4117-1-02(C) states that: "Service may be made by mail or by personal service including hand delivery or by leaving a copy at the principal office or personal residence of the party or representative required to be served. Service by mail shall be deemed complete upon mailing."

Because the ten-day hearing deadline is calculated from service of the complaint, whereas the ten-day answer deadline is calculated from receipt of that same document, there is tension between these two statutory provisions.

The answer deadline, being measured from "receipt" of the complaint, technically could arise after the commencement of the hearing.² For example, consider a complaint that is served (e.g., mailed) on July 1 and relates to a hearing set for July 11--the latest date for hearing under the ten-day limitation of O.R.C. §4117.12(B)(1). It is reasonable to expect that the complaint would be received by the respondent (verified by the certified mail return receipt) on July 3. Under a technical construction of §4117.12, the respondent would not have to file its answer until July 13--two days after the hearing. Hence, the Board sought to rectify this procedural dilemma by offering clarification through O.A.C. Rule 4117-7-04, which provides, in part, that:

A respondent's answer to an unfair labor practice complaint shall be filed within ten days from receipt of the complaint ... but in no event later than the commencement of the hearing.

This provision was promulgated with the intention of eliminating the potentially ridiculous outcome described above. It is designated to ensure that answers are filed by the time the hearing begins. Indeed, it is imperative that the hearing officer and the complaining parties receive an answer prior to the hearing. The very purpose of an answer is to frame the issues in dispute, thus delineating matters that a complainant must prove and legal questions that must be resolved. These purposes cannot be served by a post-hearing answer. It would be illogical to commence a hearing prior to receipt of the answer; there would be no way to identify the issues in dispute or to determine if, in fact, a hearing is required.³

²As a practical matter, hearings are seldom held within the ten-day limitation set forth in the statute. The general occurrence is that one party requests a continuance, to which the other party or parties agree. Of late, hearings have been scheduled within a more realistic time frame and, absent an express demand by a party for a hearing within ten days, waiver of the deadline is presumed. Nonetheless, strict adherence to the statutory language would result in a hearing taking place on or before the tenth day following service of the complaint.

³Admittedly, O.R.C. §4117.12(B)(1)'s ten-day time span between service of the complaint and the date of hearing does not provide abundant time for preparation. While the Board can clarify and interpret the limitations of O.R.C. §4117.12 to avoid obviously absurd results such as the filing of an answer after the hearing, we cannot alter unambiguous statutory requisites. Flexibility may be achieved by action of the parties (through waiver or continuances), but the Board cannot use its rule-making powers to change the actual statutory deadlines.

O.A.C. Rule 4117-7-04 does not state--and was not designed to state--that a respondent may have more than ten days in which to answer a complaint (absent appropriate extensions as may be granted by the hearing officer). The proviso in this rule simply addresses the potential situation in which the technical ten-day answer deadline would fall after the commencement of the hearing.

Accordingly, the hearing officer was correct in ruling that the Respondent's answer, filed two months after receipt of the complaint, was untimely. Pursuant to O.A.C. Rule 4117-7-04(B) and Findlay City School District Board of Education, SERB 87-031 (12/17/87), aff'd., Case No. 88-2-M, 1988 SERB 4-54 (CP, Hancock 5-11-88), the factual allegations set forth in the complaint appropriately were deemed admitted.

Issue #2

Did Respondent violate O.R.C. §4117.11(A)(1) and (3) when it did not renew Kelley's teaching contract?

Analysis of Issue #2

A. Applicable Law

O.R.C. §4117.11(A)(3) forbids employers from "discriminat[ing] in regard to hire or tenure of employment on the basis of the exercise of rights guaranteed by Chapter 4117." Thus, for a violation to be found, there generally must be proof of several elements: the public employee must have exercised or attempted to exercise protected rights; the employer must have had knowledge or imputed knowledge of the protected activity; the employer must have taken or allowed adverse action against the employee; and the adverse action must have been motivated, at least in part, by the employer's anti-union or anti-rights bias.⁴

In unfair labor practice cases alleging a violation of O.R.C. §4117.11(A)(3), there often is little dispute as to the elements of protected activity, knowledge, and adverse action. The component of the employer's improper motivation, however, frequently is an issue upon which much litigation turns. The assessment of whether an action was based upon

⁴The shorthand terminology for such motivation often is "anti-union motivation" or "union animus." As this Board has stated, however, the scope of improper motive under O.R.C. §4117.11(B) is not limited to anti-union sentiment. The law prohibits discriminatory treatment emanating in response to any type of protected activity. Warren County Sheriff, SERB 88-014 (9-28-88), aff'd., Case No. 47312, 1989 SERB 4-7 (CP, Warren, 1-13-89).

In cases where an employer's conduct is "inherently destructive" of protected rights, proof of motivation may not be required.

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Illicit bias can be a difficult call. Indeed, proof of improper motive is seldom direct. Overt statements of illicit intent are rare. Rather, the proof often centers upon a number of circumstances and inferences drawn therefrom. One such inferential indication of motive is present when the employer's stated reasons for adverse employment action are shown to be pretextual, and the employer's action appears to be, in fact, a response to the employee's exercise of protected rights. When an employer's stated basis for adverse employment action is shown to be unwarranted, illogical, or contradictory, the facts may support a conclusion that, because the stated basis is illegitimate, the true reason was one of discrimination on the basis of protected activity, and the employer's stated reason was a mere pretext.

Such cases of pretext should be distinguished from "mixed-motive" cases in which the proof establishes that the employer was operating from more than one impetus, one of which was anti-union or anti-rights. The Board has addressed the standard to be applied in such cases and has determined that if the employer is motivated "in part" by illicit intent, a violation will be found. Gallia-Jackson-Vinton Joint Vocational School Dist. Bd. of Ed., SERB 86-044 (11-13-86), aff'd., Case No. 86-CL-414, 1989 SERB 4-6 (CP, Gallia 12-30-88).⁵

⁵This approach to mixed-motive cases differs from the standard currently used by the National Labor Relations Board ("NLRB"). While this Board has held that "any anti-union bias taints" the employer's actions, the NLRB has moved to a different standard through its decision in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), enf'd., 662 F. 2d 899, 108 LRRM 2513 (1st Cir. Ct. App. 1981), cert. den., 455 U.S. 989, 109 LRRM 2779 (1982). The NLRB, presented with evidence of mixed motives, now places the burden on the employer to prove, as an affirmative defense, that its action would have been the same even in the absence of protected activity.

In its exceptions to the hearing officer's recommendations, Respondent urges the Board to retreat from the "in part" test enunciated in Gallia-Jackson and to adopt a test more similar to (although not the same as) Wright Line, releasing an employer from liability if its "dominant motive" was proper, even if a partial but less compelling motive was anti-rights bias. Respondent's Exceptions, filed November 21, 1988, page 9. Respondent's argument is not relevant because, as will be developed below, the instant case presents the issue of pretext rather than mixed motive. Thus, the Gallia-Jackson standard is inapplicable. Nonetheless, a brief response to the Respondent's argument is in order.

In Ohio Dept. of Transportation, SERB 87-020 (10-8-87), aff'd., Case No. 87CV-10-6794, 1988 SERB 4-56 (CP, Franklin 6-3-88), and again in Warren County Sheriff, SERB 88-014 (9-28-88), aff'd., 1989 SERB 4-7 (CP, Warren 1-13-89), we have reaffirmed our commitment to the propriety of the "in part" standard. We are not persuaded that the NLRB's new approach is preferable or proper under O.R.C. §4117.11(A)(3). Indeed, as Respondent noted in its exceptions, "for a number of years, the NLRB also applied the 'in part' test...." Respondent's Exceptions, filed November 21, 1988, page 9. This Board continues to adhere to its own precedent and is unwilling and certainly not bound to attempt to mirror the NLRB's undulating line of analyses.

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A case of pretext differs. The argument in such a case is not that there were several reasons upon which the employer based its action. Rather, the contention is that the true--and only--motive was anti-rights, and any other justification is merely an effort to mask the actual, unlawful reason for the employer's conduct. Unlike the concept of mixed motive, with regard to which there has been debate and divergence over time and between jurisdictions as to the proper standard, the approach to pretext is fairly consistent throughout the various labor jurisdictions. In fact, in Wright Line, Inc., in which the NLRB altered its standard for mixed-motive cases, it offered this cogent explanation of pretext:

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by definition, no dual motive.

Wright Line, Inc., 251 NLRB 1083, 1083-1084 (1980), 105 LRRM 1169 (1980), enfd., 662 F. 2d 899, 108 LRRM 2513 (1st Cir. Ct. App. 1981), cert. denied, 455 U.S. 989, 109 LRRM 2779 (1982). Similarly, the United States Court of Appeals for the Third Circuit in Hugh H. Wilson Corp. v. NLRB, 414 F. 2d 1345 at 1352 (3rd Cir. 1969), cert. denied, 397 U.S. 935, observed:

It may be that neither [discharged employee] was an ideal or even acceptable employee, but the policy and protection provided by the National Labor Relations Act does not allow the employer to substitute "good" reasons for "real" reasons when the purpose of the discharge is to retaliate for an employee's concerted activities.

Hugh H. Wilson v. NLRB, id., at 1352. See also, Xilas v. Pennsylvania Labor Relations Bd., 441 A. 2d 513 (Pa. Cmwh. Ct. 1982); Balsbaugh v. Zech, 500 A. 2d 208 (Pa. Cmwh. Ct. 1985), appeal granted, 511 Pa. 365, 513 A.2d 1382 (Pa. Sup. Ct. 1986), and appeal dismissed as improvidently granted, 519 Pa. 318, 548 A.2d 25 (Pa. Sup. Ct. 1988); Town of Middletown, Case No. MUP-2946 (Mass. Labor Relations Com., 1981); County of Middlesex, 7 NJPER ¶12037 (1-21-81) and 6 NJPER ¶11295 (10-31-80) (New Jersey Public Employment Relations Commission); Cape May City Board of Education, 6 NJPER ¶11022 at 46 (New Jersey Public Employment Relations Commission 1-18-80); Marin

Community College Dist., Calif. PER 111198 (Calif. Public Employment Relations Bd., 1980).

It is the element of motivation and the contention of pretext that are pivotal concerns in the instant case.

B. Merits of the Instant Case

The preliminary elements of a violation in this action are readily apparent. Kelley engaged in protected activity when he exercised his right to file a grievance regarding the denial of a continuing contract and the treatment of certain documents. This right was guaranteed and protected not only by the parties' collective bargaining agreement, but also by O.R.C. §4117.03(A)(2), (3) and (5) and, by implication, O.R.C. §4117.09 and §4117.11(A)(1) and (5). The Respondent's knowledge of the protected action is obvious; by processing the grievance and participating in arbitration, the Respondent clearly knew of the protected activity. Thus, the only issue in need of substantial development is that of motivation.

As stated in the preceding treatment of the applicable standard, one method of proving intent is by demonstrating that the employer's justification for an action was a pretext. The instant case presents a textbook example of pretext. When the Employer in 1984, at then-Principal Putnam's urging, denied Kelley a continuing contract and provided instead a probationary contract, it specified two areas of inadequate performance and committed to provide Kelley with a continuing contract if he performed adequately in the three designated areas.

The record establishes that Kelley corrected his performance in each of the three areas.⁶ Based upon the performance standard established by Respondent and Kelley's fulfillment of those requirements, only a new and previously unaddressed problem could justify denial of tenure. Respondent presented no such evidence. Respondent had stated an intention to grant tenure if specific performance corrections were made; those specific corrections were made, and no new performance problems were present. Thus, in accordance with Respondent's representations made in 1984, Kelley should have received a continuing contract in 1986. Respondent, however, denied Kelley the contract renewal, basing its determination upon reasoning that is directly contrary to the facts. Superintendent Putnam stated that denial of a continuing contract was based upon the same reasons as the denial of

⁶The fulfillment of these performance expectations is evinced by: the Respondent's admission of paragraph 9 of the complaint; Principal Groons' evaluation reflecting Kelley's "effective" performance in all areas, including the targeted factors (Complainant's Exhibit 15); and the principal's recommendation that Kelley receive a continuing contract (Complainant's Exhibit 30).

tenure in 1984, yet the record establishes that Kelley corrected his performance in all such areas.⁷

The record shows by a preponderance of the evidence that the Respondent's stated reason for denial of tenure--Kelley's alleged lack of improvement in the specified areas--is illogical and contrary to the facts and, therefore, invalid. The stated justification must be discounted as being a pretext for some other motivation. The question then turns to whether that "other" motivation was anti-rights bias, thus giving rise to a violation of O.R.C. §4117.11(A)(3).

Respondent notes that there is no overt evidence in this case of anti-rights sentiment by the Employer or its agents. Indeed, there is no indication beyond general employee perception that exercise of contractual or other protected rights was discouraged by Respondent. As stated above, however, anti-rights motivation is seldom openly declared by an employer. The Board must deduce from the circumstances whether such bias was operative. The facts in this case lead the Board to a finding that there was anti-rights motivation.

The Respondent's stated justifications have been shown to be invalid, and no other possible motivation has been argued or shown by Respondent, Kelley's receipt of a continuing contract was conditioned upon specific areas of improvement. Kelley fulfilled each area but was still denied tenure. The only intervening factor that could have deterred Respondent from its original commitment was Kelley's exercise of his contractual right to press a grievance. Kelley's action resulted in an arbitration award that was critical of Superintendent (then-Principal) Putnam's handling of certain sensitive documents. It was Putnam who, contrary to Principal Groom's recommendation, effectively made the decision to deny Kelley renewal even though Kelley had demonstrated acceptable improvement in each required area. To rebut the conclusion drawn from these facts, Respondent has attempted to offer evidence of long-term inadequacies in Kelley's performance, but such matters were not the reasons cited by Respondent at the time the decision was made and, in fact, were tolerated for years prior to Kelley's exercise of protected activity.

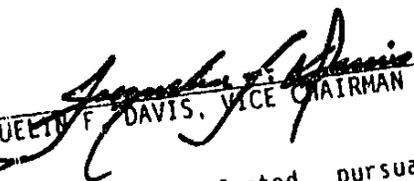
⁷At hearing, Respondent attempted to demonstrate its freedom from illicit motivation by introducing evidence that Kelley, throughout his ten-year service, had experienced difficulty in the targeted area of record keeping and the more general area of "accountability." Rather than supporting the Respondent's defense, this information weakens it, because Respondent had never taken steps to discipline Kelley for shortcomings which, it now contends, were serious enough to warrant the denial of a continuing contract and which, once brought pointedly to Kelley's attention, were rectified.

From the facts and circumstances of this action, the Board concludes that the preponderance of the evidence supports the conclusion that Putnam's stated reason for not renewing Kelley's contract was a pretextual cover for an intent to retaliate for Kelley's exercise of his protected contractual grievance rights.

For these reasons, the Board affirms the recommendations offered by the hearing officer and concludes that Respondent has committed an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (3) by denying Kelley a continuing contract. The Respondent is ordered to cease and desist from such unlawful activity and to offer Kelley a continuing contract. Respondent is further ordered to provide to Kelley any back wages lost as a result of Respondent's conduct. Of course, during the pendency of this action, Kelley had an obligation to seek other employment in order to mitigate damages available in this action, and the assessment of back wages will be reduced by any employment earnings or unemployment benefits received by Kelley during the interim. Respondent also is ordered to post the appropriate Board-provided notice in accordance with the recommendation of the hearing officer. Within twenty (20) days of issuance of this order, Respondent shall notify the Board, in writing, of the steps it has taken to comply with these remedies.

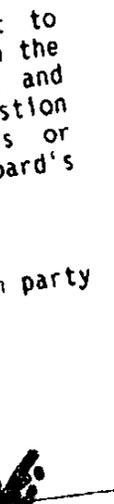
It is so ordered.

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


JACQUELIN F. DAVIS, VICE CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and common pleas court in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the Board's order.

I certify that this document was filed and a copy served upon each party on this 29th day of December, 1989.


CYNTHIA L. SPANSKI, CLERK

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 of the Revised Code 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 O.R.C. §4117.11(A)(1) and (A)(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 Daniel Kelley as a Vocational Education teacher with tenure effective the commencement of school year 1986-87 at the rate and with the benefits to which he would be entitled.
2. Compensate Daniel Kelley for the period from the commencement of school year 1986-87 to the present minus unemployment compensation or any income from other employment.
3. 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.

ADENA LOCAL SCHOOL DISTRICT BOARD OF
EDUCATION
89-REP-11-0240

DATE

BY

TITLE