

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 91-005

In the Matter of
State Employment Relations Board,

Complainant,

v.

Ft. Frye Local School District Board of Education,

Respondent.

CASE NUMBER: 88-ULP-04-0200

ORDER
(Opinion attached.)

Before Chairman Owens, Vice Chairman Pottenger and Board Member Sheehan: March 21, 1991.

On April 22, 1988, the Ft. Frye Teachers Association (Charging Party) filed an unfair labor practice charge against the Ft. Frye Local 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 nonrenewing a teacher's contract because of participation in protected activity.

The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and response. For the reasons stated in the attached opinion, incorporated by reference, the Board amends Conclusion of Law No. 4 to read, "Michael Rauch's nonrenewal was not due to exercise of rights protected by Revised Code Chapter 4117."; amends Recommendation No. 2 to read, "The complaint is dismissed and the unfair labor practice charge is dismissed."; and adopts the hearing officer's Statement of the Case, Findings of Fact, and the Conclusions of Law and Recommendations as amended.

The complaint is dismissed and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

OWENS, Chairman, and POTTENGER, Vice Chairman, concur. SHEEHAN, Board Member, dissents.


DONNA OWENS, CHAIRMAN

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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 directive.

I certify that this document was filed and a copy served upon each party on this 17th day of July, 1991.

Cynthia L. Spanski

CYNTHIA L. SPANSKI, CLERK

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Ft. Frye Local School District Board of Education,
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CASE NUMBER: 88-ULP-04-0200

OPINION

Pottenger, Vice Chairman:

On April 22, 1988, the Ft. Frye Teachers Association (Intervenor) filed an unfair labor practice charge against the Ft. Frye Local School District Board of Education (Respondent) alleging that Industrial Art Teacher Michael Rauch's contract had not been renewed because of his union activity. On October 26, 1989, SERB determined that there was probable cause to believe that an unfair labor practice had been committed and a complaint was issued on December 1, 1989. A hearing was held and the hearing officer found that the Respondent had committed an unfair labor practice. For the reasons stated below, the Board does not adopt the hearing officer's proposed order and dismisses the charge and the complaint.

The 1987-88 school year was Michael Rauch's second year with the school district under a one-year limited contract. Under the negotiated agreement between Respondent and the Intervenor, limited contracts contained no 'just cause' requirement for nonrenewal. After a teacher has taught for four years, nonrenewal of contracts can only be for just cause.

In 1987, the collective bargaining agreement was renegotiated. The parties were unable to reach an agreement and a strike began on October 19,

1987. The strike continued until November 16, 1987, when a successor agreement was reached. During the strike, Rauch spent much of his time on the main picket line and had several confrontations with members of the school administration and with nonstriking teachers and substitutes.

The terms of the agreement reached were substantially the same as Respondent's final offer before the strike. The Intervenor viewed this as a failure, and members in large part blamed the nonstriking teachers for weakening the strike. The striking teachers decided that some manifestation of post-strike union solidarity was needed. They agreed to ostracize the nonstrikers as much as possible and still perform their duties. Rauch participated in this activity and had several confrontations with nonstriking teachers and some students.

Some parents, students, nonstriking teachers and community members called the Respondent and members of the school administration to complain about Rauch's conduct, expressed their dissatisfaction with his attitude and behavior and asked that he be nonrenewed. Several administrators spoke with him about these complaints, but his behavior did not change. On March 31, 1988, Superintendent Curry sent a written notice to Rauch informing him of the intention to recommend to the Board that he be nonrenewed. The reason given for the recommendation was that Rauch's attitude and conduct did not meet the expectations of the school district.

The issue is whether the Respondent nonrenewed Michael Rauch in violation of Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (A)(3). These sections provide:

(A) 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. of 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. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.

The rights guaranteed under Chapter 4117 are found in §4117.03, which 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 ...

In In re Gallia-Jackson-Vinton Joint Vocational School Dist. Bd. of Ed., SERB 86-044 (11-13-86), aff'd. 1989 SERB 4-6 (CP, Gallia, 12-30-88), SERB adopted the "in part" test for mixed-motive discrimination cases and rejected the Wright Line,¹ "but for" test.

The "in part" test provides that if a disciplinary action was motivated in part by the protected activities of the employee, the discipline is

¹Wright Line, 251 NLRB 1083 (1980), enf'd. 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). See also NLRB v. Transportation Management Corp., 462 U.S. 393, 103 S. Ct. 2469, 113 LRRM 2857 (1983).

illicit. Legality is not saved by the fact that another part of the justification for the disciplinary act, even a principal part, is a legitimate business consideration.

The "but for" test provides that if the employer can prove that the disciplinary action at issue would still have been taken but for the illegal motive, the discipline stands and a finding of no violation will be made.

The Gallia-Jackson "in part" test for mixed-motive discrimination cases is hereby rejected. SERB is hereby stating that the applicable test for determining whether discrimination in violation of O.R.C. §4117.11(A)(3) has occurred in mixed-motive cases is, from now on, the "but for" test as is laid out in the NLRB case of Wright Line.

The historical case of "in part" v. "but for" is well known and well documented. In Dow Chemical Co., 13 NLRB 993 (1939), enforced in relevant part, 117 F. 2d 455 (6th Cir. 1941), the NLRB held that "[a] violation is ... established whether or not the [employer] may have had some other motive in addition to that of repressing self-organization and without regard to whether or not the [employer's] asserted motive was lawful." Id. at 1023 (footnote omitted). The language in Dow Chemical exemplifies the "in part" test which the NLRB used to find discrimination violations during the period prior to the 1947 enactment of the Taft-Hartley amendments.²

The "in part" test continued to be practiced by the NLRB after 1947. See, e.g., Youngstown Osteopathic Hosp. Ass'n., 224 NLRB 574 (1976). Facing

²See Carl L. Norden, Inc., 62 NLRB 828, 831, n.12 (1945); Lone Star Gas Co., 52 NLRB 1058, 1060 (1943); United Dredging Co., 30 NLRB 739, 766 n.24 (1941).

growing criticism by various federal circuit courts regarding this test,³ the NLRB in Wright Line abandoned its "in part" test for mixed-motive discrimination cases and announced the employment of the "but for" test requiring that once a prima facie showing is made sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The "in part" test clearly favors labor's interests since an employee who engaged in union activities would thereby be placed in a better position than he would have held if he had not done so. See the analysis in Mt. Healthy City School District Bd. of Ed. v. Doyle, 429 U.S. 274 (1977). The "in part" test ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established. One can always argue that there should not be union animus, but then "a bad motive without effect is no more an unfair labor practice than an unexecuted evil intent is a crime." NLRB v. Wright Line, Inc., 662 F. 2d 899 (1st Cir. 1981). Labor history shows that once a new collective bargaining law is in place, the early administration, interpretation and application of it largely favors labor's interests. This was the case with the NLRB regarding the discrimination test and Ohio has been no exception. However, like the NLRB, the time has come for SERB to change its initial "in part" test to the more balanced, more mature and more reasonable "but for" test. It is time for SERB to recognize, as the NLRB

³See, e.g., NLRB v. Billen Shoe Co., 297 F. 2d 801 (1st Cir. 1968); NLRB v. Transportation Management Corp., 103 S. Ct. at 2473 (1983).

and most state boards" did, that the existence of discrimination on the basis of protected rights is most accurately determined by asking whether the disciplinary act would have occurred but for the protected activity. The Wright Line rule protects both the employee and the employer. The aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. The employer is afforded protection since it is provided with a formal framework within which to establish its asserted legitimate justification.

In Gallia-Jackson, SERB tilted the delicate balance between employees' interests in concerted activities and the employer's interests in operating its business in favor of labor's interest. Arguably such inclination was called for in the early stages of the statute to establish the new statutory

⁴See Novato U.S.D., 4 NPER 05-13114 (Cal. PERB 1982); City of Danbury, 3 NPER 07-12052 (Ct. SBLR 1980) - the labor board applied a "but for" test in this case instead of its earlier "dominant motive" test; Pasco County School Bd. v. PERC, 353 So. 2d 108, 4 FPER ¶ 4033 (Fla. 1st Dist. Ct. App. 1977) - court abandoned the agency's "dominant motive" test for a "but for" test; County Bureau, Case No. S-CQA-B2, 1 PERI ¶ 2029 (Ill. SLRB 1985) - the board declined to adopt a hearing officer's recommendation to adopt an "in part" test but affirmed the hearing officer's remedy consisting of a cease and desist order and simultaneous denial of reinstatement and back pay in a dual-motive case; Sioux City C.S.D., PERB Case No. 1300, 1 NPER 16-10043 (Ia. PERB 1979); City of Boston, 4 NPER 22-13054 (Mass. LRC 1982); Napoleon Comm'y Schools, 4 NPER 23-13026 (Mich. ERC 1982); City of Great Falls, 5 NPER 27-13002, 646 F. 2d 512 (Mt. 1982) - Montana Supreme Court overruled a "dominant motive" test and applied a "but for" test; Town of Old Orchard Beach, Case No. 82-14, 5 NPER 20-13029 (Me. LRB 1982) - the board abandoned its prior "in part" test and adopted Wright Line; In re East Orange Public Library, 4 NPER 31-12182 (N.J. App. Ct. 1981); City of Albany, 3 PERB 3096 (N.Y. PERB 1970); Coos Bay-North Bend Water Bd., 2 NPER 39-11064 (Ore. ERB 1980); Washington Pub. Emp. Ass'n. v. Comm'y College, 642 P. 2d 1248, 4 NPER 49-13033 (Wash. Ct. App. 1982) - court specifically adopted Wright Line.

rights of employees who organize. However, seven years down the road a fair and true balance should be established. Today, SERB is establishing such balance by adopting the Wright Line rule.

One more comment should be made. SERB v. Adena Local School District Bd. of Ed., (CP, Ross, 1990) is the only case where a court in Ohio specifically adopted the Gallia-Jackson "in part" test of SERB. The court reached its conclusion by interpreting O.R.C. §4117.12(B)(4)⁵ to establish two separate and distinct requirements that must be satisfied - just cause and no relation between discharge and the employee's exercise of protected rights. The Court read what it construed as a second requirement, that discharge be unrelated to any protected activity, to mean that the proper test is "in part" and not "but for." We do not agree with this interpretation. There is only one requirement here and not two as the Court reads it. The requirement is that the suspension or discharge was for just cause. The phrase, "not related to rights, etc." is not an additional requirement but a clarification of "just cause." As a matter of fact, the proper reading of this section in §4117.12(B)(4) is that this is a codification of the "but for" test.

⁵O.R.C. §4117.12(B)(4) provides in pertinent part:

... No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or require the payment to him of any back pay, if the suspension or discharge was for just cause not related to rights provided in section 4117.03 of the Revised Code.... (Emphasis added.)

While we are mentioning the Ohio Courts, the Ohio Supreme Court ruled in Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm., (1991) 57 Ohio St. 3d 62, that:

When an employer has mixed legitimate and nonlegitimate factors in making its decision, the employer may prove that it would have made the same decision even if it had not considered the nonlegitimate factors.

Although the Supreme Court did not specifically use the term "but for," it clearly used the "but for" analysis.

The application of the "but for" test to the case at issue clearly mandates the finding that the Fort Frye School Board committed no unfair labor practice by nonrenewing Rauch. The hearing officer in a very detailed and thorough analysis concluded that the school board was motivated much more by Rauch's post-strike activities which are not protected activities than by his strike-related conduct which is at least arguably protected. The hearing officer found that each of the School Board members independently and credibly testified that no mention of Rauch's strike activities ever surfaced in any of the deliberations leading up to Rauch's nonrenewal; that the community members' calls to the School Board members did not focus on Rauch's strike activities but on the atmosphere in the school after the strike; that the School Board acted primarily out of a desire to "fix" the atmosphere in the school after the strike; that they viewed Rauch as an impediment (which, as a matter of fact, he was) to this process, and they rid themselves of the impediment by nonrenewing him on the basis of his bad attitude.

Even assuming that there is circumstantial evidence from which an inference of union animus can arguably be drawn the School Board had a legitimate business interest to nonrenew Rauch. Clearly the strife and friction that Rauch kept on stirring were not conducive to effective learning. The School Board is responsible for creating the best learning

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environment possible and to respond on this issue to the demands and complaints of the community, which were loud and clear denouncing Rauch's behavior. The record clearly supports the reason given by the School Board for the nonrenewal of Rauch which was "attitude and conduct." The fact that Rauch was never given a comprehensive list of the allegations against him is neither here nor there, since no "just cause" provision applied to Rauch. No obligation existed on the part of the School Board to give any reason for nonrenewing Rauch.

Thus, the record shows that the School Board had enough good business reasons to nonrenew Rauch because of his post-strike destructive behavior regardless of whatever part his strike-protected activities played in the nonrenewal decision.

The case is dismissed.

Owens, Chairman, concurs. Sheehan, Board Member, dissents.

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DISSENTING OPINION

Sheehan, Board Member:

I agree with the Hearing Officer's well developed, thoughtful and reasoned analysis in her proposed order, wherein she found the Respondent violated Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (A)(3), and dissent from the majority's reversal of the proposed order.

In reversing the Hearing Officer's proposed order, the majority adopted the 'Wright Line' test, or "but for" test, and overruled the Board's position in Gallia-Jackson-Vinton Joint Vocational School Dist. Bd. of Ed., SERB 86-044 (11-13-86), aff'd., 1989 SERB 4-6 (CP, Gallia 12-30-88), which the Board has consistently followed throughout SERB's cases.

Under the "but for" test any adverse action taken by the employer would only be a violation if the Board could find that "but for" the employee's protected activity, the action would not have been taken. To restate, the

¹Wright Line, 251 NLRB 1083 (1980), enf'd. 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

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employer's action would be permissible as long as it makes a showing that it would have taken the action regardless of the employee's activity.

This test is an engraved invitation to employers to articulate pretextual reasons for any discipline or discharge when faced with an unfair labor practice charge. Statements with respect to a course of action which might have been taken if things had been different should be suspect. In applying the "but for" test, the employer could escape the consequences of a violation simply by finding some legitimate business reason for taking the action it did, even if that was not the only reason and even if it was not the primary reason. The "but for" test encourages discriminatory enforcement of workplace rules, in that so long as the employee did violate a rule, regardless of the fact that the violation was minor or the rule in general was only loosely enforced, the employer has not committed an unfair labor practice.

While in theory the "but for" test reserves the right to look beneath an employer's stated reason to find whether that reason is pretextual, in practice this is extremely difficult to do. The "but for" test drastically increases the burden to be carried by the charging party in a claim of this type. Furthermore, it requires inquiry into the subjective reasons for an employer's actions. In contrast, the "in part" test is based on more objective criteria.

Under the "in part" test, the employee must adduce sufficient objective evidence in the way of timing, selective enforcement, etc. to provide an inference that at least one of the employer's motives was retaliatory. On the other hand, under a "but for" test, the employee must show by a preponderance of evidence what the employer might have done if the employee

had not engaged in protected activity. This requires an inquiry into the state of mind of the employer and is based on hypothetical conduct. Such inquiries are fraught with pitfalls for any adjudicatory body.

The majority claims that the "in part" test is inequitable. On the contrary, it evens out the balance in such cases. Under a "but for" test, the employer is totally in control of whether a violation is found. If the employer can come up with a reason for discipline, no unfair labor practice will be found. The employee has little opportunity to rebut the reason. Only in the most blatant cases would the "but for" test allow the Board to find a violation. Under the "in part" test, the employee has the opportunity to present evidence that the employer acted discriminatorily. The employer is hardly without defenses under this test. It can easily rebut a prima facie case by showing that it has a practice of even enforcement of its work rules, that the employee had indeed committed some misconduct in violation of stated work rules, etc. That employers have plenty of opportunity to rebut an employee's claim is evident from the very low number of SERB cases in which a violation has been found, in relation to the number of cases dismissed.

The majority is right that most jurisdictions, as well as the National Labor Relations Board (NLRB), use the "but for" test - the Wright Line test. However, as the then-Chairman of SERB, Jack G. Day, noted on this very point in SERB v. ODOT, SERB 87-020 (10-22-87):

The logic projected by marshalling majority versus minority views is more the logic of arithmetic than persuasion. Superior authority may compel even when reasoning (better or worse) does not persuade.

Moreover, it took the NLRB nearly 40 years to get from its "in part" original test to the Wright Line decision. Ohio Courts used the "in part"

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test in discrimination cases pursuant to O.R.C. 4112 at least from 1972, (Miller Properties v. Ohio Civil Right Comm. (1972) 34 O. App.2 113; 63 O.O.2d 169; 296 N.E.2d 300), until 1991, (Cleveland Civil Svc. Comm. v. Ohio Civil Rights Comm. (1991) 57 O.S.3d 62), a period of almost 20 years.

It takes many years to impress upon some that prejudices on the basis of color, sex or union activity, as in this case, will not be tolerated. This is the clear message that the "in part" test transmits - that unlawful prejudice constitutes unlawful discrimination even if it is only one factor in the act.

It was 20 years before Ohio courts felt that the anti-prejudice message in civil rights legislation had been understood. It took 40 years before federal courts were confident that the anti-prejudice message in labor legislation had been understood. It is not yet five years since SERB adopted the "in part" test for discrimination. It is too early to change. The message has not been fully understood that employees have a statutory right to unionize and that anti-union prejudice, like racial prejudice, is illegal.

It is important to note how the Court of Common Pleas in Ross County, SERB v. Adena Local School Dist. Bd. of Ed., (CP, Ross, 1990), commented on the subject:

4117.12(B)(4) is unique in that only the "in part" test is applicable to it and not the "but for."

Thus, apart from the policy issue, statute interpretation calls for keeping the Gallia-Jackson test as it is.

The replacement of the "in part" test with the "but for" test is an ill advised course of action for the Board to take. It will immeasurably

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increase the complexity of fact-determination in such cases where the task is already very involved and complicated. Furthermore, it will encourage employers to state pretextual reasons for its actions. Contrary to the majority's position, the "in part" test is far more equitable than the "but for" test. The Board carefully considered the question in its previous cases and determined that the "in part" test was preferable. The "in part" test should be retained.

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