

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board

Complainant,

v.

Cincinnati Metropolitan Housing Authority

Respondent.

CASE NUMBER: 87-ULP-02-0278

OPINION

POTTENGER, Vice Chairman:

The primary issues in this case were whether an employee engaged in protected, concerted activity and if so whether he was discharged as a result. The matter was heard before a State Employment Relations Board (SERB) hearing officer. After considering all the evidence, the hearing officer concluded that although the employee had engaged in protected concerted activity, the Employer had nonetheless established a legitimate business justification for his termination aside from the protected activity. The Board concurs. This case, however, presents an opportunity to reconsider SERB's current standard for determining whether an activity is concerted and protected under the Ohio Public Employee Collective Bargaining Act.

Michael Kelley was employed by the Cincinnati Metropolitan Housing Authority (CMHA or Respondent) as a maintenance mechanic from 1974 through April, 1987. CMHA utilized a second shift for maintenance employees in addition to its regular business hours, 8:00 a.m. to 4:00 p.m., Monday through Friday. On weekends, a skeleton crew divided into two 8-hour shifts, 8:00 a.m. to midnight, was utilized. In addition to working their assigned shifts, maintenance mechanics were required to carry a beeper to respond to after-hours emergencies, or to assist the weekend skeleton crew in the event of an overflow of emergency calls. They were instructed that while on "beeper duty," the beeper was to remain on the employee's person in the "on" position, particularly while the employee was away from

home. If the employee was at home, he would receive a telephone call if for any reason he could not be reached via the beeper. Employees did not automatically receive overtime for merely carrying a beeper but instead were paid on a response basis. Beeper duty had been mandatory since approximately 1986, and all CMHA maintenance foremen and mechanics had received verbal as well as written instructions as to the proper utilization of the beeper system.¹

Employees were openly dissatisfied with the beeper system. A number of CMHA maintenance mechanics had expressed their displeasure at having to work beeper duty. Specifically, there had been complaints that the beepers would be activated when in fact there were no messages; they were summoned to respond to emergencies outside of their area; the beepers caused a constant interruption of their sleep; and in general, interrupted and interfered with their weekend and after-hour activities. In addition, maintenance mechanics complained that they were paid only for response time while on beeper duty.²

The events which led to Kelley's dismissal from CMHA are as follows:³

Kelley was on beeper duty the weekend of March 13-16. He testified that during that period of time he received three false signals where his beeper was activated, but no messages were left and that on two of these occasions the beeper had awakened him.⁴

Kelley received a telephone call on Saturday morning, March 14, from another maintenance mechanic, George Gardner, apprising him of an emergency at one of the CMHA properties. When he arrived at the tenant's apartment, he checked the sink and discovered that the tail piece from the drain pipe was disconnected, causing the water to run onto the

¹See Hearing Officer's Proposed Order, Finding of Facts Nos. (hereinafter "F.F. #") 1, 2.

²See F.F. #4.

³Unless otherwise specified, all dates herein refer to the year 1987.

⁴See F.F. #5.

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kitchen floor. After reattaching the tail piece, Kelley left the tenant's apartment. He testified he received no other emergency calls that day.⁵

On Sunday, March 15, Gardner, who was working on an emergency and who was nearing the end of his shift, attempted to contact Kelley by beeper. Not being able to reach Kelley and needing to know whether to go home or continue working and accrue overtime, Gardner called the CMHA's Director of Housing Management, John Hirt, for instructions. Gardner was told to end his shift. Mr. Hirt testified that he continued, unsuccessfully, to try to reach Kelley by phone and by the beeper service.⁶

When Kelley reported to work the following Monday, March 16, he discussed with other employees his annoyance at the false alarms he had received that weekend while on beeper duty, and stated that maintenance personnel should be compensated for carrying the beepers in light of their inconveniences. Further, Kelley indicated that he intended to request overtime for the entire time that he carried the beeper during the weekend in order to make his dissatisfaction with beeper duty a matter of record.⁷ When he informed his supervisor, Elijah Dunbar, that he intended to request the overtime, Mr. Dunbar gave him the proper form for doing so. The supervisor stated, however, that he didn't think the request would be honored. Indeed, when the overtime request slip was submitted to the Maintenance Superintendent, Kelley was told that he would not be paid for carrying the beeper.⁸

Also on this date, March 16th, Lillian Smith, the tenant who had received the emergency service from Kelley on Saturday, March 14, 1987, phoned the CMHA Management Office and lodged a complaint that her kitchen sink had not been properly repaired. Ms. Smith

⁵See F.F. #6.

⁶See F.F. #10

⁷See F.F. #11

⁸See F.F. #12

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declined, however, to sign a prepared written statement at the time her complaint was made.⁹
The necessary repairs were not completed until Kelley returned Tuesday, March 17, 1987.¹⁰

On or about March 31, following a disciplinary hearing for charges of gross misconduct (failure to respond to an emergency call on March 15), falsification of records (completing a request for overtime work of 58-1/2 hours) and neglect of duty (failing to complete the necessary repairs at Ms. Smith's apartment), Kelley received notice of discharge effective April 3, 1987.¹¹ It bears noting that Kelley had both been suspended and placed on probation only six months earlier for failing to respond to an emergency call while on beeper duty. He was placed on notice at that time that any further violation of CMHA policy¹² would result in additional disciplinary action up to and including dismissal.¹³

Shortly after his dismissal, Kelley filed an unfair labor practice charge with SERB alleging that his termination was the result of his having engaged in concerted, protected activity in violation of Ohio Revised Code Sections 4117.11(A)(1) and (A)(3). Specifically, the Complainant argued that Kelley's firing was prompted by his protest of weekend beeper duty on behalf of himself and other maintenance employees and that his protest was displayed by requesting overtime for the time he was on call. CMHA, on the other hand, citing the NLRB's Meyers Industries standard,¹⁴ argued in its post-hearing brief that because it had no

⁹See F.F. #7

¹⁰See F.F. #8

¹¹See F.F. #13

¹²See pgs. 10-11, infra.

¹³See F.F. #14

¹⁴Meyers Industries, Inc., 268 NLRB 493, 115 LRRM 1025 (1984), remanded sub nom., Prill v. NLRB 755 F. 2d 941, 118 LRRM 2649 (D.C. Cir. 1985), cert. denied, 474 U.S. 948, 106 S.Ct.313, 88 L.Ed. 294, 120 LRRM 3392 (1985)(Meyers I), on remand, Meyers Industries, Inc., 281 NLRB 882, 123 LRRM 1137 (1986), enforced sub nom., Prill v. NLRB, 835 F. 2d 1481, 127 LRRM 2415 (D.C. Cir. 1987), cert denied, 487 U.S. 1205, 108 S. Ct. 2847, 101 L.Ed. 2d 884, 128 LRRM 2664 (1988)(Meyers II).

knowledge that Kelley was launching a protest on behalf of himself and other employees, the activity should not be construed as concerted.

The hearing officer's conclusion that Kelley was engaged in concerted, protected activity was premised upon SERB's broader definition of concerted activity, set forth in In re Cleveland City School District Board of Education, SERB 89-013 (5-19-89). In pertinent part, the Board held:

"...the requirement that an activity be concerted relates to the ends, not to the means. (Citations omitted.) In summary, what determines whether a certain activity is concerted activity, pursuant to R.C. 4117.03, does not hinge on whether it was done by an individual employee or a group of employees, but rather 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."

Concerted activity as defined under the Cleveland standard simply requires that an individual employee is engaged in activity which will affect the terms and conditions of employment of a group of employees. Here, because Michael Kelley had filed a claim for overtime, an activity which could well affect working conditions of other employees carrying beepers, the hearing officer concluded under Cleveland that Kelley was engaged in concerted activity.

After determining that the activity was concerted, the next issue for the hearing officer's consideration was whether the activity was also protected. The Cleveland opinion distinguished protected activity from concerted activity, stating: "'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..."¹⁵ Further, the Board stated: "The

¹⁵Cleveland, supra, at fn 12.

protection of Chapter 4117 for concerted activities and other specifically enumerated employee's rights is not dependent upon the merit or lack thereof of the specific activity."¹⁶ Consequently, the hearing officer concluded under Cleveland that the concerted activity Kelley engaged in was also protected.¹⁷

The NLRB standard used to define concerted activity and urged by the Respondent here, requires a more thorough factual analysis than that heretofore required by SERB. In Meyers, the NLRB held:

"In general, to find an employee's activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. (Emphasis added) Meyers I, 115 LRRM at 1029.

We find that the Meyers standard is appropriate both as a matter of statutory construction and public policy and hereby adopt it for future application as the proper measure of concerted activity under the Ohio Public Employees Collective Bargaining Act. The standard we adopt today rests on the collectivity of the action itself. This is in accord with Ohio's public sector bargaining law. Ohio Revised Code Sections 4117.03(A) provides:

Public employees have the right to: (2) engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection;... (4) bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment...(Emphasis added.)

¹⁶Cleveland, supra, at p. 3-83.

¹⁷Specifically, the hearing officer held: "The fact that the end result sought by Kelley on behalf of himself and similarly situated employees was inconsistent with existing CMHA policy did not divest otherwise concerted activity of its protected status. Therefore, based on the Board's holding in Cleveland Bd of Ed, supra, and the specific facts of the instant case, Kelley's actions, although singular in nature, were nonetheless concerted and protected." See Hearing Officer Proposed Order, pg. 15.

"Concerted" by its very definition, mandates more than one and clearly anticipates group action. The concept of collective activity, under the statute and under this standard, embraces the actions of employees who have joined together in order to achieve common goals.

SERB's Cleveland standard for determining concerted activity is premised upon the NLRB's Interboro doctrine, under which an individual's assertion of a right grounded in a collective bargaining agreement is recognized as concerted activity and protected.¹⁸ The Cleveland decision, however, is not limited to an employee espousing a contract right. The opinion states, in pertinent part:

...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 union representation. (Citations omitted.) Hence, even for nonorganized employees, any invocation of a rule or procedure by an individual employee contained in a manual or employer's rules of any kind is a concerted activity because the end result of this activity is interpretation and implementation of rules and procedures which affect all employees.¹⁹

Although we believe that an individual acting alone may engage in concerted activity by invoking a contract right or attempting to induce other employees to act in concert, we disavow the notion, advanced in Cleveland, that an individual engages in concerted activity by invoking manual policies or rules which did not have their genesis in collective action. Individual

¹⁸Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966), enf'd, 388 F.2d 495, 67 LRRM 2083 (2nd Cir. NLRB 1967). Meyers is not inconsistent with Interboro. The activity found not to be concerted and protected in Meyers was not based on the enforcement of a contract clause. There was no contract involved in the present case. The Interboro doctrine was approved by the U.S. Supreme Court in NLRB v. City Disposal Systems, Inc., 465 US 822, 104 S Ct 1505, 79 LEd 2d 839, 115 LRRM 3193 (1984).

¹⁹Cleveland, *supra*, at p. 3-83 & 84.

action does not become concerted simply because it may affect more than one employee.²⁰

Further, we do not find that concerted activity is automatically protected as the Board suggested in Cleveland. Although Cleveland was based on the Interboro doctrine, the Cleveland opinion did not emphasize that there must be a reasonable and honest assertion of a right in order for it to be protected. The Cleveland opinion seems to suggest that as long as an activity is concerted - it is automatically protected. We disagree. As the U.S. Supreme Court, upholding the Interboro doctrine, noted: "The fact that an activity is concerted does not necessarily mean that an employee may engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of (the Act)."²¹ We believe this rationale conforms to Ohio's legislative intent with respect to Chapter 4117.

As a matter of policy, the Meyers standard safeguards against abuse. There are obvious differences between the assertion of a contractual right and what otherwise is tantamount to a personal complaint. Under the Cleveland standard, there is no safeguard against an employee acting alone and solely in his own interest from later claiming "concerted" activity to prevent possible disciplinary measures.

As in any case of alleged discrimination, the Complainant must prove, inter alia, that the employer had knowledge or imputed knowledge of the union activity or the concerted, protected activity.²² Under the Cleveland standard, it was enough to establish that the employer knew the employee engaged in an activity which might have a concerted effect.

²⁰Federal circuit courts have approved the Meyers standard as a reasonable construction of the National Labor Relations Act. See, e.g., Office and Professional Employees v. NLRB, 981 F. 2d 76, 142 LRRM 2064 (2nd Cir. 1992); Ewing v. NLRB, 861 F. 2d 353, 129 LRRM 2853 (2nd Cir.); Reef Industries v. NLRB, 952 F. 2d 830, 139 LRRM 2435 (5th Cir. 1991); El Gran Combo v. NLRB, 853 F. 2d 996, 129 LRRM 2167 (1st Cir.) 1988); NLRB v. Stor-rite, 856 F. 2d 957, 129 LRRM 2392 (7th Cir. 1988).

²¹NLRB v. City Disposal Systems, Inc., 115 LRRM at 3200. See also Richardson Paint Co. v. N.L.R.B. 574 F.2d 1195, 98 LRRM 2951 (5th Cir. 1978).

²²See, e.g., In re Warren County Sheriff, SERB 88-014 (9-28-88).

Under the standard we adopt today, however, the employer must have knowledge that the employee is acting with or on the authority of other employees and not merely on his own behalf.

Although we decide this case under the Cleveland standard, which was in effect when the matter was litigated, we note that even under the stricter Meyers standard, the Complainant proved that Michael Kelley was engaged in protected, concerted activity and that the Respondent had knowledge of this. Kelley's request for overtime, although ultimately self-serving, was made with both the knowledge and approval of his co-workers and was for their benefit as well as his own. Prior to submitting a request for overtime beeper duty, Kelley had discussed the frustration of carrying the beeper with some of his co-workers and received their encouragement to take the action for which he was later, in part, disciplined.²³ Kelley's supervisor, Elijah Dunbar, also knew of the concerted nature of his request for overtime.²⁴

When Kelley spoke out with the support of his co-workers about a matter affecting wages and other terms and conditions of employment, he was engaging in concerted activity within the meaning of R.C. 4117.03(A)(2) and (A)(4). We agree with the Hearing Officer that

²³Specifically, Kelley made the following comments: "... I said, look, for the matter of record, let's -- I'm going to go up there and say carrying the beeper, I can put down the amount of hours from Friday night till Monday morning, and I put my exception in about the one call at Rion Lane ..." (Emphasis added.) "And I was saying, I'm going to go up for a matter of record and see if, you know -- what they're going to -- if they're going to -- just for a matter of re -- you know, if they're going to pay for carrying the beeper, what they say about that." "And that's when Scat said, that's a good idea. He said it should have been done a long time ago. That's basically what I did." See Transcript, pages 82-85.

²⁴On direct examination, Kelley stated: "... I talked to my foreman, Mr. Dunbar ... I talked to Mr. Dunbar because I had to get the overtime request sheet from Mr. Dunbar ... and I informed him what I was going to do ... I just said, you know, we were talking about this. We never -- you don't get compensated for being on call. And as I recall, Mr. Dunbar said you can do that, Mike, but I doubt if they're going to pay for it. I said, well, I just want to have it for a matter of record ..." Transcript, pages 85-86

Kelley's actions were not dishonest²⁵ and in addition, we do not find them to have been unreasonable or overly abusive. However, even though Kelley engaged in protected concerted activity, we agree with the hearing officer that the Respondent demonstrated a legitimate business justification for his termination and therefore did not violate O.R.C. 4117.11 (A)(1) and (A)(3).

The Board enunciated the standard for analyzing "mixed motive" cases in In re Fort Frye Local School District Board of Education, SERB 91-005 (7-17-91). Where the record evidence demonstrates a mixed motive for the disciplinary action rendered by the employer, SERB applies the "but for" test. This test provides that if the employer can prove that the disciplinary action at issue would still have been taken even in the absence of the illegal motive, the discipline stands and a finding of no violation will be made. The "but for" test is a balancing test which protects the rights of public employees and their employers. The rights of an aggrieved employee are protected since he/she is required only to show that protected activities play a part in the employer's decision. The rights of the employer are protected in that the employer is afforded an opportunity to establish a legitimate business justification for the disciplinary action taken.

In this case, Kelley alleged that his protected, concerted activity of requesting overtime for beeper duty was the cause of his discharge. The Respondent denied this and provided legitimate grounds for the disciplinary action. Specifically, the Respondent demonstrated that Kelley was subject to discipline for failing to respond to an emergency call and failing to

²⁵Specifically, the Hearing Officer stated: "...the record evidence demonstrates that Kelley made it clear, both orally and on the face of the overtime request slip, to his supervisors that he was requesting the overtime for carrying the beeper and not for time actually worked. There was no attempt to mislead the Respondent and thus no falsification of records. Kelley did not intend to violate a legitimate work rule but instead intended to make a statement to the effect that he and similarly situated employees should be compensated for carrying a beeper....." We agree. See Hearing Officer's Proposed Order at page 15.

complete the necessary repairs at Ms. Smith's apartment.²⁶ The disciplinary action taken in this case was consistent with the Respondent's written policy of progressive discipline.²⁷ CMHA's Personnel Policy Manual provides:

An employee can be disciplined for a variety of reasons, ... Depending on the seriousness of the offense and your own record or previous conduct, disciplinary action can range from verbal reprimand to dismissal ... Following are the usual actions taken in sequence in dealing with employee offenses. It is not required that every step be taken in every case, gross and extreme misconduct can result in recommendations for dismissal.

The disciplinary measures are listed as verbal reprimand, written reprimand, probation, suspension and dismissal.²⁸

Significantly, Kelley was both placed on probation and suspended for five working days (the final step in the discipline process before termination) without pay only six months earlier for misconduct including failing to respond to an emergency call while on beeper duty. He was

²⁶The Board gives significant deference to the hearing officer's credibility resolutions in footnotes 9 and 11 of the Hearing Officer's Proposed Order because it is the hearing officer who actually conducts the hearing and who is intimately familiar with all issues of facts and evidence. In re Warren County Sheriff, SERB 88-014 (9-28-88). Thus, we credit the hearing officer's conclusion that Kelley's termination was also based on the tenant's complaint about his repair work and the failure to answer his beeper. We are satisfied from his discussion that the hearing officer thoroughly reviewed Kelley's testimony regarding the extent of his repairs before discrediting it. Although the tenant did not testify, the Respondent did present a convincing account from the employee who received the complaint. The hearing officer was justified in concluding from that testimony that the complaint was in fact made.

²⁷Although two other employees testified that they had not received reprimands from their supervisors for not answering their beepers, we agree with the hearing officer that at the time of their apparent offenses they were not similarly situated. Unlike Kelley, they had not received prior discipline for the same offense and there was no evidence that senior management was aware of the alleged similar incidents. (Hearing Officer's Proposed Order at page 6, fn 7, page 17; Tr. 284-295, 162-164.)

²⁸See Respondent Exhibit #1.

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placed on notice at that time that any further violations of CMHA policy could result in additional disciplinary action, up to and including dismissal. We are not persuaded by Complainant's argument that since Kelley's probationary period had "expired" by the March, 1987, offense, his prior warning for the same offense should be disregarded for purposes of progressive discipline.

In view of the legitimate business defense presented by the Respondent, we agree with the hearing officer that notwithstanding the issue of Kelley's protected, concerted activity, his termination by CMHA does not constitute discrimination in violation of R.C. 4117.11(A)(1) and (A)(3).

Owens, Chairman, and Mason, Board Member, concur.