

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,  
Complainant,

v.

The Cincinnati Metropolitan Housing Authority,  
Respondent.

CASE NUMBER: 87-ULP-02-0046

OPINION

POTTENGER, Vice Chairman:

James Binford was hired by CMHA in 1979 as a painter and was a member of Local 50 of the Building Trades Union. Later, his job classification changed to maintenance employee and he came under the supervision of Maintenance Foreman Elijah Dunbar.

In April of 1984, the Greater Cincinnati Building and Construction Trades Council (BTC/Intervenor) and Ohio Council 8, American Federation of State, County and Municipal Employees (AFSCME) began organizing Respondent's employees. Binford actively participated in these efforts by passing out literature to employees, wearing union buttons and attending organizational meetings, among other things. On November 14, 1986, SERB conducted a representation election and on January 15, 1987, both BTC and AFSCME were certified as the exclusive representatives of separate bargaining units at CMHA.

In the afternoon of January 13, 1987, Binford and another CMHA employee, William Arnold, were approached by a co-worker, Walter Jackson, in the presence of Dunbar.<sup>1</sup>

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<sup>1</sup>The Complainant urges that we review "the totality of the circumstances" in examining Binford's conduct and specifically directs our attention to a meeting the morning of January 13, 1987, at which Supervisor Dunbar directed him to "shut up" when he attempted to ask a question during a group meeting over CMHA policies on leaving work without permission. The Complainant notes that Dunbar also advised that CMHA was after Binford's job. Because these statements were not recited in the Complaint, we decline to

Jackson showed them a written reprimand he had just received from Dunbar. When they advised Jackson not to sign the reprimand, Dunbar warned both Binford and Arnold to stay out of the matter. Arnold heeded the supervisor's advice. Binford, on the other hand, became loud and abusive, directing profanities at Dunbar.

Binford was terminated on February 4, 1987, as the result of this altercation with his supervisor. Before issuing the notice of termination, the Respondent held a disciplinary hearing where Binford was found guilty of gross misconduct and insubordination. Binford had been disciplined twice the previous year for similar behavior involving loud and abusive language directed at a fellow employee and for fighting on CMHA premises. He was placed on a 90-day probation period following the second incident and warned that "any further violation of personnel policy could result in additional disciplinary action, up to and including, termination."

Binford alleged that he was discharged because he actively supported the union or engaged in other concerted activity for mutual aid and protection in advising a fellow worker not to sign a written reprimand. In essence, he charged that in dismissing him for these reasons, CMHA had interfered with the exercise of rights guaranteed him under Chapter 4117 of the Ohio Revised Code as a public employee. The hearing officer concluded that the record failed to demonstrate any connection between Binford's union activities and his termination and that he was not participating in protected activity on the afternoon he engaged in a verbal altercation with his supervisor which ultimately led to his discharge. Further, the hearing officer concluded that even assuming arguendo that a prima facie case under SERB v. Gallia-Jackson-Vinton JVS District Board of Education, SERB 86-044 (11-13-86) aff'd, Gallia-Jackson-Vinton JVSD Board of Education v. SERB, 1989 SERB 4-6 (CP, Gallia, 12-30-88) had been established, CMHA nonetheless met its rebuttal burden by establishing that it would have taken the same action despite Binford's union activities. See In re Ft. Frye Local School Dist Bd of Ed, SERB 91-005 (7-17-91).

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consider whether they violate O.R.C. §4117.11(A)(1). However, for the reasons set forth herein, we find that even considering this evidence, the Respondent was justified in terminating Binford.

The exceptions to the Hearing Officer's Proposed Order (HOPO) filed by the Intervenor and Complainant raise certain issues that merit attention. The Intervenor argued, inter alia, that the hearing officer failed to address the issue of whether Binford's advice to a fellow employee about a reprimand constitutes protected activity and if so, whether Dunbar interfered with such activity by telling Binford that the reprimand was none of Binford's business and to stay out of it.<sup>2</sup>

This point is well-taken. A review of the Hearing Officer's Proposed Order reveals that he did fail to address the issue of whether advising or counseling a fellow employee constitutes protected activity. The hearing officer only made a conclusive statement that "Binford was not participating in protected activity on the afternoon of January 13, 1987, when he engaged in a verbal altercation with his supervisor, Elijah Dunbar." (Emphasis added.)<sup>3</sup>

It is well established that counseling or advising a fellow employee on a matter that affects the wages, hours, terms and/or conditions of employment is a form of protected activity that falls within the purview of O.R.C. 54117.03.<sup>4</sup> Public employees have the right to seek counsel of their co-workers for mutual aid and protection. If a supervisor knowingly attempts to interfere with protected, concerted activity, the interference constitutes a violation of O.R.C. 54117.11(A)(1).<sup>5</sup>

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<sup>2</sup>Intervenor's Brief in Support of Exceptions, pgs. 1,2.

<sup>3</sup>Hearing Officer's Proposed Order, pg. 8.

<sup>4</sup>See SERB v. Cincinnati Metropolitan Housing Authority, SERB 93-002 (4-6-93); Chatham County, 131 LRRM 1055, 293 NLRB No.19 (1989); Martin Marietta Corp., 131 LRRM 1717, 293 NLRB 719 (1989); American Lebanese Syrian Associated Charities, Inc., 121 LRRM 1286, 277 NLRB No. 189 (1986).

<sup>5</sup>The Respondent, answering the Complainant's and Intervenor's Exceptions, cites Safety-Kleen Corp., 116 LRRM 1070, 269 NLRB 110 (1984) for the proposition that counseling a co-worker not to sign a reprimand is not protected, concerted activity. In Safety-Kleen, an employee was found lawfully terminated because he had refused to sign a reprimand and verbally abused his supervisor. We agree that normally it is not protected activity to

6

Although there is conflicting testimony as to exactly what was said and how, all witnesses to the January 13th incident leading to Binford's dismissal, testified in essence that Elijah Dunbar told Binford to mind his own business, that the reprimand was none of his concern.<sup>6</sup> Dunbar himself testified, "Well, I really didn't do any arguin' with Mr. Binford. I just told him to stay out of it, it wasn't his business."<sup>7</sup> When asked whether he told Binford this as a result of his advising Walter Jackson not to sign the reprimand, Dunbar responded "Yes."<sup>8</sup>

Clearly, Dunbar's interference was a restraint on the employees' exercise of protected rights and therefore a violation of O.R.C. §4117.11(A)(1). We have amended the hearing officer's Conclusions of Law accordingly.

Having found that Binford initially engaged in protected, concerted activity, and that his supervisor responded with unlawful interference, we are now left to examine another argument raised by the Intervenor and Complainant's exceptions, i.e., that given these circumstances, Binford's verbal altercation with his supervisor is somehow protected. Again, there is conflicting testimony as to exactly what transpired. However, the record shows that the verbal exchange that took place between Binford and Dunbar was mostly one-sided with Binford holding center stage and directing extremely profane language at his supervisor. Specifically, the record indicates that Binford called Dunbar a "Mother Fucker", a "Coward", and screamed at him "You got your hand up Lee's ass." In addition, Binford pulled a piece of

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refuse a supervisor's order. Here, Dunbar had issued no ultimatum that Jackson sign the reprimand. He took the position that it was up to Jackson whether he wished to sign it. (Tr. 46, 157-58, 347, 381).

<sup>6</sup>The Board gives significant deference to the hearing officer's credibility resolutions because it is the hearing officer who actually conducts the hearing and who is intimately familiar with all issues of fact and evidence. In re Warren County Sheriff, SERB 88-014 (9-28-88).

<sup>7</sup>Transcript, pg. 3.

<sup>8</sup>Ibid.

7

paper off a bulletin board and slammed it on Dunbar's desk while screaming "Mother Fucker, can't you read? Read this, Mother Fucker." Although Dunbar instructed Binford to go home "before you lose your job" and after being warned that a written reprimand would be issued, Binford continued the verbal barrage. He stated, "I can kick your ass if I lose my job. Somebody gonna get hurt." Another maintenance worker, Joe Cockrell, entered the office and tried to get Binford to leave. Binford responded belligerently for Cockrell to "get his damn hand off of him." This remark was repeated to another employee, Sam Mays, who had to physically pull Binford out of his supervisor's office.<sup>9</sup>

Nonetheless, the Complainant urges that in cases where employee discipline may otherwise be warranted, provocation by the employer is a defense that may reduce or eliminate the disciplinary action.<sup>10</sup> In support of this position, the Complainant cites NLRB v. Steinerfilm, Inc., 669 F.2d 845, 109 LRRM 2560, 81 NLRB 1437 (1st Cir. 1982), a case in which the NLRB found unlawful the discharge of an employee who offered to "settle" things with the plant manager "out in the corn field" and who also used some offensive and abusive language during the course of the confrontation. The NLRB concluded that the employee's insubordination was an excusable reaction to an unjustified warning. The Complainant argues that here, as in the Steinerfilm case, the reaction was excusable and the penalty imposed was too severe.<sup>11</sup> The facts of Steinerfilm and the case sub judice are clearly distinguishable and therefore, the Complainant's argument is unpersuasive. Binford was discharged for directing extremely profane language, which included the threat of bodily harm, at his supervisor. The employee in Steinerfilm reacted to receipt of a written warning by telling the plant manager who gave it to him that the contents of a reprimand were a "bunch of lies." He then left and returned to his work station where the manager pursued him. A heated "discussion" ensued and the employee made the aforementioned remarks to his supervisor. Unlike James Binford, the employee in Steinerfilm had not physically threatened his supervisor, and never before had

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<sup>9</sup>Transcript, pgs. 258-261; 345-349.

<sup>10</sup>Attachment to Complainant's Exceptions, pg. 11.

<sup>11</sup>Complainant's Exceptions, pg. 3.

received a written warning. The NLRB's finding that the reprimand itself was unjustified and violated the Act was upheld by the reviewing court. The court noted, among other things, that the written reprimand was based on fabrication intended to provide a defense to an anticipated unfair labor practice charge should the employee be discharged.

These exceptions are not persuasive. Binford's language and behavior on the afternoon of January 13, 1987, were not protected activity. Although profanity may have been commonplace at CMHA, as has been suggested by some of the testimony, the language Binford directed at his supervisor is far more severe than the profanity noted in the cases cited by the Complainant and too egregious to overlook.<sup>12</sup>

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<sup>12</sup>Evidence of disciplinary measures taken against two other CMHA employees was offered by the Complainant for comparison with Binford's discipline. Upon remand by the Board for a ruling on the admissibility of this evidence, the Hearing Officer determined that the evidence (SERB Exhibits 12 through 23) was irrelevant and inadmissible. We reverse this ruling. Inasmuch as the evidence was offered for the purpose of showing disparate treatment, its admissibility is appropriate and consistent with our holding in In re Ft. Frye Local School Dist Bd of Ed, SERB 91-005 (7-17-91).

The disciplinary action taken against the two employees referenced in SERB Exhibits 12 through 23 are readily distinguishable from the discipline imposed on Binford. One employee, Jack Bostic, received a written reprimand for not following company procedures when completing his work order and time card (Ex. 12). This discipline was the result of an initial charge of gross misconduct - sexual harassment filed by a tenant against Bostic. Between their two statements as to what occurred, it was determined that Bostic's version was more credible. It was noted, however, that he was not completely blameless. The written reprimand cautioned the CMHA employee that any further incidents of this nature or violation of policy could result in further disciplinary action up to and including dismissal.

Exhibits 13 through 23 are in reference to maintenance employee Willie White who was the recipient of several disciplinary actions resulting from abuse of leave time; excessive telephone use; loafing on the job; and directing abusive language towards his supervisor. Regarding the latter charge (Ex. 23), the Complainant submitted this evidence to show that although White engaged in similar behavior as Binford, he was only given a five day suspension. It appears from the record, however, that unlike Binford, White had not committed a prior similar offense. Additionally, there was unrebutted testimony at the hearing that White's supervisor provoked him by a physical attack and thus had initiated the action that followed. (Tr. 608-609). No precipitating factor such as this was present in Binford's case.

Likewise, other cases cited by the Complainant are distinguished on the facts. In NLRB v. M & B Headwear, 349 F.2d 170 (4th Cir. 1965), the employee was laid off because of her union organizing efforts. Angered by the layoff, she threatened to harm the supervisor who had observed her union activities and told the vice president to "shut up" when he intruded on her conversation. The court held, "We in no way condone insubordination and in normal situations it would be a justifiable ground for dismissal. But we cannot disregard the fact that the unjust and discriminatory treatment of Vaughan gave rise to the antagonistic environment in which these remarks were made."

It is argued that Binford's outburst was triggered by Dunbar warning him to mind his own business and is therefore pardonable. As previously stated, Dunbar did interfere with Binford's exercise of protected rights. However, his remark to cease this activity did not create such an "antagonistic environment" so as to excuse Binford's extreme reaction. Likewise, in Crown Central Petroleum Corporation v. NLRB, 430 F.2d 724 (5th Cir. 1970) two employees were disciplined for stating at a grievance meeting that their supervisor had "lied" about a specific incident. The court upheld the NLRB's finding that their remarks were protected, even if they were not justified, and that the employer had committed unfair labor practices by disciplining them for the statements. The court stated that it didn't think the language used by the two employees "was so opprobrious as to carry them 'beyond the pole' of the Act's protection." Clearly, comparing this incident to the facts of the present case is like comparing apples and oranges. Unlike the two employees in the Crown Central Petroleum case, Binford uttered remarks so threatening and disrespectful that they are clearly outside the protection of the statute.

Management must be free to control and direct its workforce and to demand some degree of respect from their employees in achieving this. Recently, two separate Court of Appeals decisions have overturned NLRB orders of reinstatement for employees involved in situations similar to this case. In Precision Window Manufacturing Inc. v. NLRB CA 8, Nos. 91-3186 and 91-3548 (5/8/92), 140 LRRM 2321, 303 NLRB 141, the Eighth Circuit held that "Absent actual physical assault, there is no conduct more serious than a threat of physical

violence.... Threats of physical violence lie outside the scope of the Act's protection, even if they are provoked by an unfair labor practice." The only issue on appeal in this case was whether the fired employee had forfeited his right to reinstatement by threatening to kill his supervisor and by making false statements under oath about his union activity. Likewise, in Chicago Tribune Co. v. NLRB, 962 F.2d 712 (5/7/92), 140 LRRM 2286, where an employee union activist was fired for the use of abusive and profane language directed against a supervisor when he was prevented from smoking in the break room, the Seventh Circuit suggested that union activism does not shield an employee from discipline for workplace misconduct, particularly when the record reveals no animosity for union or other protected, concerted activities motivated the discipline. We agree.

The record in this case fails to demonstrate that union or other protected, concerted activities had played a role in the Respondent's decision to terminate Binford. Particularly persuasive evidence in support of this is the fact that Binford had previously been disciplined for similar behavior with a warning that any further personnel policy violations could result in termination and the fact that the other employee, William Arnold, who was also an avid union supporter<sup>13</sup> was not disciplined for the January 13th incident although he, too, advised his co-worker not to sign the written reprimand. Even if union or other protected, concerted activities had motivated the discharge, in part, CMHA set forth a legitimate business justification for terminating Mr. Binford aside from his union activities as required by Fort Frye, supra. Accordingly, we affirm the hearing officer's determination that the Respondent did not violate O.R.C. §4117.11(A)(3) by terminating James Binford.

Owens, Chairman and Mason, Board Member, concur.

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<sup>13</sup>Transcript, pgs. 207, 210, 212.