

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Dayton,

Respondent.

Case Number: 91-ULP-09-0518

Opinion

POTTENGER, Vice Chairman:

The issue before the Board is whether the Respondent's written reprimand issued to Sergeant David Maynes and his involuntary transfer to a different work assignment constitutes an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (A)(3). For the reasons stated below the Board finds that the issuance of the reprimand is not violative of the Act, but the involuntary transfer did violate O.R.C. §4117(A)(1).

I.

At the outset, a brief summary of the pertinent facts is appropriate. The entire controversy revolves around the Dayton Police Department's treatment of Officer Scott Davis. Davis was a popular officer who was indicted for aggravated assault after engaging in a physical confrontation with a suspected drug dealer in the hallway of the County Courthouse.¹ Following the indictment, Police Chief James Newby suspended Davis without pay on December 3, 1990, while the aggravated assault charge was pending. The suspension created dissension in the department as evidenced by the action of approximately 35 officers

¹See Hearing Officer's Proposed Order, Finding of Facts No. (F.F.#) 1.

who called in sick over the next three days to protest the Chief's decision.² On March 27, 1991 Officer Davis was found guilty on the assault charge. After the conviction there was an internal disciplinary hearing after which the Chief determined that Davis should be terminated.³

On April 29, 1991 Chief Newby had the Assistant Chief call Detective Bennett, President of the FOP, requesting that he and members of the Union Executive Board attend a meeting in the Chief's office.⁴ The meeting occurred later that day with Chief Newby, Assistant Chief Lt. Col. McDaniel, FOP President Detective Bennett, FOP Secretary Sgt. David Maynes, FOP Treasurer Scott Stimmel, FOP Vice-President Detective Pearson, and FOP Chairman of the Supervisors Committee Steve Grismer.⁵

The meeting began with Chief Newby announcing his decision to discharge Officer Davis. After a brief discussion, Detective Pearson said to the Chief at least twice: "That is bullshit" and almost simultaneously Sgt. Maynes called the Chief an "asshole" and said to the Chief at least once, "fuck you."⁶

The next day, as a result of the incident at the meeting, Maynes reported to Lt. Col. McDaniel's office and was advised of his transfer from his night street supervisor position to a counter position on the day shift because he was viewed as a "powder keg" that may need to seek counseling.⁷ Prior to the incident of April 29, 1991, Sgt. Maynes had told Chief

²Id.

³Id.

⁴F.F. #2.

⁵F.F. #3.

⁶Id.

⁷F.F. #5.

Newby that he would consider it punishment to be assigned to an 'inside' job on the day shift.⁸ Also, Maynes was subjected to a disciplinary hearing that resulted in a written reprimand received by Maynes on August 5, 1991.⁹ Despite the transfer, Maynes continued to serve on the SWAT team and other special assignments, including work on the drug unit, and was not evaluated or directed to counseling.¹⁰

II.

On September 5, 1991 the FOP filed an Unfair Labor Practice Charge against the Respondent alleging that the Respondent had violated Ohio Revised Code §4117.11(A)(1), (A)(2) and (A)(3). On November 21, 1991, SERB determined that there was probable cause to believe that the Respondent had committed an unfair labor practice. On January 9, 1992, SERB issued a Complaint against the Respondent alleging violations of O.R.C. §4117.11(A)(1) and (A)(3). The matter was directed to hearing with the hearing officer issuing his Proposed Order on November 17, 1992. The hearing officer concluded that Sgt. Maynes was engaged in concerted, protected activity during the course of the meeting which occurred on April 29, 1991, in Chief Newby's office and that the Respondent's issuance of a written reprimand to Sgt. Maynes and his involuntary transfer violated O.R.C. §4117.11(A)(1) and (A)(3). For the reasons stated below, the Board finds that Sgt. David Maynes' profanities directed at Chief of Police Newby were not concerted, protected activity, and therefore the issuance of a written reprimand is not an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (A)(3). However, the related involuntary transfer, while not an unfair labor practice in violation of O.R.C. §4117.11(A)(3), is found to be an unfair labor practice in violation of O.R.C. §4117.11(A)(1).

⁸F.F. #8

⁹F.F. #6.

¹⁰F.F. #s 9 & 10

III.

To establish a case of discrimination under O.R.C. §4117.11(A)(3) it must be established that the alleged discriminatee engaged in, or attempted to engage in, concerted, protected activity under Chapter 4117. See *In re Warren County Sheriff*, SERB 88-104 (9-28-88).¹¹ It is without question that Sgt. Maynes attended the meeting of April 29, 1991 in his union capacity and thus it would normally be found that he was engaging in concerted, protected activity and could not be disciplined for his involvement in the meeting. The issue here is whether his use of vulgar, profane language directed toward the Chief removed him from the protection of the Act. We find that under the particular circumstances of this case it did. Therefore, we find that Sgt. Maynes was not engaged in concerted, protected activity when he directed vulgar, profane language at the Chief.

The Board acknowledges its earlier position of equality articulated in *In re City of Cleveland*, SERB 88-020, 1988 Opinions 3-118 (12-28-88). There the Board stated: "When an employee is performing in the capacity of a union representative, the employee enjoys equal status with the employer or the employer representative even though the employer or the employer representative in the normal course of work activity is the employee's supervisor." *Id.* at 3-119. This equality, however, does not confer on an employee the unlimited right to engage in any type of behavior he chooses without fear of discipline. Decisions of the National Labor Relations Board have consistently held that an employee can be disciplined if his conduct is so egregious, as to remove him from the protection of the Act. See *Woodruff & Sons, Inc.*, 265 NLRB 345 (1982), *Hyatt on Union Square*, 265 NLRB 612 (1982), and *Fibracan Corp.*, 259 NLRB 161 (1981).

¹¹The determination that the activity involved is protected activity is fundamental to any finding of an unfair labor practice in violation of O.R.C. §4117.11(A)(3). This principle was recently affirmed by the Ohio Supreme Court in SERB v. Adena Local School Dist. Bd. of Ed., 99 Ohio St. 3d (June 23, 1993).

24

In determining whether an employee by his conduct has exceeded the protection of the Act, each case must be judged on its own particular circumstances. The NLRB in a 1979 decision articulated factors that it would consider when deciding if an employee had by his conduct exceeded the protection afforded by the National Labor Relations Act. The decision enumerated four factors to weigh in deciding if an employee had crossed the line: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). We find that an evaluation of these factors is helpful in reaching our decision.

Initially, we note that the employee's outburst was a particularly vulgar and profane individual attack on the Chief of Police. The subject matter of the discussion was admittedly an emotional one, but perhaps most important, this discussion was not in the context of a grievance proceeding or collective bargaining negotiations.

The widest latitude has been granted by other labor boards to employees acting in a representation capacity when they are engaged in negotiating collective bargaining agreements or arguing grievances. *United States Postal Service v. N.L.R.B.*, 652 F.2d 409 (5th Cir. 1981), *Crown Central Petroleum v. N.L.R.B.*, 430 F.2d 7224 (5th Cir. 1970). *Betcher Manufacturing Corporation*, 76 NLRB 526 (1948). The reason for this latitude is two-fold. First, it must be realized that these two types of proceedings are often emotionally charged and thus some profane language may regretfully be expected and tolerated. Second, if employers were allowed to discipline employees for intemperate language in these settings there would be a chilling effect on the exercise of statutory rights, since employees would be hesitant to zealously represent the interests of their members in fear of discipline. In the instant situation, we have neither a grievance meeting nor collective bargaining negotiations, so these two policy considerations are not applicable. The meeting was purely informational, a courtesy to the Union so it could hear the decision first-hand. The decision had already been made, there was no impression given that this would be a time to bargain or argue over the

25

decision. If the Union wished to fight the decision, it could have filed a grievance or sought other appropriate means of redress. Instead, Sgt. Maynes decided to direct obscenities at the Chief of Police.

Finally, in evaluating a O.R.C. §4117(A)(3) claim, it is important to look at the totality of the circumstances. A full view of the facts in this case convinces us that no discrimination for engaging in protected activities took place. Several individuals who voiced their displeasure, but not to the vulgar level of Sgt. Maynes, received no discipline for their actions. None of the approximately 35 individuals who called in sick to protest the suspension of Officer Davis received discipline. At the meeting itself, others in attendance conducted themselves properly and received no discipline. Detective Pearson twice said, "This is bullshit," and received no discipline. Only when the conduct rose to the profane and personal level that Sgt. Maynes chose to utilize was discipline meted out. Thus, he was disciplined only for his profane remarks, not his exercise of any concerted, protected activity. Quite simply, we cannot condone the conduct that Sgt. Maynes engaged in at a purely informational meeting by barring the employer from lawfully imposing reasonable discipline. Therefore, we find that by directing personal and profane remarks at the Chief of Police, Sgt. Maynes' conduct exceeded the protection of the Act and thus the issuance of a written reprimand was not a violation of O.R.C. §4117(A)(1) and (A)(3).

IV.

The related involuntary transfer of Sgt. Maynes, however, warrants a different analysis. This serious response would more likely have a coercive effect on individuals in exercising their statutory rights. The Employer said that the decision was being made because Sgt. Maynes was unstable and perhaps in need of counseling. Given its later actions, these articulated reasons appear to be nothing more than pretextual. Maynes continued to serve on the SWAT Team and other special assignments including the drug unit. This type of duty hardly seems appropriate for an unstable individual in need of counseling. Thus, given the

circumstances of the decision, the reasons articulated for it, and the fact that Maynes had previously made it known that he would not be receptive to inside work, the transfer was clearly a punitive action above and beyond the written reprimand. Thus, we find that, in the circumstances of this case, the involuntary transfer of Sgt. Maynes had gone beyond the bounds of a reasonable discipline and one could reasonably conclude that employees were restrained or coerced, or that their rights under O.R.C. §4117.03 were interfered with by the Respondent's conduct. In re Pickaway County Human Services Dept. SERB 93-001 (3-24-93). Under the objective standard set forth in Pickaway we find that the involuntary transfer of Sgt. Maynes, while not a violation of O.R.C. §4117.11(A)(3), did violate O.R.C. §4117.11(A)(1).

Owens, Chairman and Mason, Board Member, concur.