

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Napoleon City School District Board of Education,

Employer,

and

Napoleon Faculty Association, OEA/NEA

Employee Organization.

CASE NUMBER: 93-STK-11-0005

OPINION

OWENS, Chairman:

**I. Procedural Background and Facts**

The Napoleon City School District Board of Education (Employer) filed a Request for Determination of Clear and Present Danger under the auspices of Ohio Revised Code (O.R.C.) §4117.16(A). The Court of Common Pleas, Henry County, Ohio, pursuant to O.R.C. §4117.16, issued a temporary restraining order for a period of seventy-two (72) hours commencing at 8:00 a.m. on November 30, 1993.

The Board is required by O.R.C. §4117.16(A) to determine whether the strike in question creates a clear and present danger to the health or safety of the public within the effective period of the temporary restraining order. Accordingly, SERB conducted a hearing on November 30, 1993, at the Board's office. Pre-hearing procedures were conducted by SERB's General Counsel, and stipulations were agreed upon by the Napoleon Faculty Association, OEA/NEA ("Employee Organization" or "Union") and the Employer. The stipulations are:

1. Napoleon City School District Board of Education ("Employer") is a "public employer" within the meaning of O.R.C. Sec. 4117.01(B).
2. Napoleon Faculty Association, OEA/NEA ("Union") is an "employee organization"

within the meaning of O.R.C. Sec. 4117.01(D).

3. The Union is the deemed-certified representative for a unit of all certified personnel of the Employer, including long-term substitutes as defined in Article IV of the agreement, but excluding substitutes, tutors, aides, and administrative and supervisory staff, and auxiliary personnel hired by the Employer on behalf of parochial schools.

4. The Employer owns, operates and maintains Napoleon High School, Central Elementary and Middle School, C.D. Brillhart Elementary School and West Elementary School, all in the City of Napoleon, Ohio.

5. The Employer and the Union have been parties to a series of collective bargaining agreements, the first of which became effective sometime before 1978, the exact date being unknown. The most recent agreement was effective by its terms from July 1, 1991 until June 30, 1993, said agreement having been extended by mutual agreement on June 22, 1993, until September 15, 1993, for the stated reason of permitting sufficient time for negotiation and mediation.

6. The Employer and the Union have been engaged in collective bargaining for a new contract since on or about May 1993, but have failed to reach agreement.

7. From October 13, 1993 until November 30, 1993, approximately 130 teachers in the bargaining unit described above in Paragraph 3, have been engaged in partial or intermittent strike activity, for which various Notices of Intent to Strike have been timely filed with the Employer and SERB. Striking and/or picketing has proceeded according to the schedules attached to the notices and appended hereto as Attachment A.

Specifically, during the period October 20 through November 7, striking has occurred on an alternating schedule, striking one day in the morning, the next in the afternoon. During the period November 8 through November 24, teachers have struck daily both in the morning

and afternoon, except for the hours of 10 a.m. to 1:30 p.m.

Pursuant to the strike schedule filed with SERB, during the period November 29 through December 10, the plan was to strike at a different time in each building and at a different time each day.

Striking proceeded according to the schedule November 29. The strike temporarily ceased Tuesday, November 30, pursuant to the terms of a Temporary Restraining Order issued by Henry County Common Pleas Court Judge Kenneth A. Rohrs on November 29, effective at 8 a.m. November 30.

8. During the strike, the Employer has kept its schools open, operating with non-unit substitute teachers during periods regular teachers were striking, except for the following days, when the Employer closed its schools:

October 13-15  
October 18  
October 19  
November 22  
November 25-26.

On October 18 and November 25-26, the schools were already scheduled to close, notwithstanding the strike. (Tr. 309).

#### FINDINGS OF FACT <sup>1</sup>

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<sup>1</sup>All references to the transcript of the hearing are indicated parenthetically by "Tr." followed by the page number(s). All references to exhibits are indicated parenthetically by "Ex," followed by the number. References to the transcript and/or exhibits in this Opinion are intended for convenience only and are not intended to suggest that such references are the sole support in the record for any particular Finding of Fact.

1. There are approximately 2,500 students served by the Napoleon City School District. At the high school, there are 700 students taught by approximately 47 teachers. (Tr. 78, 131, 186).
2. The Employer and Union exchanged initial contract packages in May 1993. Negotiations proceeded over the Summer. Since the strike began on October 13, the parties have met weekly. (Tr. 296-98).
3. The following picket line activity has been observed by school or security personnel: striking teachers encircling substitutes' cars with their own, so that it was difficult to leave the high school parking lot (Tr. 861), strikers physically blocking parents' cars (Tr. 189), a striking teacher blocking a substitute's egress with his own car (Tr. 220), an OEA representative pushing someone in front of a moving bus (Tr. 225, 233), as well as striking teachers yelling profanity to substitutes on school property right in the faces of students walking in between (Tr. 166), and strikers making threats to substitutes, such as "I know where you live." (Tr. 218-19).
4. During the strike, substitute teachers at the high school and middle school received provocative notes from striking teachers critical of their crossing the picket line, and challenging their ability to teach, discipline students and maintain classroom equipment. (Attachments to Affidavits of Larry Long, Thomas Condit).
5. At the time of the hearing, only about six of the 47 regular high school teachers were leaving assignments for the teachers employed as substitutes during the hours of the strike. Striking teachers do not communicate with the substitutes who are relieving them about material covered in class. Regular teachers have not turned weekly lesson plans in to the high school administration since the first week of the strike. Discipline problems in the high school have escalated during those periods when substitute teachers are in charge and the students have nothing to do. Since the strike began, about two dozen students have transferred from the high school for strike-related reasons. (Tr. 76, 78, 82, 96, 203, 264).

6. On one occasion, Carmelita Williams, a parent volunteer on duty daily at the middle school during the strike, heard a striking teacher tell Williams' daughter's class: "I will talk about the strike if I want to; I have freedom of speech." On another occasion, the striking reading teacher told Williams' daughter angrily not to do handwriting assignments for the substitute teacher who relieved the reading teacher while she was striking. (Tr. 147, 148).

7. Striking teachers, including all but four of the high school teachers, have refused to turn in grades to the administration and intend to continue withholding grades for the duration of the strike. Strikers stated that they are withholding grades in protest of the schools' failure to pay them for hours worked. Students have been rated on a pass-fail system during the strike. Some teachers will provide grades to students and guidance counselors upon request and have participated in parent-teacher conferences. Senior grades are ordinarily sent to colleges during the second semester or at the end of the year. In the Fall, freshman, sophomore and junior year grades are sent to colleges. (Tr. 73, 258, 292, 311).

8. To avoid confrontation between striking teachers and substitutes inside school buildings and classrooms, Superintendent Russell created "transition periods" when regular teachers, scheduled to strike, vacate the building, the building is checked, then substitutes, who have been waiting in a separate area within the building, are brought to their classroom. During a transition period, which typically lasts 10-12 minutes, no teachers (striking or substitute) are in the classroom with the students. ( Tr. 85, 119, 164-66, 182, 319).

9. Before Superintendent Russell decided to create transition periods, he considered and rejected other options, including moving students to a large group setting to wait during the change of personnel. He rejected this option because it would require too much time and more supervision than was available to move the students to a central location. Central Elementary Principal Thomas Jenny attempted to bring all students into the school gymnasium during transition, rather than have them wait in individual classrooms, but found they were too noisy and unruly and that waiting in individual classrooms worked better. ( Tr. 164,214).

10. The following Ohio school districts have been faced with intermittent strikes and have not chosen the option of creating transition periods to separate striking teachers and substitutes within school buildings: Groveport-Madison, Columbiana, Besvar Creek, and Switzerland. (Tr. 237-41).

11. During the transition periods created in response to the pre-hearing strike schedules there were not enough personnel to supervise students. Among those left unsupervised were developmentally handicapped students at the high school and middle school and industrial arts classes with power tools, chemistry labs, and home economics rooms. (Tr. 73, 83, 140).

12. At the middle school during a transition period, a developmentally handicapped student was injured when she fell while chasing another student in the classroom. At Central Elementary School, during a transition period, a student was struck by scissors thrown in class. At the high school, there have been no injuries during unsupervised time. (Tr. 118, 158, 213).

13. The following has occurred during transition periods at the middle school: students removing safety guards from radial arm saws in the shop, throwing objects out of classroom windows and stones at each other on the playground, children pushing, shoving and shooting staples, burning fellow students with ink pens, and throwing large erasers. On one occasion, a student operated a radial arm saw in an unsafe manner during a period when his striking teacher was rushing to leave the classroom to meet the strike schedule. (Tr. 141-44; 194-95 ).

14. Under the strike schedule filed for the time period November 30 through December 10, a separation of strikers and substitutes within school buildings via "transition periods" would result in students being left unattended by a regular or substitute teacher for two periods of 10-12 minutes per day in all but one school building. Also under this schedule, which called for striking at a different time in each building and at a different time each day, substitute and regular teachers would at times be teaching side by side in the adjoining Central Elementary

and Middle Schools, and high school teachers would be leaving to strike in the middle of their classes. Elementary school students would have different teachers at different times from one day to the next. Students in the high school shop, home economics room and chemistry lab would be unsupervised at times under the new schedule. (Appendix A, Employer Ex. 1, Tr. 81-82, 166, 270).

15. When the strike began, School Superintendent Mark Russell invited parents and other concerned citizens to volunteer on-site in school buildings. Volunteers have helped supervise students during transition periods. Although the initial response was good, the volunteer base, which hinges on personal and job schedules, has dwindled as the strike has continued. (Tr. 154, 156, 177-78, 192, 212).

16. Although the Employer engaged approximately 21 security guards for all five buildings in the system at the beginning of the strike for asset protection, executive protection and personnel protection, the number had been reduced to nine (9) by the time of the hearing due to cost considerations. Security personnel are not responsible for monitoring classrooms. (Tr. 178-79, 186, 226, 234).

17. At the high school, approximately 200 students leave the facility and do not attend any classes when the regular teachers leave. An unspecified number of students also leave the middle school on this basis. At Central Elementary School, approximately 21 of 390 students normally leave before the end of the day due to the strike schedule. Although administrators have attempted to secure notes from parents regarding absences, reduced staff has prevented tracking all comings and goings. A number of elementary students leave the premises without their parents. (Tr. 129, 171, 207).

18. Marsha Gerken, a licensed social worker specializing in children, adolescents, and young adults, has a private practice in Napoleon and has counseled Napoleon school children before and during the period of the strike. Since the strike began, her caseload of Napoleon school children has increased from 7 to 15. She has observed strike-related confusion and

separation anxiety in elementary-age school children and anger in middle school and high school students. The strike has contributed to some of these students being placed on medication or hospitalized. Consulting with her clients' teachers is an integral part of Gerken's treatment program. Her ability to consult with regular teachers has been impaired by the strike.<sup>2</sup> (Tr. 52-53, 39-42, 57, 60).

19. Since the strike began, school administrators and parents have observed strike-related emotional upheaval in children and adolescents who attend the struck schools. High School Principal Larry Long has had a half dozen students come to him in tears over the strike's effect on the athletic program, grading system, and class schedule. He referred 3 or 4 students to outside counselors as a result. Parents report to administrators that their children are experiencing depression, anxiety, throwing up at night, and headaches from the strike. Central Elementary Principal Jenny has observed an increase in stomach aches at 1:30 p.m., when the regular teachers leave to go on strike. He has observed that discipline problems that he resolved last year and that remained resolved at the beginning of the school year have escalated as the strike continued for weeks "to a point where they couldn't handle it anymore." These discipline problems have been referred to counseling. (Tr. 75, 122-26, 149, 174, 200, 211, 215).

## II. Analysis

This case presents a question of first impression: whether a prolonged strike by Ohio teachers, which involves unsupervised students endangering themselves and their fellow students, constitutes a "clear and present danger to the health or safety of the public" within the meaning of O.R.C. §4117.16. Under the unique circumstances of this case, we find that it does.

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<sup>2</sup>Testimony by Gerken is considered to the extent of her observations in the course of counselling strike-affected children but not as an expert regarding the long-term effects of the strike on overall emotional health. This limitation is consistent with our evidentiary ruling disqualifying Gerken as an expert witness. Tr. 36.

Opinion  
Case No. 93-STK-11-0005  
November 30, 1993  
Page 9 of 15

On only two occasions since the Collective Bargaining Act took effect in 1984 has the Board been asked to find that a strike created such a clear and present danger. Both involved a wider segment of the public. In In re Central Ohio Transit Auth., SERB 87-001 (2-19-87 ("COTA"), a public transit strike was at issue. In re City of Gallipolis, SERB 90-016 (9-14-90), involved a strike at a municipal water plant.

In COTA, SERB developed and applied a clear and present danger standard which in essence required actual harm to a broad segment of the public. In COTA, the Board reasoned that O.R.C. §4117.16 contemplated a "powerful life, body or property threatening condition both obvious and imminent. And the threat must imperil a broad and substantial range of persons in the community...(i) it must involve a magnitude that is more than random individual hardship and more than mere inconvenience." Id. at 3-3 (Emphasis added).

Considering individual testimony suggesting that the poor, jobless, homeless, handicapped, sick or aged would suffer hardship as a result of the transit shutdown, SERB concluded that peril to a broad and substantial range of the population had not been established. Although judicial review of SERB's decision was ultimately nullified on jurisdictional grounds<sup>3</sup>, the 10th District Court of Appeals faulted the stringent COTA standard as being "greatly overly restrictive" both for the degree of harm and the range of public which it required to be affected.<sup>4</sup>

Criticizing SERB's standard, the Appeals Court stated:

...(c)lear means obvious or apparent, and "present" means

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<sup>3</sup>Central Ohio Transit Auth v. Transport Workers Union of America, Local 208, 37 OS 3d 56, 1988 SERB 4-47 (1988).

<sup>4</sup>Central Ohio Transit Auth v. Transport Workers Union of America, Nos. 87AP-124, 87AP-174, 1987 SERB 4-6 (10th Dist Ct App, Franklin, 3-18-87), remanding to Franklin County Common Pleas Court to hold an evidentiary hearing and issue a determination consistent with the Appeals Court opinion. The Common Pleas Court found, following hearing, that strike created a clear and present danger as defined by the Appeals Court. Central Ohio Transit Auth v. Transport Workers Union of America, 1987 SERB 4-29 (CP, Franklin, 3-20-87), affirmed 1987 SERB 4-14 (10th Dist. Ct App, Franklin, 4-7-87).

immediate or existing. However, what is required to be clear and present is the danger, that is, risk of harm, not the actual harm itself. In other words, it is not necessary to wait until the public health and safety has been substantially injured before issuing an injunction; instead, an injunction may issue where there is a clear and present danger that such injury to the public health or safety will occur. *Id.* at 4-10.

Regarding SERB's interpretation of "the public" under the statute, the Court, contrary to SERB, found that the public at large need not be affected for a clear and present danger strike to be enjoined.<sup>5</sup> The Court stated:

More than mere inconvenience either to the public in general or to isolated groups of individuals is required. However, the word "public" connotes that the interest involved or to be protected must be general, even though the immediate effect may be only upon a limited segment of the general public. For example, it is in the public interest to care for the indigent and homeless, even though they may comprise only a small percentage of the total public. *Id.*

The situation before us illustrates how a literal reading of the COTA standard could result in relief being denied where it is warranted under the statute. Here, although it is clear that the strike by Napoleon teachers creates a risk of significant harm to the student population (which it is in the public interest to protect) no relief would be available under COTA because the risk of harm, though substantial, runs to only a segment of the public, and evidence of actual physical injury to young students is limited.

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<sup>5</sup>Our reading of "the public" is consistent not only with that of the Ohio courts reviewing the COTA decision but also with the interpretation utilized by the Supreme Court of Pennsylvania in interpreting a similar Pennsylvania statute, which allows public employee strikes "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public." In Jersey Shore Area School District v. Jersey Shore Education Ass'n, 548 A. 2d 1202 (Pa. 1988), the Court stated that students "cannot and must not be treated as a category separate from the public at large."

Accordingly, we overrule the standard for clear and present danger first articulated in COIA and restated in Gallipolis and hold instead that clear and present danger will be found pursuant to O.R.C. §4117.16 where a strike poses a risk of significant harm to the health or safety of the general public or segment of the general public, in contravention of the public interest. What constitutes a risk of significant harm to the public or any particular segment of the public will depend upon the facts and circumstances of each case.

Applying the new standard to the facts before us, we are convinced that the prolonged intermittent strike by Napoleon teachers has exposed students to a risk of significant harm, warranting a finding of clear and present danger.

At the time of hearing, the strike was entering its 50th day. Like any partial or intermittent school strike where the administration seeks to offer full-day instruction, replacements were used to fill in for those time periods when striking teachers were picketing. Here, the striking teachers' animosity toward their replacements was so pronounced that the school superintendent concluded the two groups should not be in a school building at the same time with students at close range.<sup>6</sup> The decision was a reasonable one under the circumstances. Although hostility toward replacements is to be expected in any strike situation, it proceeded here without regard to the presence of students and in active contravention of providing meaningful educational services. In the buildings, striking teachers left derogatory notes to their replacements but refused to communicate lesson plans and undermined their replacements' assignments. Outside, they shouted profanities across to replacements as students walked between.<sup>7</sup>

Given this atmosphere, the administration was justified in devising the system of

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<sup>6</sup>Finding of Fact ("FF") No. 3.

<sup>7</sup>FF Nos. 3,4.

transition periods to minimize any further enmeshing of the students in the teachers' dispute.<sup>8</sup> Under the strike schedule in effect until November 8, one transition period of 10 to 12 minutes per day was scheduled to handle the personnel changes necessitated by the strike schedule. Thereafter, during the period from November 8 until November 30, two such transition periods were scheduled.<sup>9</sup>

The Employer presented evidence that these daily transition periods created confusion, resulted in some physical injury, and posed a risk of physical harm to students. During this free time, where many classes had no adult supervision, students threw objects out of classroom windows, burned each other with ink pens, shot staples through the air, pushed, shoved, and chased each other and, in a particularly alarming incident, began to remove the safety guards from radial arm saws in an industrial arts class. One child was struck by an airborne pair of scissors and a developmentally handicapped child fell and hit her head against a desk.<sup>10</sup>

These activities occurred despite the administration's good faith attempts to monitor the transition periods by recruiting parent volunteers to come when they could, even on their lunch hours, to supervise so that the teachers could keep striking and schools could stay open all day. It was only after a new strike schedule was announced, which had teachers striking at a different time in each building and at a different time each day, and would have had replacements teaching alongside regular teachers in some buildings, and had regular high

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<sup>8</sup>We are not convinced that herding students en masse into one central location would have provided a more favorable alternative. We note that Principal Jenny attempted this approach and found it unsatisfactory. FF No. 9.

Nor are we persuaded that because other school districts have not responded to intermittent strikes in this way (FF No. 10), the response was inappropriate in this case. When presented with work stoppages, school administrators must have the discretion to assess the situation in their own districts and take whatever lawful action they believe will best assure student health and safety.

<sup>9</sup>Stipulation No. 7, Appendix.

<sup>10</sup>FF Nos. 12, 13.

school teachers leaving to strike in the middle of class, that the school administration petitioned for relief. The increasingly disruptive schedule came at a time when the parent volunteer force was dwindling and security forces, never intended even at their peak to monitor classrooms, had been reduced due to cost. It came on the heels of a series of heated encounters on the picket line, when tensions were running high.<sup>11</sup>

It is true, as counsel for the Employee Organization pointed out during closing arguments, that as of the time of hearing, no student had suffered a serious physical injury. So far, the scissors tossed through the air had not hit an eye. Fortunately, the curious students who had removed the safety guards from the power tools had not also switched them on -- either as a prank, or just to scare a classmate, or just to see what would happen. This does not mean that leaving unsupervised teen-agers with power tools or in chemistry labs under these circumstances carries no substantial risk of physical harm. It simply means that as of the date of hearing, Napoleon students had been extremely lucky. All the ingredients for disaster were there. And with the new strike schedule, they intensified.

Contributing to the safety risk by the time of the hearing was the level of emotional upheaval which had built up over the course of the strike, manifested as anger in the older students and confusion in the younger ones. High school students, already distressed about grades, class schedules, and the impact of the work stoppage on athletic programs, would now have their teachers walking out in the middle of class. Young children, already confused by a strike schedule which, though intermittent, was comparatively predictable, would now have a different schedule every day. Increased anger and confusion, coupled with a schedule which predicts even less volunteer supervision presented a formula for disaster.<sup>12</sup>

Contributing also to the risk was the atmosphere which had been created by the striking teachers. By failing to cooperate with the replacements even to the minimum degree required to provide educational services, the strikers contributed to an atmosphere where substitutes

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<sup>11</sup>FF Nos. 3, 15, 16, Stipulation No. 7, Appendix.

<sup>12</sup>FF Nos. 18, 19.

had difficulty keeping order in the classrooms and discipline problems increased. Large numbers of students simply left the premises when the regular teachers were striking, so that it became impossible for schools to effectively monitor their comings and goings.<sup>13</sup>

This is not to say that in every school strike, or every partial strike, the risk rises to the level of clear and present danger.<sup>14</sup> Strikes are by their nature disruptive. They are unpleasant. They are a lawful tool by which employees can pressure employers into compromise. But there are limits.

In this case, where prolonged animosity and emotional upheaval brought a significant risk of harm right into the classroom, right into the faces of the students, the limit had been reached.

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<sup>13</sup>FF Nos. 5, 17. The Union offered several Pennsylvania court decisions where schools strikes were found not to create a clear and present danger. We find those cases distinguishable from the instant matter. Armstrong Education Ass'n v. School District, 80 LRRM 2613 (Pa. Commonwealth Court, May 17, 1992) did not involve danger to students but rather a disruption of routine administrative procedures, harassment of school administrators by unknown persons, and a mere possibility that school days lost in the strike could not be made up. In Education Ass'n v. Wilkes-Barre School Dist., 128 LRRM 3482 (Pa. Commonwealth Court, April 6, 1987), the intermittent strike had proceeded for only seven days at the time of the determination; the Court was unwilling to assume it would continue on that basis and predict what harm might occur if it did. Likewise, in School District v. Education Assn., 79 LRRM 2455 (September 22, 1971), the Common Pleas Court overturned injunctive relief granted the same day a strike was to begin. At that point, there was no evidence from which to conclude that there was a substantial risk of physical harm. Similarly, Bellefonte Educ. Assn v. Board of Educ., 83 LRRM 2974 (Pa. Commonwealth Court, May 23, 1973), did not involve any risk of physical harm but only a possibility that district experimental and extracurricular activities would have to be suspended during the strike and that state substitutes might be lost.

<sup>14</sup>We are mindful of the 10th District Court of Appeals ruling in Ohio Council 8 AFSCME v. Summit County Child Support Enforcement Agency, 1992 SERB 4-61 (10th Dist Ct App, Franklin, 9-24-92), that partial strikes are not unauthorized *per se* and that partial strikes, like any other, must be evaluated on a case-by-case basis, as we have done here. We are also aware of the Franklin County Common Pleas Court decision in Groveport-Madison Local Ed Assn. OEA/NEA v. SERB, 1993 SERB 4-53 (CP, Franklin, 6-21-93), in which a partial strike, which complied with the notice requirements of R.C. 4117.23, was not unauthorized. No petition for clear and present danger determination was filed in the Ohio Council 8 or Groveport cases, and the strikes were not determined on that basis.

Opinion  
Case No. 93-STK-11-0005  
November 30, 1993  
Page 15 of 16

Therefore, we find that the strike by Napoleon teachers creates a clear and present danger within the meaning of O.R.C. §4117.16(A).

Pottenger, Vice Chairman, and Mason, Board Member, concur.