

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

and

Fort Frye Teachers Association, OEA/NEA, and Mr. Michael Rauch,

Intervenors,

vs.

Fort Frye Local School District Board of Education,

Respondent.

CASE NUMBER: 88-ULP-04-0200

OPINION

POHLER, Chairman:

This matter is before the Board on remand from the Washington County Court of Appeals, Fourth Appellate District for reconsideration under a new standard announced by the Ohio Supreme Court in *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485. In *Adena*, the Court rejected the "but for" analysis in cases involving a question of mixed motive, i.e., whether an employment decision was motivated by an individual's exercise of protected activity or by legitimate business justifications, and announced a new "in part" test.

I. BACKGROUND

In 1987, the collective bargaining agreement between the Fort Frye Local School District Board of Education (Respondent/Board of Education/School District) and the Fort Frye Teachers Association (Intervenor/Association) was renegotiated. After the parties were unable

OPINION

Case No. 88-ULP-04-0200

Page 2 of 16

to reach an agreement, a strike began on October 19, 1987. On November 2, 1987, the Board of Education reopened the schools utilizing replacement substitute teachers and Fort Frye teachers who crossed the picket line. A successor agreement was reached on November 16, 1987, the terms of which were substantially the same as the Board of Education's final offer before the strike. The Association 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 and collectively agreed to ostracize or shun the nonstriking teachers where possible while still performing their duties. The ostracism included glaring; refusing to speak in the hallways, unless necessary for the performance of professional duties or when the welfare of a student was involved; refusing to eat lunch together; and otherwise refusing to socialize with the nonstriking teachers. The Association never formally sanctioned these practices.¹

The school administrators' and Board Members' desire to have the staff put the strike behind them was frustrated by the shunning tactics. They viewed this activity as unprofessional. However, believing that the problem would be better addressed by informal talks rather than formal reprimands, the administration never took any action to discipline the striking teachers for shunning the nonstriking teachers.²

At the time of the strike, Michael Rauch had been employed by the School District as an Industrial Arts teacher since 1986. Mr. Rauch participated in both the strike and the post-strike shunning activities. During the strike, Mr. 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.³

¹Findings of Fact (F.F.) Nos. 9, 10, 23 and 24.

²F.F. Nos. 62 and 63.

³Stipulation (Stip.) No. 7; F.F. Nos. 14, 16-19.

The 1987-88 school year was Mr. Rauch's second year with the School District under a one-year limited contract. Pursuant to the collective bargaining agreement between the Board of Education and the Union, limited contracts for teachers with less than four years of service did not contain a "just cause" requirement for nonrenewal. After a teacher had taught for four years, nonrenewal of limited contracts could only be for "just cause".⁴

The school administration and members of the Board of Education received complaints from students, teachers, and parents about Mr. Rauch's conduct, expressing their dissatisfaction with his attitude and behavior and asking that his contract not be renewed. Specific incidents of alleged misconduct included the following:

- (1) Mr. Rauch threatened physical harm to a substitute teacher, Ken Mills, who inadvertently entered his classroom. Specifically, with clenched fist and in the presence of students, Mr. Rauch called Mr. Mills a "scab" and told him never to enter his classroom again.⁵
- (2) Mr. Rauch questioned a substitute teacher, Shirley Singree, in the teachers' lounge after the strike about whether or not she had "scabbed" during a strike at another school district.⁶
- (3) Mr. Rauch directed nasty looks at a student, Duane Ours, who had written a letter to the Editor of the Marietta Times that attributed certain conduct during the strike to the Association. Mr. Rauch also walked in his path in an uncrowded hallway. Another student, Jill Curry, also made a complaint regarding Mr. Rauch's treatment towards her. She stated that he would stand by her locker and stare at her. She also complained that Mr. Rauch made pejorative comments about her restaurant job.⁷

⁴Stip. Nos. 6 and 10.

⁵F.F. No. 31.

⁶F.F. No. 32.

⁷F.F. Nos. 27 and 33.

OPINION

Case No. 88-ULP-04-0200

Page 4 of 16

(4) Mr. Rauch glared at a nonstriking teacher, Kim Vineyard, in the school hallways after the strike and, in another incident, blocked her car on the school access road.⁸

(5) Mr. Rauch sabotaged an air compressor so that a class taught by Ralph Coffman, a nonstriking teacher, was unable to use it.⁹

Several school administrators spoke with Mr. Rauch on numerous occasions about these complaints and his attitude in general; however, his behavior did not change. Specifically, Principal Clayton Butler spoke to Mr. Rauch on approximately ten occasions during the first quarter of 1988. Many of the discussions were of a general nature regarding Mr. Rauch's feelings about the nonstriking teachers and his attitude towards teachers, students, and school generally. Mr. Butler indicated to Mr. Rauch that he did not need to socialize with the nonstriking teachers, but needed to speak more and to have a more cooperative attitude towards the nonstriking teachers. In the context of these general discussions, Mr. Butler also spoke specifically to Mr. Rauch about some of the above referenced incidents. During late February 1988, Superintendent Ronald Curry spoke to Mr. Rauch about his attitude. Mr. Curry did not bring up any alleged instances of misconduct during this meeting. Instead, the conversation centered around Mr. Rauch having to work cooperatively with other teachers. Also in February 1988, the Director of Student Services, David Branch, spoke to Mr. Rauch about his behavior and attitude telling him that community and staff members were upset with him about such things as his glaring at individuals and the incident involving the student Duane Ours. Additionally, two members of the School Board, Herb Kasum and Kent Place, spoke with Mr. Rauch regarding his attitude and conduct. Mr. Kasum, who cast the one vote for Mr. Rauch's renewal, telephoned him well before the vote by the Board on his contract to discuss his attitude in general and to advise him to improve such. Mr. Place, who resigned his position on the Board at the meeting before the vote on

⁸F.F. No. 28.

⁹F.F. No. 30.

OPINION

Case No. 88-ULP-04-0200

Page 5 of 16

Rauch's contract renewal, questioned Mr. Rauch about the air compressor and student incidents.¹⁰

On March 31, 1988 Superintendent Curry sent a written notice to Mr. Rauch informing him of his intention to recommend to the Board of Education that his teaching contract not be renewed. The reason given for the intended recommendation was that Mr. Rauch's attitude and conduct did not meet the expectations of the School District. Mr. Curry also sent similar notices to five other teachers: Lois Spenser, Andrew Sleek, Susan Cydrus, Melanie Fouss and Donis Yoder. All of the teachers recommended for nonrenewal were striking teachers and two, Ms. Spenser and Mr. Sleek, were among the teachers who ostracized the nonstriking teachers. The basis for the intended recommendation of nonrenewal for these two teachers was based on their performance and attitude.¹¹

Between the issuance of these notices from Superintendent Curry and the Board of Education's vote on their contract renewal, each of these teachers, including Mr. Rauch, were given an opportunity to meet with Mr. Curry and a union representative. The purpose of these meetings was to open a dialogue between the teacher and Mr. Curry, whereby the teacher could indicate his or her willingness to improve his or her performance and attitude as it related to relationships between students and teachers. At their individual meetings, Ms. Spenser, Mr. Sleek and Mr. Rauch made general statements to Mr. Curry that they would attempt to improve their attitude, performance and relationships with other teachers and students.¹²

Following the meeting with Superintendent Curry, Mr. Rauch's attitude remained unchanged. On April 21, 1988, the Board of Education met to consider Mr. Curry's

¹⁰F.F. Nos. 35-39, 41-42, 44-46.

¹¹Stip. Nos. 8 and 9; F.F. No. 47.

¹²F.F. Nos. 47, 49 and 50.

OPINION

Case No. 88-ULP-04-0200

Page 6 of 16

recommendations. At this meeting, Mr. Rauch was given an opportunity to address the Board. Neither Mr. Rauch nor the Board Members spoke to the above-referenced allegations of misconduct against him. Instead, Mr. Rauch made a presentation centering on the positive improvements that he had made in the Industrial Arts program during his two year tenure.¹³

Of the six teaching contracts being considered by the Board Members at this meeting, only Mr. Rauch and Melanie Fouss were actually nonrenewed. The stated reason for Mr. Rauch's nonrenewal was that his attitude and conduct as a teacher did not meet the expectations of the Board. Only one Board Member, Herb Kasum, voted to renew Mr. Rauch's teaching contract. Mr. Kasum testified that he was not influenced by the communications he received from community members, parents, or nonstriking teachers and that he thought Mr. Rauch's classroom teaching performance outweighed any negative considerations. Board Member Matthews based his vote to nonrenew Mr. Rauch both on Superintendent Curry's recommendation and on information he had personally gathered. Board Member Lang based her vote to nonrenew Mr. Rauch in large part upon community opposition to Mr. Rauch's renewal. Finally, Board Member Farson based his vote to nonrenew Mr. Rauch largely on the above-referenced alleged instances of misconduct. Mr. Farson knew that Principal Butler had spoken to Mr. Rauch on several occasions and believed that he knew of at least some of the allegations against him.¹⁴ Of the remaining four teachers whose contracts were also being considered, the Board Members approved Susan Cydrus' resignation effective upon completion of the 1987-88 school year and renewed the limited contracts of the remaining three teachers.¹⁵

On April 22, 1988, the Association, on behalf of Mr. Rauch, filed an unfair labor practice charge alleging that the Board of Education had nonrenewed Mr. Rauch's employment

¹³F.F. No. 51 and 57; Stip. No. 11.

¹⁴F.F. Nos. 58-61.

¹⁵Stip. Nos. 11 and 14.

22

contract in retaliation for his engaging in protected activities. On October 26, 1989, SERB found probable cause to believe that the Board of Education had committed an unfair labor practice in violation of Ohio Revised Code (O.R.C.) §§ 4117.11(A)(1) and (A)(3). A hearing was held and the hearing officer recommended that Mr. Rauch be reinstated and compensated for his lost wages and benefits. On March 21, 1991, SERB reversed the hearing officer and dismissed the unfair labor practice charge and complaint. While rejecting the "in part" test, SERB adopted the "but for" standard as articulated by the National Labor Relations Board.

An appeal was taken by the Association to the Washington County Common Pleas Court challenging SERB's application of the "but for" test and on January 12, 1993, the court found that the standard was appropriate and affirmed SERB's decision. Thereafter, the Union and Mr. Rauch filed an appeal to the Washington County Court of Appeals, Fourth Appellate District. In light of the new Ohio Supreme Court standard announced in *Adena* on June 23, 1993, the court of appeals reversed the trial court's judgment and remanded the case to SERB for further consideration under the new standard. Subsequently, Complainant, Respondent and Intervenor filed Supplemental Briefs with SERB outlining their positions under the new standard.

II. ANALYSIS

In *Adena*, the Ohio Supreme Court found the "but for" standard to be inconsistent with O.R.C. Chapter 4117. However, in doing so, the Court did not advocate returning to SERB's earlier "in part" standard announced in *In re Gallia-Jackson-Vinton Joint Vocational School Dist Bd of Ed*, SERB 86-044 (11-13-86). Instead, the Court announced a new "in part" test. The Court held that SERB's primary focus is to be the "motivation" of the employer. The *Adena* standard involves the following three-step process:

- (1) The Complainant has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by O.R.C. Chapter

4117. Where this burden is met, a prima facie case is created which raises a "presumption" of anti-union animus.

(2) The Respondent is then given the opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity for the purpose of rebutting the presumption of anti-union animus.

(3) The Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

A. COMPLAINANT ESTABLISHED A PRIMA FACIE CASE

To make out a prima facie case of discrimination under O.R.C. §4117.11(A)(3), Complainant must establish the following elements by a preponderance of the evidence: (1) That the employee at issue is a public employee and was employed at relevant times by Respondent; (2) That he or she engaged in concerted protected activity under O.R.C. Chapter 4117, which fact was either known to Respondent or suspected by Respondent; (3) That Respondent took adverse action against the employee under circumstances which could, if left un rebutted by other evidence, lead to a reasonable inference that Respondent's actions were related to the employee's exercise of concerted protected activity under O.R.C. Chapter 4117. *In re Warren County Sheriff*, SERB 88-014 (9-28-88). The *Adena* decision does not depart from this standard for establishing a prima facie case.

In the matter now before us, Complainant met its burden of establishing a prima facie case of discrimination by indicating protected activity that Mr. Rauch had engaged in that the Board of Education was aware of and which may have been the motive for its nonrenewing his teaching contract. Specifically, the parties stipulated the following facts: that Mr. Rauch was a public employee as defined by O.R.C. §4117.01(C) and employed by the Board of Education under a one-year limited contract during the 1987-88 school year; that he participated in the strike against the Board of Education; and that on April 21, 1988, the Board of Education voted to accept Superintendent Curry's recommendation that Mr. Rauch's

limited teaching contract be nonrenewed.¹⁶ Given these facts, and absent rebuttal, it is not unreasonable to infer that Mr. Rauch's teaching contract was nonrenewed due to his engaging in protected activities.

In support of its position that Mr. Rauch was illegally discriminated against due to his involvement in protected activities, Complainant stressed the point that he was a highly visible union supporter and played a prominent role in the 1987 strike of which both Superintendent Curry and the Board Members were aware. After the strike, they contend nonstriking teachers and certain individuals from the community opposed to the union began to campaign to have Mr. Rauch's employment terminated. Complainant argues that Mr. Rauch's "attitude and conduct", the basis for his nonrenewal, became unsatisfactory only after his participation in the fall strike and that Superintendent Curry himself testified that if asked the day before the strike, he would probably have recommended Mr. Rauch for renewal. Complainant states that although Mr. Rauch was allegedly nonrenewed due to his attitude and conduct, he was never apprised by Superintendent Curry or any other school administrator that the numerous instances of alleged misconduct cited by Respondent were the basis for Mr. Curry's nonrenewal recommendation. Further, Complainant argues that even though the parties' collective bargaining agreement contains a procedure for resolving complaints against teachers made by students, parents and members of the community, this procedure was never invoked to resolve the allegations against Mr. Rauch, whom it was stipulated had never been disciplined for any of the allegations. Finally, it was argued that Mr. Rauch's performance evaluations were, on the whole, above average and that at least one Board Member, Donna Lang, admitted that her decision to vote to nonrenew him was based on his actions during the strike.

Based on the above, Complainant has established a prima facie case and raised a "presumption" of antiunion animus.

¹⁶Stip. Nos. 3, 6, 7 and 11.

The arguments raised by Intervenor mirror those of Complainant in that the allegations of misconduct advanced by Respondent in support of its decision to nonrenew Mr. Rauch's teaching contract were concocted as a pretext to cover for its retaliation against him for having participated in the strike and engaging in union solidarity activities afterward.

B. REBUTTAL BY RESPONDENT

Pursuant to the *Adena* standard, where the burden of establishing a prima facie case has been met, a presumption of antiunion animus is raised. For the purpose of rebutting this presumption, Respondent is given the opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity. Here, Respondent denies that the decision to nonrenew Mr. Rauch's teaching contract had anything to do with antiunion animus, but instead was based on the fact that his attitude and conduct as a teacher did not meet the expectations of the Board of Education and that O.R.C. 53319.20 grants the Board of Education the authority to make such rules and regulations as are necessary for the government of its employees and the pupils of the school. Further, Respondent points out that Mr. Rauch was working pursuant to a limited teaching contract and that nonrenewal of such contracts is controlled by the provisions of the parties' collective bargaining agreement, which does not contain a "just cause" standard for nonrenewing limited contracts of teachers who have taught less than four years in the district.

As evidence that its decision to nonrenew Mr. Rauch's teaching contract was arrived at independently of his involvement in protected activities, Respondent cited the many instances of misconduct reported against Mr. Rauch by teachers, students and community members, specifically: his threatening physical harm to a substitute teacher; questioning another substitute teacher as to whether or not she had "scabbed" during a strike at another school district; glaring at a nonstriking teacher and blocking her car on the road; directing nasty looks at a student and walking in his path; and sabotaging an air compressor so that a nonstriking teacher's class was unable to use it. Respondent emphasized the fact that Mr.

Rauch was spoken to on numerous instances about his attitude and conduct in general, as well as these specific incidents, by school administrators and even Board Members.

Respondent argues that Complainant and Intervenor have failed to prove that Mr. Rauch was treated differently than others because of his union activity and that there was absolutely no evidence presented to indicate that nonstriking teachers engaged in acts similar to those which formed the basis for Respondent's action on Mr. Rauch's contract. Respondent also points out that the evidence establishes that of the six teachers receiving notices of intent to recommend nonrenewal, only three were given reasons based on attitude and conduct and that of those three, only Mr. Rauch was actually nonrenewed because he, unlike the others, continued to be obstinate and unyielding in his behavior.

In conclusion, Respondent argues that its decision to nonrenew Mr. Rauch's teaching contract was based on his inability to meet the Board of Education's professional expectations of a teacher with respect to his attitude and conduct, and not because of his involvement in protected activities. Additionally, it points out that Complainant failed to produce evidence affirmatively linking Mr. Rauch's nonrenewal to protected strike activity and had likewise failed to present sufficient evidence of a general antiunion sentiment among Board Members and Superintendent Curry.

C. PREPONDERANCE OF THE EVIDENCE

When making the decision whether antiunion animus actually motivated a respondent to take certain action against an employee, the *Adena* standard mandates that SERB focus its inquiry on the employer's motivation and not the employee's work history, which may only be considered as circumstantial evidence and not as a separate inquiry characterized as a defense. Evaluation of evidence is not bifurcated, but according to the Court, "... the requirements of O.R.C. Chapter 4117 are best fulfilled when SERB considers the evidence before it in the framework of a single inquiry, focusing on the intent of the employer." *Adena*,

supra, at pg. 498.)

In the present matter, it is undisputed that Mr. Rauch was an active participant in the 1987 strike against the Board of Education and that he was later recommended for nonrenewal. However, five other teachers who also participated in this strike were recommended for nonrenewal at the same time as well, thereby negating any inference that Mr. Rauch was singled out for his strike activity. Additionally, although only teachers who had participated in the strike were recommended for nonrenewal, absolutely no evidence was offered, other than this coincidence, to suggest that Respondent engaged in disparate treatment between them and the nonstriking teachers. Further, it is also important to note that of the six teachers whose contracts were in question, only two, including Mr. Rauch, were ultimately nonrenewed by the Board of Education.

It is also undisputed that Mr. Rauch participated in the social ostracism or shunning of the nonstriking teachers following the strike and that the stated basis for his contract nonrenewal was that his attitude and conduct did not meet the expectations of the Board of Education. Again, however, Mr. Rauch was not singled out. The basis for the recommendation of nonrenewal for two other teachers as well, Lois Spenser and Andrew Sleek, was also partially based on their attitude. Like Mr. Rauch, both Ms. Spenser and Mr. Sleek had participated in ostracizing nonstriking teachers. However, unlike Mr. Rauch, their contracts were renewed by Respondent. After receiving notice of Superintendent Curry's intent to recommend nonrenewal of their teaching contracts to the Board of Education, Ms. Spenser and Mr. Sleek individually met with Superintendent Curry and a union representative to express their willingness to improve their performance and attitude as it related to relationships between students and teachers. Mr. Rauch also had a similar meeting with Superintendent Curry. Ms. Spenser and Mr. Sleek each pledged to Superintendent Curry that they would work on improving their attitude. Mr. Rauch also made a similar commitment. Based on the fact that their contracts were renewed, Ms. Spenser and Mr. Sleek apparently kept their promise. Mr. Rauch, on the other hand, did not. We find this comparison between

OPINION

Case No. 88-ULP-04-0200

Page 13 of 16

the three similarly situated teachers pivotal in our conclusion that Respondent's motivation for nonrenewing Mr. Rauch was not based upon his previous exercise of protected activity, but instead was premised solely on his individual post-strike behavior and performance unrelated to his exercise of any fundamental rights.

As previously stated, several allegations of misconduct were made against Mr. Rauch by students, teachers and other individuals. Complainant contends that although these allegations formed the basis for Superintendent Curry's recommendation of nonrenewal, Mr. Rauch had never been informed of the allegations by him or any other administrator. This position is not supported by the record, which in fact, clearly indicates just the opposite. Several school officials testified that they not only spoke with Mr. Rauch about his attitude in general, but also had spoken to him about some of the specific allegations that had been made against him.¹⁷

Principal Clayton Butler spoke to Mr. Rauch on approximately ten occasions during the first quarter of 1988. Although many of these discussions were of a general nature regarding Mr. Rauch's attitude, Principal Butler also spoke to him specifically about some of the alleged incidents. The Director of Student Services, David Branch, also spoke to Mr. Rauch about his behavior and attitude and that the alleged incident involving the student, Duane Ours, was specifically mentioned. Mr. Rauch was also questioned about the student incident by school Board Member Kent Place, who resigned his position on the Board of Education at the meeting before the vote on Mr. Rauch's contract renewal. Mr. Place also questioned Mr. Rauch about the incident involving the air compressor. In addition to testimony that these school officials spoke directly to Mr. Rauch about some of these alleged incidents of misconduct, Superintendent Curry and Board Member Herb Kasum also spoke to him about his attitude and conduct in general.¹⁸

¹⁷F.F. Nos. 35-39, 41-42, 44-46.

¹⁸F.F. Nos. 35-39, 41-42, 44-46.

Based on the above, Complainant's argument that Mr. Rauch was not given notice of the alleged instances of misconduct made against him which formed the basis for his nonrenewal is totally lacking in merit. Furthermore, even if it were not, Respondent had no duty to inform Mr. Rauch of the basis for its decision to nonrenew his teaching contract due to the absence of a "just cause" provision in the parties' collective bargaining agreement.

Finally, Complainant's argument that Mr. Rauch's attitude and conduct became unsatisfactory only after he participated in the strike and that Superintendent Curry testified he would have probably recommended renewal of his contract before the strike is without merit. No evidence was offered that would indicate Mr. Rauch had engaged in similar instances of misconduct before the strike as those which formed the basis for his nonrenewal after the strike. This Board previously held, and continues to hold, that Mr. Rauch's post-strike activities were not protected and this determination was not disturbed on appeal. The record clearly indicates that it was Mr. Rauch's own misconduct after the strike and his failure to reform, as promised, which led to the majority of the Board Members' decision to nonrenew his teaching contract.

Complainant contends, however, that at least one Board Member's vote against Mr. Rauch was influenced by his strike activity. According to Complainant, Board Member Lang admitted that her decision to vote to nonrenew Mr. Rauch was based on his actions during the strike. We have reviewed the specific testimony referred to by Complainant⁹, and inasmuch as it is only a small excerpt taken from her full testimony, we find that it does not paint a complete picture. Complainant suggests that because upon direct questioning, Board Member Lang responded that she thought it inappropriate for Mr. Rauch to have referred to teachers who crossed the picket line as "scabs" and that his having done so would in part justify his being nonrenewed, this, in and of itself, indicated antiunion sentiments which led to the nonrenewal of his teaching contract. We disagree for two reasons. First, even if this

⁹Transcript, p. 537.

OPINION

Case No. 88-ULP-04-0200

Page 15 of 16

testimony were indicative of antiunion sentiments, which we do not believe it is, Board Member Lang's one vote out of four was hardly sufficient to be outcome determinative on Mr. Rauch's contract renewal. Second, the complete record indicates that Board Member Lang, like Board Members Kasum and Matthews, based her vote to nonrenew Mr. Rauch's teaching contract in large part upon community opposition to him. Board Member Lang testified that she received many complaints from community members, parents and nonstriking teachers that were not related to Mr. Rauch's strike activities or any post-strike activities formally endorsed by the Union. Instead, most of the complaints were from parents in reference to Mr. Rauch ostracizing the nonstriking teachers and harassing students.²⁰

Considering all of the above, a preponderance of the evidence supports the finding that Respondent did not act, at least in part, to discriminate against Mr. Rauch for the exercise of his protected rights and that an unfair labor practice did not occur.

III. PROCEDURAL ISSUE

In addition to Intervenor's substantive arguments, they also raised a procedural issue regarding SERB's jurisdiction. Specifically, it is argued that since the issue of Respondent's motivation for terminating Mr. Rauch's employment as a violation of the First Amendment of the United States Constitution has already been decided by a federal court in Rauch v. Fort Frye Local School Dist Bd of Ed., et al., Case No. C2-91-0679, United States District Court, Southern District of Ohio, Eastern Division, SERB is now precluded from relitigating the same issue pursuant to the doctrine of issue preclusion/collateral estoppel.

This argument is not well taken. The doctrine of issue preclusion/collateral estoppel is not applicable in this instance. Even though the same issue as to Respondent's motive for nonrenewing Mr. Rauch's teaching contract has already been decided by a court, the context

²⁰F.F. No. 60.

in which it was addressed in that forum was as a constitutional issue. The issue before SERB is completely separate from that constitutional question. Here, the issue is whether guaranteed protected rights under O.R.C. Chapter 4117 have been violated, and only SERB has the initial authority to make that determination.

IV. CONCLUSION

Only when the employer's decision regarding the employee was actually motivated by antiunion animus must an unfair labor practice be found. We find that (1) Complainant presented sufficient evidence to establish a prima facie case and create a presumption of antiunion animus, (2) Respondent presented sufficient evidence to rebut the presumption and (3) a preponderance of the evidence supports the findings that Respondent did not act, at least in part, to discriminate against Mr. Rauch for the exercise of his protected rights and, consequently, that an unfair labor practice did not occur. Having carefully reconsidered this matter under the new "in part" standard, the Board finds by a preponderance of the evidence that the action taken by Respondent to nonrenew Mr. Rauch's teaching contract was not motivated by his exercise of rights protected by O.R.C. Chapter 4117, but instead, was premised on legitimate business justifications having to do with his individual unprotected post-strike activities. Based upon the above considerations, all charges against Respondent in this matter are dismissed.

POTTENGER, Vice Chairman, and MASON, Board Member, concur.