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. Steven Miller,

Intervenors,

vs.

Fort Frye Local School District Board of Education,

Respondent.

CASE NUMBER: 92-ULP-03-0156

OPINION

POHLER, Chairman:

This case is before this Board on exceptions to the Hearing Officer's Proposed Order and involves a question of mixed motive, whether an employment decision was motivated by an individual's exercise of protected activity or by legitimate business justifications. A hearing was conducted after SERB found probable cause to believe that the Fort Frye Local School District Board of Education (Respondent/Board of Education/School District) had violated Ohio Revised Code (O.R.C.) Sections §§4117.11(A)(1) and (A)(3) by discriminating against a job applicant for his exercise of protected activities by not appointing him to a position he sought with the School District.

On February 20, 1992, the Board of Education advertised for the position of Athletic Director, a supplemental contract assignment. Only two employees submitted applications, Steven Miller and Dennis Bahen. Both men were interviewed individually and ultimately Mr. Bahen was selected for the position. On March 20, 1992, Fort Frye Teachers Association,

OEA/NEA, and Mr. Miller (Intervenors) filed an unfair labor practice charge with SERB regarding the selection.

Following a hearing, the hearing officer concluded, under the "but for" standard announced in *In re Ft. Frye Local School Dist Bd of Ed*, SERB 91-005 (7-17-91), that Respondent had not violated O.R.C. §§4117.11 (A)(1) and (A)(3) by hiring one applicant instead of the other, but that pursuant to *In re Lakota Local School Dist Bd of Ed*, SERB 89-019 (8-23-89) an O.R.C. §4117.11(A)(1) violation had occurred when they questioned the applicants during their interviews about their ability to work with co-workers following a strike.

Shortly after the Hearing Officer's Proposed Order and exceptions thereto were submitted to SERB for a ruling, the Ohio Supreme Court issued *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485, which has direct bearing on the present matter. In *Adena*, the Court expressly overruled SERB's "but for" standard and announced a new "in part" test for reviewing mixed motive cases. This being so, the present case was remanded to the hearing officer for review under the new standard with instructions to have the parties submit supplemental briefs addressing said standard.

On October 20, 1993, a revised Hearing Officer's Proposed Order was issued based upon the *Adena* decision and supplemental briefs from the parties as directed by the Board. Exceptions to the revised proposed order were filed by Respondent and by Intervenor. Complainant filed its exceptions and a response to Respondent's exceptions.

I. BACKGROUND

In the fall of 1987, the Fort Frye Teachers Association, OEA/NEA and the Board of Education were parties to a bitter, relatively lengthy strike which polarized the School District and pitted teacher against teacher. Not all teachers supported the strike; several crossed the picket line including some coaches. Mr. Bahen originally participated in the strike, but later

crossed the picket line and taught. Mr. Miller actively participated in the strike. He served as picket line captain and led the striking teachers while the strike was ongoing and in a slow down on the first day the School District resumed school. Following the strike there was a great division between teachers who honored the picket line and teachers who had crossed the picket line. Striking teachers and non-striking teachers communicated solely on a professional basis. The two groups did not socialize or engage in any discussions that were unrelated to classroom duties. Even though the strike took place several years ago, teachers still talk about those who stayed out and those who crossed the picket line. Mr. Miller testified at the SERB hearing that "shunning", a practice of ostracizing opposing factions, still occurs now between the striking and nonstriking teachers.[1]

Mr. Bahen and Mr. Miller were both employed by the School District at the time they submitted their applications for the supplemental position of Athletic Director. Mr. Miller had been employed with the School District since August 29, 1972, as a Social Studies teacher and became tenured on April 16, 1986. Mr. Miller previously held the Athletic Director post from 1980 until he voluntarily resigned in 1985. Mr. Miller had also been employed as a coach, and his coaching experience included: two years in girls basketball; one year in boys basketball; and one year in golf.[2] In addition to his professional duties, Mr. Miller was also involved in union activities. He testified that he had twice served as president of the teacher's union; had been the head negotiator on numerous occasions; and that he was currently serving as Grievance Chairman.[3]

Mr. Bahen was also a Social Studies teacher. In addition to his teaching duties, he also acted as a coach in four different sports. Mr. Bahen's coaching experience included twelve years in boys basketball; four years in girls basketball; six years in football; and six years in

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[1]Transcript (Tr.), pp. 120-122.

[2]Stipulations (Stip.) Nos. 6, 7 and 16.

[3]Tr., pp. 119-120.

girls softball.[4]

The interviews for the position of Athletic Director were conducted by Superintendent Ronald Curry, Principal Samuel Sells, and Director of Student Services Robert Heinlein. Mr. Curry was responsible for making the recommendation to the Board of Education regarding the selection. At Mr. Curry's direction, Mr. Sells and Mr. Heinlein developed questions and prepared everything for the interviews. During the interviews, Mr. Curry asked both applicants independent questions as well as prepared questions. The questions for Mr. Miller were similar to those asked of Mr. Bahen. Of those questions asked both applicants was the following hypothetical question, referred to as the "Morgan hypothetical" in the transcript:

> Given the opportunity to schedule a larger school for football, assuming that we know that we're going to get beat, would you do that for financial gain? We know we can get a bigger gate from the larger school.[5]

Superintendent Curry testified that the most important and perhaps most instrumental factor in his selection of the candidate for the position of Athletic Director was their response to this question. At the SERB hearing, Mr. Curry stated that in playing a larger school there were chances of student injury. He testified that Mr. Miller's answer to the hypothetical question was that he would play the larger school and, thus, go for the bigger gate receipt, whereas Mr. Bahen's response was that he did not want the students injured and therefore would not play the larger school.[6]

Due to some past events involving Mr. Miller, some questions were directed specifically to him. He was asked about signing an affidavit regarding the use of an athletic field by the public, which was the subject of a lawsuit against the school. During the period

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[4]Stip. Nos. 14 and 15.

[5]Tr., pp. 54-58, 97-99.

[6]Tr., pp. 192-194.

of time Mr. Miller previously held the Athletic Director position, he was approached by a student initiating the legal action and was asked to sign an affidavit concerning the state of the athletic complex. Mr. Curry testified that he felt Mr Miller's affidavit, in which he had stated that the athletic field was not open to the public, was false because Mr. Miller knew that a fitness trail passed straight through it and that people had to have access in and out of the facility for that purpose.[7] Mr. Miller was also questioned about the handling of certain funds during his previous tenure as Athletic Director. Specifically, Mr. Curry testified that during the interviewing process he questioned Mr. Miller about an incident in which funds raised from selling candy were found missing and which ultimately resulted in a State Auditor's finding against several teachers, including Mr. Miller.[8]

During the course of the interview, Mr. Miller, who had not crossed the picket line or taught during the teachers' strike, was asked about his ability to work with other individuals who had crossed the picket line. Mr. Bahen, who had crossed the picket line and continued to teach during the strike, was asked about his ability to work with other individuals who had not crossed the picket line during the strike.[9]

Mr. Curry was not present in the School District when Mr. Miller was Athletic Director. Mr. Curry was aware that Mr. Miller had been a strike captain during the 1987 strike and had observed him on the strike line. Respondent was aware that Mr. Miller had been active in union activities and had held the position of Grievance Chairperson. Mr. Bahen was also involved in the strike when it began and Respondent admitted having knowledge that he crossed the picket line and taught during the strike, but lacked any knowledge or information concerning his union membership.[10]

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[7]Tr., pp. 25, 192-194.

[8]Tr., pp. 138-148.

[9]Stip. No. 21.

[10]Admissions Nos. 8 and 11; Findings of Fact (F.F.) No. 7.

In addition to the interviews, the applicants' performance evaluations were also considered. While employed by the School District, Mr. Miller received several staff performance appraisals for his teaching position and at least two co-curriculum evaluations from his supplemental post as Athletic Director.[11] Over the years of his employment with the School District, Mr. Bahen also received several staff performance appraisals for his teaching position and two from coaching.[12] With respect to their co-curriculum evaluations, Mr. Bahen received exceptionally high marks in practically every area he was rated with only one evaluation noting the need for improvement in bench conduct behavior, self-control and organization. Mr. Miller's evaluations, on the other hand, were not quite as positive, with one mentioning many areas for improvement.[13]

Four members of Respondent's Athletic Boosters Club met with Mr. Sells, Mr. Curry, and Mr. Heinlein. The opinion and recommendation of the Boosters was very important to those concerned in selecting the Athletic Director. The Boosters stated that there had been friction in the past between the Boosters and the Athletic Director. The Boosters were aware of the applicants for the position of Athletic Director. Two of the four Boosters expressed a preference for Mr. Bahen over Mr. Miller. The 1987 strike was not discussed during the meeting with the Boosters.[14]

After the interviews were concluded, Mr. Curry told Mr. Sells and Mr. Heinlein that he was going to recommend Mr. Bahen for the position. Mr. Curry told them that he thought Mr. Bahen was a "better team player" than Mr. Miller. He also stated that his reasons for recommending Mr. Bahen for the position were: the Athletic Booster Club's recommendation; the answers given to his "Morgan hypothetical" question; Mr. Miller's evaluations while he was Athletic Director; Mr. Miller's involvement in the lawsuit against the school district; and

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[11]Exhibits (Exh.) 1A-E and 2A-B.

[12]Exh. 8A-F and 9A-B.

[13]Exh. 2A-B and 9A-B.

[14]F.F. No. 8.

the Auditor's findings from the school candy sale. On March 12, 1992, Mr. Curry sent a memo to Mr. Miller indicating that he would be recommending Mr. Bahen for the position of Athletic Director.[15]

II. ANALYSIS

The first issue before the Board is whether the Respondent violated O.R.C. §4117.11 (A)(1) & (A)(3) when it did not appoint Mr. Miller as Athletic Director.

Upon review under the standard set forth in *Adena*, the hearing officer concluded that Complainant and Intervenors had failed to present sufficient evidence to warrant a finding that Respondent had violated O.R.C. Chapter 4117 when it did not appoint Mr. Miller; that the requisite quantum of evidence to find a violation had not been met; and that Respondent showed legitimate, non-discriminatory reasons for its decision. The hearing officer held that although the record did show Mr. Miller was a public employee who had engaged in concerted protected activity that Respondent was aware of, Respondent had successfully rebutted all allegations that its actual motivation for not hiring him as Athletic Director was his engagement in those protected activities.[16]

In *Adena*, the Ohio Supreme Court rejected SERB's "but for" test; however, they did not embrace or 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) and overruled in *In re Ft. Frye Local School Dist Bd of Ed, supra*. In rejecting such a narrow application of the test, the Court stated that even though they had found the "but for" approach to be inconsistent with O.R.C. Chapter 4117, they also found that unless the employer was given the opportunity to counter the evidence presented by the employee, the earlier "in part" approach would not be the most appropriate test. However, even though the

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[15]F.F. No. 14 and Stip. No. 22.

[16]Revised H.O.P.O., pg. 5.

employer is given this opportunity to counter evidence presented by the employee or employee organization, the new standard mandates that SERB's primary focus be on the motive of the employer.

The *Adena* standard involves a 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 R.C. Chapter 4117. Where this burden is met, a prima facie case is created which raises a "presumption" of anti-union animus.
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> (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.
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> (3) The Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

The third step of *Adena* 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 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 p. 498.)

A. COMPLAINANT ESTABLISHED A PRIMA FACIE CASE

With respect to the first issue raised in this case, Complainant met its burden of establishing a prima facie case of discrimination by indicating that Mr. Miller had engaged in protected activity, that Respondent was aware of this activity and that this activity may have been the motive for Respondent not awarding the Athletic Director position to Mr. Miller. Complainant and Intervenors argue that the real reason Mr. Miller was not selected for the Athletic Director position was his prior involvement in a course of concerted activities.

Specifically, he was an active participant in a 1987 strike against the school; served several years as Grievance Chairman; served as the chief negotiator during contract negotiations on several occasions and finally had been involved in a series of legal proceedings against the school district in support of the union and its members relating back to the strike of 1987.

Complainant and Intervenors further argued that Respondent's cited business justifications for not selecting Mr. Miller for the Athletic Director position were a pretext to cover for its anti-union animus. In support of this position they presented several arguments.

With respect to the "Morgan hypothetical", they stated that premising a hiring decision as important as filling the Athletic Director post on the answer to a hypothetical question instead of the applicants' teaching and coaching credentials was suspect. Additionally, they argued the question itself was flawed in that the School District already played a larger school and, therefore, safety for the students could not have been a primary concern as claimed. Next, in regard to Mr. Miller's perceived inability to handle money, Complainant and Intervenors argued that no evidence had been offered to establish that Mr. Miller had any problems handling money for the Athletic Booster Club or gate receipts and that his willingness to spend his own money revealed a commitment to the athletic program. As to the affidavit Mr. Miller provided to a student involved in a lawsuit against the School District, Complainant and Intervenors stated that during the time Mr. Miller previously held the Athletic Director position, he had been approached by a plaintiff in an action against the School District and was asked to sign an affidavit concerning the state of the athletic complex. According to the parties, he was simply performing a civic duty. Regarding the Athletic Booster Club's input that they could work better with Mr. Bahen, Complainant and Intervenors argued that the members of the interviewing team met with only four club members to discuss the selection for the position and made no effort to meet with the entire group. They contend that even with the four members questioned, a consensus was not reached because only two voted in favor of Mr. Bahen and the other two were neutral. Finally, regarding Mr. Miller's prior evaluations when he previously served as Athletic Director, Complainant and Intervenors argued that although these evaluations did note areas for improvement, those problem areas specified have now been corrected and Mr. Miller was never questioned about these

evaluations during the interview to receive his input.

Respondent argued that Complainant did not meet its initial burden of establishing a prima facie case. According to Respondent, although it was shown that Mr. Miller was a public employee that had participated in a strike against the School District and that it did not hire him as the Athletic Director, its position was that Complainant failed to establish that Respondent was motivated at all by unlawful motives in making its selection for Athletic Director and, thus, Complainant failed to establish even a prima facie case of discriminatory conduct.

This argument is not well taken and the assessment in the initial Hearing Officer's Proposed Order was accurate. 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 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 unrebutted 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).

In establishing a prima facie case, the inquiry is not whether the employer was "motivated by unlawful motives" in taking the action in question, but rather whether the employer took action against the employee in circumstances from which, absent rebuttal, it could be reasonably inferred the action was related to the employee's protected activity, as stated above. The *Adena* decision does not depart from SERB's standard in establishing a prima facie case. In this regard, the Court held:

> Under the "in part" test to determine the actual motivation of an employer charged with an unfair labor practice, the proponent of

> the charge has the initial burden of showing that the actions by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. Where the proponent meets this burden, a prima facie case is created which raises a presumption of anti-union animus. The employer is then given an opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity, to rebut the presumption. The State Employment Realtions Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred. (*Adena, supra*, at Syllabus 2.)

B. REBUTTAL BY RESPONDENT

Respondent met its burden under *Adena* of rebutting the presumption by offering evidence that notwithstanding Mr. Miller's union involvement and strike activity, its decision to hire Mr. Bahen instead of Mr. Miller was the result of the following independent reasons:

1. Mr. Miller's response to Mr. Curry's hypothetical question concerning scheduling an open date on the football schedule;

2. Mr. Miller's perceived inability to handle money;

3. Mr. Miller's affidavit which he provided to a student involved in a lawsuit against the District;

4. The Athletic Booster Club's input suggesting they could work better with Mr. Bahen;

5. Mr. Miller's prior evaluations as Athletic Director.

Respondent admitted having knowledge of Mr. Miller's active involvement in union activities and that he had held the position of Grievance Chairperson. Respondent further admitted that Dennis Bahen crossed a picket line and taught during the strike, but it lacked any knowledge or information concerning his OEA/NEA membership.[17] However, according to Respondent, this awareness of either of the individual's involvement in protected activities

[17]Admissions Nos. 8 and 11.

played no role in its decision to select one candidate over the other. Instead, the decision was based on the above business concerns.

Respondent argued that the applicants' response to the "Morgan hypothetical" was the most important and perhaps most instrumental factor in Mr. Curry's selection since it involved one of the key roles of the Athletic Director and that Mr. Bahen's concern for the safety of the students opposed to Mr. Miller's answer that he would go for gate receipts stood out in his mind. As to Mr. Miller's perceived inability to handle money, Respondent points to an incident that occurred when Mr. Miller previously held the Athletic Director position where funds were found missing and an auditor's finding was made against him and several other teachers. Additionally, there was concern expressed about the manner in which Mr. Miller had handled Booster Club money. Respondent argues that its consideration of an affidavit Mr. Miller provided to a student involved in a lawsuit against the school district was a legitimate business concern since the statement provided by Mr. Miller not only impeded the settlement of the case but also displayed his inability to be truthful. With respect to the Athletic Booster Club's input, Respondent emphasized the importance of the club to the Athletic Department and the close working relationship between it and the Athletic Director. According to Respondent, the Athletic Booster Club had previously worked with Mr. Miller as the Athletic Director and recommended hiring Mr. Bahen for the job. Finally, Respondent argues that concern with Mr. Miller's evaluations when he previously held the Athletic Director position were valid and that these evaluations spoke for themselves verifying their concerns over tardiness, absence and missing games.

C. PREPONDERANCE OF THE EVIDENCE

It appears from the record that both candidates were qualified for the Athletic Director position with one distinguishing himself by previously having held the job for five years and the other distinguishing himself with considerably more coaching experience. Given a situation such as this, any employer would find itself with a difficult decision to make. In this case, Mr. Curry alone was responsible for making the recommendation to the Board of Education and he testified as to the importance he placed on the "Morgan hypothetical" in making his

decision. Therefore, even though it may seem illogical to the Complainant and Intervenors that the selection was premised on a hypothetical question instead of other factors such as teaching experience and coaching credentials, without more justification, we cannot displace the employer's thinking in making a selection that it felt best suited its needs.

The record evidence also supports Respondent's decision not to hire Mr. Miller because of a perceived inability to handle money. Since the Athletic Director position apparently involved this task, there was nothing unreasonable about Respondent's interest in the integrity of the individual selected to fill the job. Nothing in the record points to any concerns having been raised about Mr. Bahen in this regard; however, reservations were expressed about Mr. Miller. Therefore, given the fact that the Auditor's Office did make a finding against Mr. Miller and several other teachers regarding the candy money incident and given that the other candidate's integrity was never called into question, Respondent's decision not to hire Mr. Miller for this reason was a legitimate business justification.

The record indicates that the Athletic Booster Club and Athletic Director are required to work together closely and, therefore, it appears to have been sound business judgment to seek the club's input regarding the selection for the Athletic Director position. Complainant and Intervenors argued, however, that since the full club did not participate in making a recommendation and only two of the four present recommended Mr. Bahen, there was not a consensus and, therefore, this justification was another pretext to camouflage Respondent's true reason for not selecting Mr. Miller. We disagree. Notwithstanding the fact that the record does not provide information as to exactly how many members are in the Athletic Booster Club, Complainant's and Intervenors' arguments lack merit since of the four members present, none recommended Mr. Miller. The two who did not recommend Mr. Bahen remained neutral. Thus, it appears that the Athletic Booster Club's input was a legitimate business justification.

Another reason offered by Respondent as a legitimate business justification for not hiring Mr. Miller as Athletic Director was his having provided an affidavit allegedly containing false information to a student involved in a lawsuit against the School District. Complainant,

on the other hand, argued as to the truthfulness of the document signed by Mr. Miller and that this justification was simply a pretext. This is the extent of the information offered on this issue. The affidavit in question was not submitted as evidence nor was any other information which would tend to support, prove or disprove Complainant's position. For this Board to make a thorough and fair assessment in this instance as to whether the business justification was legitimate or a pretext, more information would be required, but it is not necessary to reach a decision.

Finally, in making his choice between the candidates for the position, Mr. Curry focused on those evaluations which pertained to both candidates' prior coaching experience and not those relevant to their primary duties as Social Studies teachers. Since one of the job candidates had previously held the Athletic Director position for five years and the other had prior coaching experience with the School District, it seems reasonable that Respondent would rely upon these particular evaluations when making the selection. We have reviewed both candidates' performance evaluations and find that overall, Mr. Bahen's were better than Mr. Miller's. Even though it appears that Mr. Miller's performance improved following the negative evaluation, the fact remains that when a comparison between his two evaluations is made with the two of Mr. Bahen, there is little question that those of Mr. Bahen are better. Therefore, again, this business justification appears legitimate.

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. Miller for the exercise of his protected rights and that an unfair labor practice did not occur.

D. INTERVIEW QUESTIONS

The second issue raised in this case was whether Respondent violated O.R.C. §§4117.11(A)(1) and (A)(3) by questioning the job applicants during their interviews for the Athletic Director position about their ability to work with co-workers following a strike. Specifically, both Mr. Miller and Mr. Bahen were asked the following question during their

interviews:

> During the past there have been times when you and certain coaches have not communicated as a result of the strike. If you become A.D. how will you be able to communicate with them?[18]

The hearing officer concluded that this inquiry was a *per se* violation pursuant to *In re Lakota Local School Dist Bd of Ed.* We disagree. A careful reading of *Lakota* does not lend itself to the interpretation that *any* question asked of an employee by an employer which pertains to union activities constitutes a *per se* violation. In *Lakota*, an unfair labor practice was held to have been committed when an employee was questioned by a member of management during the pendency of a representation election about other employees' support for the union. The principal asked an employee, "Who is for the union?" We found this questioning to be inherently coercive on the grounds that it would tend to inhibit employees' pursuit of rights guaranteed in O.R.C. Chapter 4117 given the environment in which the statements were made and who made the statements to whom. Accordingly, the Board concluded that "this type", not *every* type, of communication was a *per se* violation. Clearly it was not mandated through this decision that *all* questioning regarding protected activity was prohibited. A strict *per se* standard does not permit the flexibility needed in situations where a thorough examination of the facts would clearly indicate that those employee rights guaranteed under O.R.C. Chapter 4117 have neither been inhibited nor interfered with by the employer's reasonable inquiry.

Lakota and the matter now before us present very different facts which in our opinion warrant different results. In the present case, we do not find the inquiry as to the applicant's ability to work with co-workers following a strike inappropriate. Initially, it is important to point out that the mere mention of the word "strike" does not establish a violation. Here, the question was merely a reference to a point in time when differences between employees may have arisen. The question dealt with past difficulties in communication between coaches and these applicants and their present ability to communicate with these same coaches in the role

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[18]F.F. No. 17.

of Athletic Director. No evidence was introduced to dispute this justification or to suggest that the inquiry was prompted by antiunion animus.

Secondly, unlike *Lakota*, coercion is not the issue in this case, discrimination is the issue. However, we do not find discriminatory treatment to be a factor. With respect to the latter, O.R.C. §4117.11(A)(3) states:

> (A) It is an unfair labor practice for a public employer, its agents or representatives to:
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> . . .
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> (3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code.
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> . . .

Here, both parties stipulated that during the course of the interview, Mr. Miller was asked about his ability to work with other individuals who had crossed the picket line during the strike which occurred in 1987, and Mr. Bahen was asked about his ability to work with other individuals who had not crossed the picket line during the same strike.[19] Both candidates responded that they did not believe they would have any problem communicating with anyone due to the strike.[20] We find this inquiry by Respondent was neither coercive, threatening nor discriminatory, based upon the environment in which it was asked and its content. Given that both candidates were asked the same question and gave the same reply, we find that any impact from this questioning would be *de minimus*. Likewise, there is no evidence to conclude that their participation in the strike, their union loyalties, support of organized labor issues or freedom of association were the basis of the question being asked in the first place.

Thirdly, given the type of position involved, we find nothing unreasonable with Respondent's concern that the individual selected for the Athletic Director position possess the ability to relate on a professional level with other employees they would be required to

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[19]Stip. No. 21.

[20]F.F. No. 18.

work closely with. Therefore, the question as to the applicants' ability to work with co-workers following a strike was not inappropriate because it was legitimately tied to the responsibilities of the position with respect to the applicants' communication skills and was asked of each job candidate.

For all of the foregoing reasons, we do not find the inquiry as to the applicants' ability to work with co-workers following a strike inappropriate.

III. CONCLUSION

Only when the employer's decision regarding the employee was actually motivated by antiunion animus must an unfair labor practice be found. The record of this case has been closely reviewed in its entirety and the Board finds 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. Miller for the exercise of his protected rights and, consequently, that an unfair labor practice did not occur. Respondent's decision not to hire Mr. Miller for the supplemental position of Athletic Director was not based on any reasons other than the business justifications advanced by Respondent. We have found those justifications to be legitimate and uninfluenced by antiunion animus. Further, a thorough review of the circumstances under which both applicants were questioned regarding their ability to work with co-workers following a strike reveals that such questioning was neither threatening, coercive, forced or discriminatory and, therefore, not tantamount to O.R.C. §§4117.11(A)(1) and (A)(3) violations. Based upon the above considerations, all charges against Respondent in this matter are dismissed.

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