

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Fulton County Engineer,

Respondent.

CASE NUMBER: 95-ULP-05-0219

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Pottenger, and Board Member Mason:
April 11, 1996.

The Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO, filed an unfair labor practice charge with SERB on May 3, 1995. SERB determined on September 7, 1995, there was a probable cause for believing the Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, and directed the matter to hearing. The hearing began on October 17, 1995, and continued on November 15-16, 1995, and December 7-8, 1995. All posthearing briefs were filed on December 29, 1995. On January 31, 1996, the Hearing Officer's Proposed Order in the above-styled case was issued. The parties filed exceptions. On February 28, 1996, the Respondent filed a motion for oral argument.

The Board has reviewed the record and the Hearing Officer's Proposed Order. The Board denies the Respondent's motion for oral argument, adopts the Jurisdictional Stipulations, Findings of Fact, Conclusions of Law, and Recommendation No. 2 in the Hearing Officer's Proposed Order.

The Respondent is ordered to:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 and from discriminating in regard to hire or employment on the basis of the exercise of rights guaranteed by Ohio Revised Code Chapter 4117 by terminating the employment of Gary St. John for engaging in protected activities, and from otherwise violating Ohio Revised Code §§ 4117.11(A)(1) and 4117.11(A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all buildings where employees of the Fulton County Engineer work, the NOTICE TO EMPLOYEES furnished by the Board stating that the Fulton County Engineer shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B).
- (2) Reinstatement Gary St. John to his position as the Ditch Maintenance Supervisor/Roadside Vegetation Specialist and update his salary to what it would have been but for his having been discharged on February 17, 1995.
- (3) Pay to Gary St. John back pay from February 17, 1995, until the effective date of the offer of reinstatement, together with all Public Employee Retirement System and other benefits he would have received had he remained continuously employed by the Fulton County Engineer less all Unemployment Compensation benefits received and any other wages received except those he was already earning from outside activities in 1994.
- (4) Pay to Gary St. John interest at the rate customarily paid by the courts of common pleas on similar awards on the amount calculated in number three above from the date of this decision until the back pay award is paid.
- (5) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

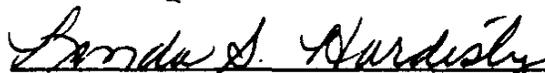

SUE POHLER, CHAIRMAN

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You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the common pleas court where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days (15) after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this

24th day of June, 1996.


LINDA S. HARDESTY, LEGAL ASSISTANT



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 and from discriminating in regard to hire or employment on the basis of the exercise of rights guaranteed by Ohio Revised Code Chapter 4117 by terminating the employment of Gary St. John for engaging in protected activities, and from otherwise violating Ohio Revised Code §§ 4117.11(A)(1) and 4117.11(A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all buildings where employees of the Fulton County Engineer work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Fulton County Engineer shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B).
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- (4) Pay to Gary St. John interest at the rate customarily paid by the courts of common pleas on similar awards on the amount calculated in number three above from the date of this decision until the back pay award is paid.
- (5) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

FULTON COUNTY ENGINEER
CASE NUMBER 95-ULP-05-0219

BY _____

DATE _____

TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERS 2012

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the Board.

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of
State Employment Relations Board,
Complainant,
v.
Fulton County Engineer,
Respondent.

CASE NUMBER: 95-ULP-05-0219

OPINION

POTTENGER, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Board") on exceptions filed to the Hearing Officer's Proposed Order issued on January 31, 1996. For the reasons below, we find that the Fulton County Engineer ("County Engineer" or "Respondent") violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(3) by terminating a public employee for engaging in activities protected by O.R.C. Chapter 4117. This opinion specifically addresses three issues raised in the Respondent's exceptions: (1) which party has the burden of proof for demonstrating that an employee is a "public employee"; (2) what standard should be adopted for determining whether an employee is a fiduciary employee; and (3) what standard should be adopted for determining whether an employee is a fiduciary employee by estoppel.

I. BACKGROUND

Gary St. John worked for the County Engineer for nineteen (19) years prior to his termination. In 1985, County Engineer Tom Stahl split the ditch maintenance work from the prior drainage department and placed Gary St. John as the only employee permanently

assigned to the new ditch maintenance department. Ditch maintenance work is funded by a separate ditch maintenance account set up for each ditch.¹

Ditch maintenance work is seasonal in nature; most of it is performed when crops are not in the fields to minimize crop damage. Crews were assigned to Mr. St. John by the Highway Superintendent when the latter did not need their services. When Edwin Wyrick became County Engineer in 1989, he left Mr. St. John in his position with the title of Ditch Maintenance Supervisor/Roadside Vegetation Specialist. Mr. Wyrick filed a form with the State of Ohio, Department of Administrative Services designating Mr. St. John as a fiduciary employee, citing O.R.C. § 124.11(A)(9). Mr. Wyrick had Mr. St. John sign a statement acknowledging that the new designation was in the unclassified service.²

Mr. St. John did not directly supervise or evaluate any employees. He did, however, act as crew leader to the employees assigned to him in the field. Mr. St. John was responsible for determining what ditch maintenance work needed to be done, which projects had priority, and when outside contractors were required. He inspected the completed work and initialed invoices to attest that the work represented by an invoice was properly performed. The law requires ditch maintenance work be done by the most cost-effective method that will restore the ditch to its original condition. By law, Mr. St. John cannot make any changes to a ditch's original design specifications.³

Because of the separate nature of ditch maintenance accounts, Mr. St. John was expected to submit a separate estimated budget proposal for each ditch to the County Engineer in fulfillment of state law requirements. There was little discretion or variation in these budget proposals from year to year. All but a few items in these budgets were supplied to Mr. St. John by other people. Mr. St. John, like other employees, could order only minor

¹Finding of Fact ("F.F.") Nos. 1 - 3.

²F.F. Nos. 2, 4, and 10.

³F.F. Nos. 5, 8, 11, and 20.

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dollar amounts of supplies. On a few rare occasions, Mr. St. John was asked to attend the county commissioners' meetings as Fulton County's "ditch man" to answer questions about a given project. In Fulton County, it was not unusual for a county commissioner to call the County Engineer's office on behalf of a farmer to express concerns about ditch maintenance; these calls were usually referred to Mr. St. John.⁴

Mr. St. John attended periodic staff meetings where projects were coordinated and work force needs between departments were determined. Once a year Mr. St. John spent about an hour to inventory equipment used in his work. He accrued compensatory time at time and a half for each hour of overtime worked. When the situation warranted it, Mr. St. John called in for permission to work crews on overtime. Mr. St. John served on various committees on his own volition and mostly on his own time; the record does not reflect that he was required to be on any of these committees.⁵

The American Federation of State, County and Municipal Employees ("AFSCME") began organizing employees under the County Engineer in August 1994. A letter dated September 1, 1994, was sent to Mr. Wyrick by AFSCME to inform him of the local employees' union representative. On September 13, 1994, Mr. Wyrick called Mr. St. John into his office and told him that he was not supporting Mr. Wyrick's policies and that he was not supporting the Highway Superintendent. Mr. St. John was told that he was no longer a trusted employee; that he and his wife had signed union cards; and that he was one of the biggest "cheerleaders" of the union. Mr. Wyrick asked, "How does it make you feel to stab me in the back?" Mr. Wyrick reminded him that he was an unclassified employee. Mr. St. John denied all of these allegations and asked if he was fired. Mr. Wyrick said, "Not right now. We'll see who's lying."⁶

⁴F.F. Nos. 18, 19, and 27.

⁵F.F. Nos. 13 - 15.

⁶F.F. Nos. 29 - 31.

On September 20, 1994, Mr. Wyrick asked Mr. St. John to think about making proposals to contract out all the ditch maintenance work, stating: "If this union gets in, we're going to have to do things differently." After these events, on an attorney's advice Mr. St. John contacted AFSCME and began to support the union. He signed a union card, attended union meetings, and asked to be included in the bargaining unit. Between September and November 1994, the Highway Superintendent told two (2) employees to stay away from Mr. St. John because Mr. St. John was "no good" and was "union." Mr. St. John's good evaluation of June 13, 1994, was subsequently downgraded on thirty-eight (38) out of forty-two (42) items on the next evaluation dated September 28, 1994. Mr. St. John disagreed with the Highway Superintendent many times over the years regarding the number of workers allocated to the ditch maintenance work. Mr. Wyrick reminded Mr. St. John that the work force was allocated by the Highway Superintendent.⁷

Mr. St. John had a historical pattern of sick leave abuse for most of the nineteen (19) years he worked for the County Engineer. He was only spoken to about this on a few occasions. He had supplied doctor's verifications of illnesses since November 1993. Another employee with a more blatant record of sick leave usage was not terminated or disciplined. Mr. St. John was also never disciplined for his use of sick leave over the years.⁸

The Respondent terminated Mr. St. John's employment on February 17, 1995, one (1) week after Mr. St. John had requested a vacation day for the day on which a hearing involving the County Engineer and AFSCME was scheduled before SERB. AFSCME had requested that Mr. St. John testify at that hearing. Mr. St. John was given no reason for his discharge. Prior to AFSCME's letter of September 1, 1994, discipline for employees was rare at the County Engineer's Office; there were no suspensions and no terminations. After September 1, 1994, discipline for employees became more common with suspensions becoming more frequent. In September 1994, the County Engineer employed between

⁷F.F. Nos. 33 - 34, 36, and 38.

⁸F.F. No. 37.

fifteen (15) and eighteen (18) employees in the bargaining unit represented by AFSCME. By December 7, 1995, the County Engineer had only nine (9) or ten (10) employees remaining in positions of employment in bargaining unit represented by AFSCME.⁹

II. DISCUSSION

A. Burden of Proof

The Respondent argues in its exceptions that the Complainant has the burden of proving that Gary St. John was a "public employee" within the meaning of O.R.C. § 4117.01(C). Thus, the Respondent asserts that the burden of proving that Mr. St. John was not a supervisor, not a management level employee, and not a fiduciary employee rests with Complainant. The Respondent's argument is not persuasive.

The Complainant has the burden of proving that the County Engineer is a "public employer" within the meaning of O.R.C. § 4117.01(B) and that Mr. St. John was an employee of the County Engineer during the relevant periods of time. These matters were stipulated by the County Engineer. The assertion that an employee meets one or more of the seventeen (17) exceptions to the definition of "public employee" is in the nature of an affirmative defense which must be pled and proved by a preponderance of the evidence by the Respondent. This is the same standard the Board has consistently applied in representation cases since its decision in *In re Franklin Local School District Bd of Ed*, SERB 84-008 (11-8-84).

B. Fiduciary Employees

The issue before the Board is whether Mr. St. John was a fiduciary employee because, under the Board's existing standards, Mr. St. John was not a "supervisor"¹⁰ pursuant to

⁹F.F. Nos. 39, 41, and 42.

¹⁰*In re Mahoning County Dept of Human Services*, SERB 92-006 (6-5-92); *In re Guernsey Cty Bd of Mental Retardation and Developmental Disabilities*, SERB 95-019 (10-31-95).

O.R.C. § 4117.01(F) and also not a "management level employee"¹¹ pursuant to O.R.C. § 4117.01(K).¹² This Board has never previously had occasion to articulate a standard for determining whether an employee is a fiduciary employee and, thus, exempt from the definition of "public employee" under O.R.C. § 4117.01(C)(9).¹³ Unlike "supervisor," "confidential employee," and "management level employee," the words "act in a fiduciary capacity" are not defined in O.R.C. Chapter 4117. Thus, we conclude that the appropriate standard to apply to these words is that standard applied by the Ohio courts in similar cases.

The phrase "act in a fiduciary capacity" indicates that the mere designation of an employee as a fiduciary is insufficient to warrant exclusion from the definition of "public employee." Rather, as with cases involving supervisors, management level employees, and confidential employees, it must be proved that the employee's actual job duties meet the test for finding an employee to be a fiduciary.

The Ohio Supreme Court had several occasions to examine the question of what constitutes a fiduciary relationship between employer and employee, in which particular attention was given to the employee's assigned and performed job duties. *In re Termination of Employment* (1974), 40 Ohio St.2d 107; *Rarick v. Bd. of County Commrs.* (1980), 63 Ohio St.2d 34; *State ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, [hereinafter "*Corrigan*"]. In *Corrigan, supra* at 70 - 71, the Court opined:

¹¹See *In re City of Wilmington*, SERB 94-007 (4-27-94) and *In re University of Cincinnati*, SERB 89-028 (10-12-89). See also *General Dynamics Corp.*, 213 N.L.R.B. 851, 857, 87 L.R.R.M. 1705, 1715 (1974).

¹²O.R.C. § 4117.01 was amended effective September 21, 1995, by Am. H.B. 200, and "management level employee" is now defined at O.R.C. § 4117.01(L).

¹³O.R.C. § 4117.01(C)(9) excludes from the definition of "public employee":

(9) Employees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code[.]

Cases which have analyzed the nature of the fiduciary relationship exception to classified civil service requirements have invariably characterized the relationship as one of trust and confidence. See, e.g., *In re Termination of Employment*, (1974), 40 Ohio St.2d 107, 69 O.O. 2d 512, 321 N.E. 2d 603; *Yarosh v. Becane, supra* [63 Ohio St.2d 7]; *Rarick v. Bd. of Cty. Comms.* (1980), 63 Ohio St.2d 34, 17 O.O. 3d 21, 406 N.E. 2d 1101. It is "more than the ordinary relationship of employer and employee." *In re Termination of Employment, supra*, at 114, 69 O.O. 2d at 516, 321 N.E. 2d at 608; and exists where "special confidence . . . is reposed in the integrity and fidelity of another," *id.* at 115, 69 O.O. 2d at 517, 321 N.E. 2d at 609, citing 5 Bogert, *Trust & Trustees*, 119-132; see also *Yarosh v. Becane, supra* at 11, 17 O.O.3d at 7, 406 N.E. 2d at 1360.

The Court went on to state that when examining the employer/employee fiduciary relationship exemption of O.R.C. § 124.11(A)(9), the focus should be on whether the assigned job duties require "a high degree of trust, confidence, reliance, integrity and fidelity," *Corrigan, supra* at 71, above and beyond whatever technical competence the position may require. Indeed, a high degree of discretion in carrying out assigned duties indicates, according to the Court, a trust relationship. *Rarick v. Bd. of County Comms., supra* at 37 - 38; *Corrigan, supra*. See also *Yarosh v. Becane, supra* at 11. Yet, factors other than an employee possessed with a high degree of discretion may also indicate the presence of a fiduciary relationship. Those other factors include whether the action was done "in good faith, for another's behalf and not merely because of legal obligations[.]" *Corrigan, supra* at 71.

Applying the standard established by in these cases, we conclude that Gary St. John did not act in a fiduciary capacity for the County Engineer. The record does not establish any special relationship of trust and confidence beyond that expected of the ordinary employee. Mr. St. John did not have the "high degree of discretion in carrying out assigned duties" that is typically seen in individuals who act in a fiduciary capacity. His work was routine in nature and he was accorded no extra trust than most other employees for purchasing items, notifying contractors, or performing other job duties.

While in many instances direct contact with county commissioners might render an employee a fiduciary, some latitude must be accorded to the informal nature of Fulton

County's local government where the county commissioners are much more likely to speak directly to rank and file employees than commissioners of most other counties. In any event, the record reflects such direct contacts with Mr. St. John were relatively rare occurrences. We conclude that the evidence demonstrates that Mr. St. John did not act in a fiduciary capacity.

C. Estoppel

An employee who accepts a job or promotion knowing it to be in the unclassified service as a fiduciary employee may well be estopped from later denying that the employee is a fiduciary. However, not every unclassified employee is a fiduciary, and Mr. St. John cannot be estopped since he was never told he was a fiduciary employee. Many unclassified employees are eligible to be in bargaining units, and these employees cannot be discriminated against for engaging in protected activities. Only employees excluded from the definition of "public employee" in O.R.C. § 4117.01(C) lack the rights guaranteed by O.R.C. Chapter 4117.

Similarly, Mr. St. John had held his position for a number of years before being asked to sign a statement that he was unclassified. According to the cases where estoppel has been found, the employee at issue has typically been found to have received a definite benefit from the designation. In this instance, we can find no additional benefit that Mr. St. John received from a designation as a fiduciary employee that would operate as an estoppel to his litigating the issue of this status. The lack of estoppel, of course, does not mean that employees will necessarily prevail on the merits of whether they are acting in a fiduciary capacity. It simply means that the employee is entitled to have the issue resolved on the merits of the case.

D. The Respondent Violated O.R.C. §§ 4117.11(A)(1) and (A)(3)

The Ohio Supreme Court stated that an "in part" standard was to be used by SERB in making a determination of discrimination. *SERB v. Adena Local Sch. Dist. Bd. of Educ.*

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(1993), 66 Ohio St.3d 485, 1993 SERB 4-43 [hereinafter "*Adena*"]. The Court held that SERB's primary focus is to be the "motivation" of the employer. In *In re Ft. Frye Local School Dist Bd of Ed*, SERB 94-016, 3-99 (10-14-94), *aff'd sub nom, Ft. Frye Teachers Assn v. SERB*, 1995 SERB 4-37 (CP, Washington, 8-23-95) [hereinafter "*Ft. Frye*"], SERB explained that the *Adena* standard involves the following three-step process: (1) the Complainant's initial burden to establish a prima facie case of discrimination for engaging in protected activities; (2) the Respondent's opportunity to demonstrate that the decision was motivated by legitimate, nondiscriminatory reasons; (3) the Board's determination, by a preponderance of the evidence, whether an unfair labor practice has occurred.

In *Ft. Frye, supra* at 3-99, SERB explained the steps required to establish a prima facie case of discrimination: (1) that the employee at issue is a public employee and was employed at relevant times by the Respondent; (2) that he or she engaged in concerted protected activity under O.R.C. Chapter 4117, which fact was either known to the Respondent or suspected by the Respondent; (3) that the Respondent took adverse action against the employee under circumstances which could, if left unrebutted by other evidence, lead to a reasonable inference that the Respondent's actions were related to the employee's exercise of concerted protected activity under O.R.C. Chapter 4117.

The record demonstrates that Mr. St. John was a public employee prior to his termination and that he became active in the union, signed a union card, and sought to testify for AFSCME at a hearing scheduled before SERB involving the County Engineer. The County Engineer knew or suspected Mr. St. John had engaged in these activities. Furthermore, Mr. St. John was terminated only one week after seeking a day off to testify at the SERB hearing. The evidence also amply demonstrated that the County Engineer harbored anti-union animus. Accordingly, the Complainant established a prima facie case.

The County Engineer attempted to rebut the prima facie case and apparent evidence of anti-union motivation by presenting evidence that Mr. St. John had a history of sick leave abuse and had argued on several occasions with the Highway Superintendent about manpower allocation. The County Engineer had counseled Mr. St. John on several occasions

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about these problems. The problems with the County Engineer's proffered reasons include: the long history of sick leave abuse by Mr. St. John without any prior discipline; the existence of an employee with a more blatant sick leave history during the same time period who was not disciplined; the fact that Mr. St. John had provided a doctor's note for each sick leave usage from November 1993 until his termination with the exception of one (1) bereavement leave occurrence; the absence of progressive discipline being applied for these problems despite the Respondent's policy of using progressive discipline; the lack of mention of these problems in a good evaluation given to Mr. St. John in June 1994, prior to any suspicions of union activity; the fact that Mr. St. John had argued over work force allocations for years prior to his termination without being disciplined; the timing of Mr. St. John's termination, occurring during a time of year when work force allocation issues had not been a problem for many months and only one (1) week after his request for time off to testify in a SERB hearing involving the County Engineer; and the Respondent's contradictory testimony, in an unemployment compensation benefits case, that Mr. St. John was terminated due to a reorganization of the ditch maintenance work.

Reviewing the evidence in its entirety, we conclude by a preponderance of the evidence, including both direct and circumstantial evidence of anti-union animus, together with the County Engineer's unconvincing rebuttal, that the Respondent's decision to terminate Mr. St. John was actually motivated by the Respondent's anti-union animus and by Mr. St. John's engaging in protected activity under O.R.C. Chapter 4117. Under *Adena* and *Ft. Frye*, the above conclusion is sufficient to establish that the County Engineer violated both O.R.C. §§ 4117.11(A)(1) and (A)(3). After carefully considering the Respondent's other exceptions, we find them to be without merit.

III. CONCLUSION

For the reasons above, we find that the Fulton County Engineer committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(3) by terminating a public employee for engaging in activities protected by O.R.C. Chapter 4117. As a remedy in this matter: (1) a cease and desist order shall be issued with a notice to employees to be posted

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by the Respondent for sixty (60) days in all of its buildings where employees represented by the American Federation of State, County and Municipal Employees work; (2) Gary St. John shall be reinstated to his position as the Ditch Maintenance Supervisor/Roadside Vegetation Specialist and his salary shall be updated to what it would have been but for his having been discharged on February 17, 1995; (3) Gary St. John shall receive back pay from February 17, 1995, until the effective date of his reinstatement, together with all Public Employee Retirement System and other benefits he would have received had he remained continuously employed by the Fulton County Engineer, less all unemployment compensation benefits received and any other wages received except those he had already been earning from outside activities in 1994; and (4) Gary St. John shall be paid interest at the rate customarily paid by the courts of common pleas on similar awards on the amount calculated in number three above from the date of this decision until the back pay award is paid.

Pohler, Chairman, and Mason, Board Member, concur.