

97-009

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE EMPLOYMENT RELATIONS BOARD,

Complainant,

v.

NORDONIA HILLS CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

CASE NO. 96-ULP-06-0393

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") on exceptions and response to exceptions to the Hearing Officer's Proposed Order issued on February 24, 1997. For the reasons below, we find that the decision of the Nordonia Hills City School District Board of Education ("School Board") to not award an Occupational Work Experience ("OWE") position to Gayle Gallupe was based upon legitimate business justifications and not anti-union animus. Consequently, the School Board did not violate O.R.C. §§ 4117.11(A)(1) or (A)(3).

I. BACKGROUND¹

The School Board and the Nordonia Hills Education Association ("NHEA") are parties to a collective bargaining agreement effective January 1, 1995 to June 30, 1998 containing

¹Finding of Fact ("F.F.") Nos. 3-6, 8-9, 18-20, 22-23, 25-33; Transcript, pp. 25-26, 141.

a grievance procedure that culminates in final and binding arbitration. The NHEA is the exclusive bargaining representative for certain teaching personnel employed by the School Board. Gayle Gallupe has been employed by the School Board since 1983. She is currently assigned to teach high school English. Ms. Gallupe has been a member of the NHEA since 1983. Since 1989, she has represented the NHEA in various official capacities. Ms. Gallupe served as vice-president of the NHEA during the 1990-1991 school year. She served as president from 1991 through 1994. She was the NHEA grievance chairperson for the 1994-1995 and 1995-1996 school years. She also served on the NHEA negotiation team for two different collective bargaining agreements. Ms. Gallupe is currently serving another term as the NHEA vice-president.

In early 1996, Ms. Gallupe became aware of the possibility of an OWE position in a work/study program for "at-risk" students. The program has 8-15 students per class at one time. The students receive instruction from the OWE instructor for the first two periods of the day and then they are enrolled in two other periods of academic classes such as math or English. The students work in the afternoon and the OWE instructor visits their employers, prospective employers, and the students on the job.

Roger Sidoti has been employed as Principal of the School Board's high school for two and one-half years and at all times relevant herein was an agent or representative of the School Board. Before becoming Principal, Mr. Sidoti was employed for nine years as a classroom teacher. He was a strike coordinator during a work stoppage in 1978.

Although Assistant Superintendent Wayne Blankenship did not officially decide to fill the OWE position until April 1996, Principal Sidoti had separate conversations during the 1995-1996 school year with Michael Douglas, Dave Smith, and Ms. Gallupe regarding the OWE position before its posting in March/April 1996. Principal Sidoti

spoke with Ms. Gallupe before the OWE position was posted and expressed concern about her ability to meet his expectations for the OWE position in light of her very active participation in NHEA matters. Because of his strike coordinator experience in 1978, he was aware of what it was like to be active in an employee organization. Principal Sidoti had similar conversations with two other candidates, Mr. Smith (Social Studies teacher and Basketball Coach) and Mr. Douglas (Title VI Coordinator), regarding his expectations for serving in the OWE position relative to their other responsibilities.

Of the five applicants for the OWE position, three had experience in teaching OWE students in their classes: Ms. Gallupe, Mr. Smith and Mr. Douglas. On May 14, 1996, Principal Sidoti interviewed each of the five applicants using the same list of questions.

During Ms. Gallupe's interview, Principal Sidoti made no reference to her membership in, or participation on behalf of, the NHEA. A few days after the May 14, 1996 interviews, Principal Sidoti met with his associate principals, Kathy Hocevar and Jay Ruble, to get their input in regard to the type of person best suited for the OWE position.

On May 20, 1996, Principal Sidoti issued a memorandum to Superintendent Pendleton and Assistant Superintendent Blankenship summarizing his interviews with the five applicants and recommended either Ms. Gallupe or Mr. Smith for the OWE position. After May 20, 1996, Assistant Superintendent Blankenship met with Principal Sidoti and Associate Principals Hocevar and Ruble to discuss Ms. Gallupe and Mr. Smith's strengths and weaknesses. The consensus was that Mr. Smith was best suited for the position. On May 21, 1996, Principal Sidoti offered the OWE position to Mr. Smith.

II. DISCUSSION

The School Board is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (A)(3), which state in relevant part as follows:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. * * *

* * *

(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[.]

In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.*, 66 Ohio St.3d 485, 498, 1993 SERB 4-43, 4-50 (1993) ("*Adena*"), the Ohio Supreme Court articulated the "in part" test to be applied by SERB to determine whether an individual has been discriminated against on the basis of protected activity in violation of O.R.C. § §4117.11(A)(1) and (A)(3). In *In re Ft. Frye Local School Dist. Bd. of Ed.*, SERB 94-017 (10-14-94) ("*Ft. Frye*"), SERB interpreted and applied the Ohio Supreme Court's *Adena* opinion. Acknowledging that the standard mandates that SERB's primary focus be on the motive of the employer, SERB held that the *Adena* standard involves a three-step process: first, the complainant must present a prima facie case, raising the presumption of anti-union animus, by showing that the employer's action was taken to discriminate against the employee for the exercise of rights protected by O.R.C. Chapter 4117. Second, the respondent is then given the opportunity to rebut this presumption by presenting evidence that its actions were the result of other conduct by the employee not related to protected activity. Third, SERB then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.²

A. *The Complainant Established A Prima Facie Case*

²*Id.* at 3-107.

To make a prima facie case of discrimination under O.R.C. § 4117.11(A)(3), the complainant must establish the following elements: (1) that the employee 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 un rebutted 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 4117.³

The record establishes a prima facie case. Gayle Gallupe was a public employee employed by the School Board at all relevant times. Ms. Gallupe also engaged in concerted, protected activities, which fact was known to the School Board. She represented the NHEA in various official capacities, including serving as president, vice-president, grievance chairperson, and negotiation team member. Consequently, Principal Sidoti's expression of concern regarding Ms. Gallupe's ability to meet his expectations for the OWE position in light of her very active participation in NHEA matters could lead to a reasonable inference, if left un rebutted, that the School Board's failure to award her the OWE position was related to the aforementioned concerted, protected activities.

B. The School Board's Rebuttal

The primary basis for the charge against the School Board depends upon establishing that Principal Sidoti was motivated to discriminate against Ms. Gallupe due to her activities on behalf of the NHEA. The NHEA attempts to accomplish this by suggesting

³*Id.*

that any reference Principal Sidoti made to Ms. Gallupe's union activities is evidence of anti-union animus. However, the record reveals that Principal Sidoti's reference to Ms. Gallupe's union involvement was only in the context of his concern how much time such involvement consumes as it relates to the OWE requirements. He knew she was actively involved in association activities and knew how time consuming this activity was based upon his previous involvement as an active member of an employee organization. However, after Ms. Gallupe assured Principal Sidoti that time would not be a problem, he dropped the issue, and actually recommended her as one of the two finalists for the job. Principal Sidoti's primary concern was each candidate's level of commitment to the OWE position in light of the fact that an OWE instructor's afternoons are largely unstructured and unsupervised. Indeed, Principal Sidoti had similar conversations with other candidates regarding his expectations for serving in the OWE position relative to their other responsibilities.

After becoming convinced of the applicants' sincere commitment to the requirements of the OWE position in light of their other respective responsibilities, Principal Sidoti proceeded to interview each of the five applicants, including Ms. Gallupe. Each applicant was interviewed for approximately one-half hour and asked to answer the same questions from a list developed by Principal Sidoti. Principal Sidoti made no reference to Ms. Gallupe's membership in, or participation on behalf of, the NHEA during the course of her interview. A few days later, Principal Sidoti met with his associate principals to obtain their general input regarding the type of person best suited to the OWE position. Subsequently, on or about May 20, 1996, Principal Sidoti issued a memorandum to Superintendent Pendleton and Assistant Superintendent Blankenship summarizing his interviews with the five applicants and recommending either Ms. Gallupe or Mr. Smith for the OWE position.

On May 21, 1996, Assistant Superintendent Blankenship met with Principal Sidoti and Associate Principals Hocevar and Ruble regarding the OWE position. During the meeting they discussed their concerns regarding Ms. Gallupe's seemingly negative relationship with her students as well as the perceived lack of achievement by students in her classes.

The group's *consensus* decision ultimately was that Mr. Smith was best suited to the OWE position, in part, because of his more positive attitude with the students and, in part, due to the possibility that his social studies position could be filled by someone also willing to coach — a commonplace need.

The School Board persuasively points to the similarities existing between the instant matter and the facts within *Ft. Frye*. In distinguishing our previous holding in *In re Lakota Local School Dist. Bd. of Ed.*, SERB 89-019 (8-23-89), we noted: "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."⁴ The Board reached this conclusion in *Ft. Frye* while examining the appropriateness of the employer's questioning of current employee applicants during interviews for an Athletic Director position about their ability to work with co-workers following a strike.

C. *Preponderance Of The Evidence*

The School Board successfully rebuts any presumption of anti-union animus and the suggestion that it was motivated to assign the OWE position to someone other than Ms. Gallupe as a result of her participation in protected activities. The cumulative effect of the evidence defeats, rather than supports, the notion that the School Board's

⁴ *Ft. Frye, supra* at 3-111 (emphasis in original).

motivation was based upon a desire to retaliate against Ms. Gallupe due to her active participation in NHEA matters.

Principal Sidoti addressed his questions concerning each of the three applicant's perceived time conflicts and their commitment to the position. His concerns for the successful applicant for the OWE position was how much time the individual's involvement in other activities consumes as it relates to the OWE requirements. His attention was not directed to the *content* of the activities. There exists absolutely no corroborated evidence in the record that the other three administrators, either individually or collectively, were influenced by anti-union animus. The Complainant and the NHEA fail to adequately explain why Ms. Gallupe was one of the two applicants recommended for the position if Principal Sidoti was motivated to discriminate against her due to her participation in protected activities or to rebut that Mr. Smith was the better qualified candidate. Consequently, we must conclude, by a preponderance of the evidence, that the School Board's decision to not award the OWE position to Ms. Gallupe was based upon legitimate business justifications and not anti-union animus and did not violate O. R. C. §§ 4117.11(A)(1) or (A)(3). Absent the presence of illegal motivation, the School Board should have the discretion to select the applicant it perceives to be the right choice under the circumstances. Indeed, this was the sentiment expressed in *Ft. Frye*: "We cannot displace the employer's thinking in making a selection that it felt best suited its needs."⁵

III. CONCLUSION

For the reasons above, we find that the Nordon Hills City School District Board of Education did not violate O. R. C. §§ 4117.11(A)(1) or (A)(3) because its decision to

⁵*Id.* at 3-110.

OPINION

Case No. 96-ULP-06-0393

Page 9 of 7

not award the OWE position to Ms. Gallupe was based upon legitimate business justifications and not anti-union animus.

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