98-013

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Perrysburg Exempted Village School District Board of Education,

Respondent.

Case No. 97-ULP-09-0483

OPINION

GILLMOR, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("Board" or "SERB") upon the filing of exceptions, a reply and cross-exceptions, and a response to cross-exceptions to the Hearing Officer's Proposed Order issued on April 13, 1998. For the reasons below, we find that the Perrysburg Exempted Village School District Board of Education ("District") did not violate either Ohio Revised Code §§ 4117.11(A)(1) or (A)(3) when it added a comment about collaboration on Ms. Hollabaugh's 1996-1997 evaluation and when it transferred Ms. Hollabaugh involuntarily from Toth Elementary School to Frank Elementary School before the start of the 1997-98 school year.

I. BACKGROUND[1]

Jan Hollabaugh is a teacher employed by the District and is a fair share fee

[1]Finding of Fact ("F.F.") Nos. 3, 5-8, 13-14, and 17-21.

paying member of the bargaining unit represented by the Perrysburg Education Association ("PEA"). Ms. Hollabaugh taught second grade at Toth Elementary School ("Toth") from 1991 through the end of the 1996-1997 academic year. She received a continuing contract beginning with the 1994-1995 school year. John H. Pertner, Ph.D., was Principal at Toth and was Ms. Hollabaugh's supervisor from 1991 through 1997. Although Dr. Pertner never questioned Ms. Hollabaugh's ability within her classroom, he did speak to her over the years about participating and trying to get along better with co-workers during her time in the building.

In the 1996-1997 school year, Toth became the District's first school to adopt a school-wide collaborative model. The collaborative teaching model revolves around all teachers working in teams to share information and teaching techniques, thereby maximizing educational opportunities for Toth students. Ms. Hollabaugh collaborated with the special education teachers because it directly benefited her students, but she made no attempt to collaborate with other teachers.

In early October 1996, Betsy Schaf, a Toth teacher, sent an electronic mail message ("e-mail") to Dr. Pertner containing a gratuitous comment complimenting Ms. Hollabaugh. Ms. Schaf informed Ms. Hollabaugh of this comment, to which Ms. Hollabaugh responded that she wished Ms. Schaf had not done that. On October 14, 1996, Ms. Hollabaugh sent a grievance letter to Dr. Pertner in which she complained about the e-mail from Ms. Schaf. The letter was copied to Ms. Schaf, Sue Schad, a PEA representative, and Ray Pohlman, the PEA president. The letter states in pertinent part:

> An informant system based on perceptions, innuendo and one-sided communication should not be allowed in your building. It is unconscionable that you would encourage this practice, either tacitly or

overtly, to acquire information or form opinions about your staff.

In an effort to resolve the issue, Dr. Pertner set up a meeting for October 30, 1996. Present at this meeting were Dr. Pertner, Dr. Sharon Zimmers, the District's Superintendent, Ms. Schaf, Ms. Hollabaugh, Ms. Schad, and Mr. Pohlman. The meeting concluded without any resolution of the issue. Ms. Hollabaugh did not file a formal grievance on this issue.

On April 21, 1997, Dr. Pertner authored and submitted an evaluation of Ms. Hollabaugh. In a generally positive evaluation, the following comment was made in the category of Non-Instructional Professional Responsibilities:

> If the Toth organization is to improve, 100% participation will be needed in the future. Consequently it is important to remember that building relationships and working collaboratively with other staff members strengthens the overall academic program.

In the Spring of 1997, District enrollment projections indicated that Toth would have one excess faculty member while Frank Elementary School ("Frank") would need an additional teacher. Dr. Pertner recommended Ms. Hollabaugh to Dr. Zimmers as the teacher to be transferred since Frank was not using a collaborative model of teaching. Dr. Zimmers approved the reassignment. On May 14, 1997, the District informed Ms. Hollabaugh of her involuntary transfer. On or about May 20, 1997, Ms. Hollabaugh was formally notified by letter of her reassignment to a first grade teaching assignment at Frank beginning with the 1997-1998 school year. On or about May 19 and May 28, 1997, Ms. Hollabaugh filed a letter styled as a grievance over the reassignment to Frank. The grievance was denied.

Following the transfer to Frank, Ms. Hollabaugh suffered no reduction in pay, benefits, or seniority. Frank was closer in distance to Ms. Hollabaugh's home than was Toth. Ms. Hollabaugh did have extra expenses related to purchasing some furniture and materials to teach her first grade class at Frank. She did not seek reimbursement for these expenses from the District. Teaching a new grade level did involve extra work for Ms. Hollabaugh over and above what she would have needed to do had she remained a second grade teacher at Toth.

II. DISCUSSION

O.R.C. §§ 4117.11(A)(1) and (A)(3) state in pertinent part:

> (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[.]

The Complainant has the burden of demonstrating by a preponderance of the evidence that a Respondent has committed an unfair labor practice.[2]

The issue to be resolved is whether the District violated O.R.C. § § 4117.11(A)(1) and (A)(3) when it added a comment about collaboration on Ms. Hollabaugh's evaluation and when it involuntarily transferred Ms. Hollabaugh from Toth to Frank. In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993),

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[2]O.R.C. § 4117.12(B)(3).

66 Ohio St.3d 485, 498, 1993 SERB 4-43, 4-49 ("*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). The *Adena* standard mandates that SERB's primary focus be on the employer's motive. SERB interpreted and applied the Ohio Supreme Court's *Adena* opinion in *In re Fort Frye Local School Dist. Bd. of Ed.*, SERB 94-017, p. 3-104 (10-14-94) ("*Ft. Frye*"), and held that the *Adena* standard involves a three-step process:

> (1) The Complainant must create a "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.
> (2) The Respondent is then given the opportunity to rebut the presumption by presenting evidence that shows legitimate, nondiscriminatory reasons for its decision.
> (3) The Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

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 at issue is a public employee and was employed at relevant times by the Respondent; (2) that he or she engaged in protected activity under O.R.C. Chapter 4117, which fact was either known to the Respondent or suspected by the Respondent; and (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 protected concerted activity under O.R.C. Chapter 4117.[3]

It is undisputed that the first element of a prima facie case is established. At all

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[3] *Id.*

relevant times, Ms. Hollabaugh was employed by the District. The second element of a prima facie case was established when Ms. Hollabaugh engaged in the protected activity of filing an informal grievance letter with her immediate supervisor, Dr. Pertner. The third element of a prima facie case was established when the District took the adverse action against Ms. Hollabaugh of transferring her involuntarily from Toth to Frank.

Because a prima facie case is established, the employer has the opportunity to present evidence that its actions were motivated by a legitimate interest unrelated to the employee's exercise of protected activity. The District successfully did so in this instance. The District presented persuasive evidence that Toth Elementary School had moved to a collaborative model of teaching during the 1996-97 school year, and that Ms. Hollabaugh had shown little interest or cooperation in pursuing such an approach.

In the Spring of 1997, enrollment projections indicated that Toth Elementary School would have one too many teachers and that Frank Elementary School would need one new teacher for the 1997-98 school year. Consequently, Dr. Pertner needed to involuntarily reassign one teacher. He chose Ms. Hollabaugh because she was not cooperating with the collaborative model and because Frank Elementary School was not using a collaborative model.

The District's rebuttal contained no documentation (except for one vague reference to collaboration on one evaluation) that Ms. Hollabaugh was ever presented with her deficiencies as a collaborative teacher. When, as in this case, the credibility of the witnesses will be controlling on the outcome of the case, an employer's credibility is strengthened by the presentation of contemporaneous, documentary evidence of the

employee's deficiencies that was shared with the employee. The hearing officer resolved the credibility issue in favor of the District, and we will not reverse credibility findings without substantial evidence to the contrary.

It is the Complainant, however, that ultimately bears the burden of proving that the involuntary transfer was motivated, at least in part, by animus based on the exercise of protected activity by an employee. The vague reference in the evaluation, standing alone, did not establish antiunion animus. A preponderance of the evidence establishes that the District's only motivation for the involuntary transfer was for a legitimate business reason unrelated to Ms. Hollabaugh's complaint against Dr. Pertner: Ms. Hollabaugh was selected for the transfer because she would not participate in Toth's collaborative model of teaching. The record is devoid of any evidence of antiunion animus or discriminatory intent toward Ms. Hollabaugh. Thus, the District did not violate O.R.C. § § 4117.11(A)(1) and (A)(3).

III. CONCLUSION

For the reasons above, we find that the Perrysburg Exempted Village School District Board of Education did not violate either Ohio Revised Code §§ 4117.11(A)(1) or (A)(3) when it added a comment about collaboration on Ms. Hollabaugh's 1996-1997 evaluation and when it involuntarily transferred Ms. Hollabaugh from Toth Elementary School to Frank Elementary School before the start of the 1997-1998 school year. As a result, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

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