

98-014

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Wolf Creek Local School District Board of Education

Respondent.

Case No. 97-ULP-07-0416

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") on the exceptions and response to exceptions to the Hearing Officer's Proposed Order issued April 30, 1998. For the reasons below, we find that the Wolf Creek Local School District Board of Education ("School Board") did not violate O.R.C. §§ 4117.11(A)(1) and (A)(3) when it elected not to renew Brandon Neville's employment contract.

I. BACKGROUND¹

The Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 504 ("OAPSE") is the exclusive representative for a bargaining unit of the School Board's employees including Bus Drivers. OAPSE and the School Board are parties to a collective bargaining agreement effective from September 1, 1995, to August 31, 1998. New employees are covered by a "Schedule II" provision of the

¹Findings of Fact ("F.F.") Nos. 2-36.

contract until they have worked for the School Board five years. Schedule II employees do not receive the same wages and benefits as non-Schedule II employees.

Brandon Neville worked as a substitute bus driver for the School Board from February 1994 through May 1994. Before being hired as a regular bus driver, Mr. Neville was informed by Superintendent Clyde J. Crewey that he would be subject to Schedule II of the contract. On August 22, 1994, Mr. Neville and the School Board entered into a one-year employment contract for Mr. Neville to serve as a Bus Driver.

In November 1994, five or six sets of parents went to the School Board meeting and complained about Mr. Neville. They complained that their children were afraid to get on the bus, that Mr. Neville was too strict and did not speak to the children, that Mr. Neville did not stop long enough to give the children time to get on the bus, and that Mr. Neville exhibited a lack of respect for both the students and the parents. In early 1995, Superintendent Crewey talked to Mr. Neville about these complaints.

Jim Rohrer is both a bargaining-unit member and OAPSE member, yet he effectively acted as Mr. Neville's supervisor. He timed bus routes and conducted performance evaluations on Mr. Neville. Karen Rohrer is currently the Assistant Treasurer for the School Board. She is a former union member who served both as OAPSE Secretary and Vice President. Mr. Neville did not get along well with Mr. Rohrer, Mrs. Rohrer, Mr. Martin, the former high school principal, or Superintendent Crewey. Superintendent Crewey counseled Mr. Neville about his interactions with others and tried to help him improve in his work performance.

In the first quarter of 1995, Mr. Neville served jury duty on three separate occasions. Mr. Neville submitted absence sheets for each occasion, but failed to submit the required jury duty pay slips for the last two occasions. When Mrs. Rohrer asked Mr. Neville for his pay slips, he said he had not had time to go get his pay. At

the end of the fiscal year, Mrs. Rohrer called the County Auditor's office to verify that Mr. Neville had not received any jury duty pay for February and March. The Auditor's Office confirmed that Mr. Neville had received jury duty pay slips in January, February, and March. Mrs. Rohrer subsequently obtained copies of the last two pay slips and docked Mr. Neville's pay. Mr. Neville did not complain that his pay had been docked.

While employed by the School Board, Mr. Neville was an OAPSE member. Mr. Neville attended most of the OAPSE meetings each year, voicing his opinion on various issues. In September 1995, when a tentative agreement was presented to the Local for ratification, Mr. Neville, among others, urged against ratification. Mr. Neville and an OAPSE bargaining-team member spoke out against Schedule II. At the end of the 1994-95 school year, Mr. Neville and his mother-in-law, Lois Schwendeman, another bus driver, together approached Mrs. Rohrer about a mistake made on Mrs. Schwendeman's paycheck. Mrs. Rohrer agreed that there was a mistake and that it needed to be corrected. Mrs. Schwendeman subsequently received a pay adjustment.

At the end of the 1994-95 school year, Superintendent Crewey informed Mr. Neville that he had concerns about recommending Mr. Neville for renewal. Mr. Neville discussed the complaints that parents had made about him with Mr. Huck, a School Board member. On April 10, 1995, the School Board met in executive session to discuss the employment of personnel. Mr. Neville was permitted to attend the executive session. Superintendent Crewey and the School Board discussed their concerns regarding Mr. Neville. When given the opportunity to address the School Board, Mr. Neville told its members that he would try to improve. Superintendent Crewey ultimately recommended a second contract. The sentiment of both Superintendent Crewey and the School Board was to give Mr. Neville a "second chance."

Between November 1995 and March 1996, Mr. Neville, along with fellow bus drivers Chris Baker, Lois Schwendeman, and Brenda Pugh (who is also the Local's President), attended several School Board meetings where the subject of adding a new shuttle run was addressed. During at least one of these meetings, Mr. Neville expressed his opinion that adding the shuttle run was not cost effective and would hurt the bus drivers.² Mr. Neville at some point spoke with another bus driver about Schedule II.

A bus driver testified that Mr. Neville at one time had come into the bus garage laughing and said that he had screamed at a kindergartner until the child started crying.

On another occasion, Mr. Neville came into the bus garage and asked: "Where's my retard?", referring to one of the children with disabilities on his extra duty run.

In December 1996, Mr. Rohrer was instructed to evaluate Mr. Neville. Mr. Neville complained to Superintendent Crewey about Mr. Rohrer, a fellow union member, evaluating him. Mr. Rohrer rated Mr. Neville "Good" in six categories. Mr. Neville received a "Satisfactory" in the categories of Disciplinary Procedures and Cooperation. In the Public Relations category Mr. Neville received a rating of "Needs Improvement."³ On January 24, 1997, Superintendent Crewey and Mr. Rohrer met with Mr. Neville to discuss the evaluation. Since Mr. Neville had objected to Mr. Rohrer, as a fellow union member, evaluating him, Superintendent Crewey conducted his own evaluation with input from Mr. Rohrer and other administrators. The evaluation signed by Superintendent Crewey was marked similarly to the one marked by Mr. Rohrer.

²Mr. Neville claimed he spoke at five or six meetings. The hearing officer found that this was not credible. One School Board member remembered Mr. Neville speaking at one meeting. Although Mr. Neville testified that he signed in to speak at School Board meetings two or three times, the official School Board minutes do not reference Mr. Neville other than when he spoke on his contract renewals.

³ The evaluation's ratings were Needs Improvement, Satisfactory, Good, and Outstanding.

On April 25, 1997, Superintendent Crewey, in the presence of Mr. Rohrer, explained to Mr. Neville his concerns in considering Mr. Neville for renewal. Superintendent Crewey had not yet decided whether he would make a recommendation regarding renewal to the School Board. Superintendent Crewey had spoken to Mr. Martin several times about what to do about Mr. Neville. Mr. Neville's protected activities never came up in any of those discussions; primarily, Superintendent Crewey's concern was with Mr. Neville's "attitude."

On the afternoon of April 28, 1997, Superintendent Crewey gave Mr. Neville a letter outlining five concerns and stating that Superintendent Crewey could not recommend that Mr. Neville be reemployed. The five concerns were: (1) insubordination to Building Principal, (2) discourteous to the public, (3) inaccuracies in time sheets and concerns, (4) concerns with attitude and cooperation, and (5) intimidation accusations. This letter was not given to the School Board members before the meeting at which they were to vote on Mr. Neville's contract.

On April 28, 1997, the School Board went into executive session to discuss Mr. Neville's employment status. In accordance with O.R.C § 3119.081(B), if Mr. Neville's contract was renewed, it would be a continuing contract. During the executive session, Mr. Neville told his version of the facts surrounding the allegations in the letter that Superintendent Crewey had given to him earlier that day. During his presentation, he sat slouched in his chair with his arms crossed. At the end of his testimony, he stood up and stated that he expected to have a continuing contract when the School Board meeting was over. The Board members acknowledged his testimony, but did not speak much while Mr. Neville was in the room. Superintendent Crewey spoke about Mr. Neville's attitude and interactions with students and parents, but made no recommendation as to whether Mr. Neville should be renewed. Neither during these deliberations nor at any other time did the School Board ever discuss Mr. Neville's

union status or protected activities. When the School Board returned to open session, they unanimously passed a resolution to nonrenew Mr. Neville's contract at the end of the 1996-97 school year.

All of the School Board members testified that they based their decision in part on Mr. Neville's attitude and demeanor on the night of April 28, 1997. He seemed to be trying to intimidate the School Board into renewing his contract. All five Board Members cited complaints from parents as a reason for nonrenewal. Other reasons cited included the inconsistencies in his time cards, and the alleged intimidation of a bus driver. None of the School Board members had any knowledge of whether Mr. Neville ever discussed Schedule II with Superintendent Crewey or threatened to file grievances. School Board Member Barnett and his wife are former members of the Local; School Board Member Huck is currently a Local member.

Mr. Neville never filed any grievances while employed by the School Board nor did he ever talk to Ms. Pugh about filing a grievance. Mr. Neville never received any formal discipline while employed by the School Board.

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.⁴

In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 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.

⁴O.R.C. § 4117.12(B)(3).

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 un rebutted by other evidence, lead to a reasonable inference that the Respondent's actions were related to the employee's exercise of protected activity under O.R.C. Chapter 4117.⁵

⁵*Id.*

A. Prima Facie Case by the Complainant

The first element is met through the parties' stipulations. Mr. Neville was employed by the School Board as a public employee from August 22, 1994 to May 30, 1997. The Complainant has also satisfied the third element of a prima facie case. The nonrenewal of Mr. Neville's employment contract clearly falls within the description of an adverse action.

Whether the requirements for the second element have been met is in dispute. The Complainant and the Intervenor argue that the School Board had knowledge that Mr. Neville engaged in the following protected activities: (1) discussing Mr. Neville's contractual rate of pay with the Treasurer, (2) discussing the pay of another bargaining-unit member, Mrs. Schwendeman, with the Treasurer, (3) discussing terms and conditions of employment, rerouting of buses, at School Board meetings, (4) threatening to file grievances against agents of the School Board, Mr. Rohrer, Mrs. Rohrer, and Superintendent Crewey, on several occasions, (5) discussing Schedule II with Superintendent Crewey, and (6) attending union meetings. The School Board does not necessarily dispute that Mr. Neville did some of these things, but argues: (1) to the extent that Mr. Neville engaged in these activities, he was not engaged in protected activity because he had no authority to act on behalf of the union or any other bargaining-unit member and was, in fact, acting either in his own self-interest or in the interest of a family member, (2) Mr. Neville's alleged activities did not involve the invocation of any contractual right, and (3) the School Board members had no knowledge that Mr. Neville had engaged in these activities.

It is unnecessary to determine whether each and every activity engaged in by Mr. Neville rises to the level of protected activity; it is sufficient, in establishing a prima

facie case, to find that the School Board had knowledge of some protected activity.⁶ Individual action falls within protected activity only when the individual is attempting to invoke a statutory right under O.R.C. Chapter 4117; a contractual right obtained thorough a collective bargaining agreement fits within this context. “There are obvious differences between the assertion of a contractual right and what otherwise is tantamount to a *personal* complaint.”⁷

Mr. Neville was an OAPSE member who attended and actively participated in numerous union meetings. O.R.C. § 4117.03(A) gives public employees the right to join and participate in an employee organization, and Mr. Neville’s exercise of that right is one example of protected activity. Both Mr. and Mrs. Rohrer, Superintendent Crewey and at least three of the School Board members knew or suspected that Mr. Neville was a union member. Mr. Neville’s activity in approaching Mrs. Rohrer to ensure that Mrs. Schwendeman was being paid in accordance with the contract also might rise to the level of protected activity.⁸ Therefore the Complainant has satisfied the minimum requirements to establish the second element.

B. Rebuttal by the Respondent

The School Board members consistently echo two common themes for Mr. Neville’s nonrenewal. The first theme is that the School Board obviously felt bound to answer to its political constituency, the parents in the district. School Board Member Barnett based part of his decision not to renew Mr. Neville’s contract on complaints he

⁶*In re Cincinnati Metropolitan Housing Auth*, SERB 93-002 (4-6-93) (“CMHA”).

⁷*Id.* at 3-11. (emphasis in original).

⁸Conversely, while Mr. Neville might have been engaged in protected activity when he spoke to the School Board regarding the reconfiguration of bus routes, his activity was apparently so limited that, two years later, only one School Board member could even recall that Mr. Neville spoke, and his impression was that Mr. Neville was speaking in self-interest.

had received from parents that Mr. Neville was not friendly to the children riding on his school bus. School Board Member Semon was also influenced by calls from two parents who said that children were still afraid of Mr. Neville; these calls reminded him of a call he had received from a parent during Mr. Neville's first year of employment, who said that her child cried at the prospect of having to ride Mr. Neville's bus. School Board Member Huck, a union member for twenty-seven years, voted to nonrenew the contract due to continuing complaints from parents that Mr. Neville was not speaking to students on the bus.

The second is that the School Board, based both on the information they had and on Mr. Neville's presentation to them, simply were not impressed with Mr. Neville. School Board Member Barnett considered Mr. Neville's attitude to be that things went "his way or no one else's way." Several of the Board Members were directly influenced by Mr. Neville's attitude and demeanor at the April 28, 1997 School Board meeting, thinking that Mr. Neville tried to intimidate the School Board members that night by his demand that he be given a continuing contract. School Board Member Barnett was also put off by what he viewed as Mr. Neville's attitude that the Board of Education worked for him, rather than the other way around; Mr. Barnett believed that anyone with that sort of demeanor should not be working with young children. School Board Members Semon, Sanford, and Arnold did not believe that Mr. Neville had improved significantly during his employment. They concluded that he had continuing performance problems. Mr. Sanford thought that Mr. Neville was disrespectful to people in the school system. School Board Members Sanford and Arnold also were concerned about Mr. Neville's timekeeping.

C. Preponderance of the Evidence

When the facts of this case are viewed in their entirety, the record does not establish any causal link between Mr. Neville's protected activity and the School

Board's nonrenewal of his contract. There is no evidence to suggest that the School Board or Mr. Crewey had any knowledge of Mr. Neville assisting Ms. Schwendeman in correcting her pay, assuming arguendo that this rose to the level of protected activity. Nor is there any evidence to suggest that the School Board members or Superintendent Crewey knew that Mr. Neville had complained to Mrs. Rohrer about his contractual rate of pay. There was no evidence to support Mr. Neville's testimony that he threatened to file a grievance on several occasions. Ms. Pugh, the Local President, testified that Mr. Neville had never discussed filing a grievance with her. All of the School Board members testified that neither Mr. Neville's union membership nor his activities as a union member were discussed or factored into their decision to nonrenew his contract. At least two of the School Board members were former union members, yet the vote to nonrenew was unanimous.

The School Board did not formally investigate all of the incidents in Superintendent Crewey's letter to Mr. Neville and did not formally discipline Mr. Neville for these alleged improprieties. While, standing alone, this action could raise an inference of animus, it does not prove antiunion animus by a preponderance of the evidence when the record is viewed as a whole. The School Board did not let the problems stated in the letter go unattended. Mr. Neville conceded that Superintendent Crewey repeatedly counseled him regarding his performance problems. Mr. Neville further conceded that Superintendent Crewey never expressed any concern about his union activities.

The information the School Board members had before them when they decided not to renew Mr. Neville's contract showed a consistent pattern over three years of behavior unbecoming a bus driver. The School Board did not invent these incidents at the last minute as a pretext. Faced with the choice of giving Mr. Neville a continuing contract or not renewing it, the School Board simply chose not to renew Mr. Neville's contract.

A decision to nonrenew a contract is not the same as discipline under a “just cause” standard. The decision to nonrenew is similar to terminating an employee at the end of a probationary period.⁹ School districts are entitled to a great deal of deference in making such decisions in the absence of evidence of antiunion animus or other animus towards the employee’s protected activities.

In sum, the sole issue is whether the School Board was actually motivated to nonrenew Mr. Neville’s contract because it knew he had engaged in protected activity and it subsequently discriminated against him because of that activity. The Complainant offered no evidence to contradict the School Board members’ unanimous testimony that they never discussed or considered any protected activity, or any of the activities that Mr. Neville characterized as union activity, when they voted to nonrenew Mr. Neville’s contract. Therefore, we find by a preponderance of the evidence that the Employer was not actually motivated by antiunion animus, either in whole or in part, when it decided not to renew Mr. Neville’s contract.

III. CONCLUSION

For the reasons above, we find that the Wolf Creek Local School District Board of Education did not violate O.R.C. §§ 4117.11(A)(1) and (A)(3) when it elected not to renew Brandon Neville’s employment contract. Therefore, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

⁹See, e.g., O.R.C. §§ 3319.081(A), 3319.11(B), and 3319.11(E); *Gerner v. Salem City School Dist. Bd. of Educ.*, 69 Ohio St.3d 170, 175 (1994); *Winston v. Bd. of Educ. of Borough of S. Plainfield*, 125 N.J. Super. 131, 145, 309 A.2d 89, 96 (1973) *aff’d*, 64 N.J. 582, 585, 319 A.2d 226, 227 (1974); *Mindemann v. Indep. School Dist. No. 6*, 771 P.2d 996, 1000, 134 L.R.R.M. 3216 (Okla. 1989); *Midwest Cent. Educ. Ass’n v. Illinois Educ. Labor Relations Bd.*, 227 Ill. App.3d 440, 447, 153 L.R.R.M. 2245 (1995).

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