

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Fort Frye Local School District Board of Education,

Respondent.

CASE NUMBER: 88-UJP-04-0200

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
June 17, 1999.

On April 22, 1988, the Fort Frye Teachers Association ("Charging Party") filed an unfair labor practice charge against the Fort Frye Local School District Board of Education ("Respondent"). Pursuant to Ohio Revised Code ("O.R.C.") § 4117.12, the State Employment Relations Board ("SERB" or "Complainant") conducted an investigation and found probable cause to believe that an unfair labor practice had been committed. A complaint was issued alleging that the Respondent had violated O.R.C. §§ 4117.11(A)(1) and (A)(3) by nonrenewing the limited teaching contract of Michael Rauch because of his participation in protected activity.

The case was heard by a SERB hearing officer from June 25, 1990 through June 29, 1990. On December 11, 1990, the Hearing Officer's Proposed Order was issued; it included the parties' Stipulations, as well as the hearing officer's proposed Findings of Fact and Conclusions of Law. The parties filed objections to the proposed order, and the case was reviewed by SERB. On July 17, 1991, SERB issued its Order and Opinion [SERB 91-005 (7-17-91)] in which it determined that an unfair labor practice had not been committed by the Respondent and dismissed the complaint and charge. On July 22, 1991, the Association filed a notice of appeal with the Washington County Court of Common Pleas. On January 12, 1993, the Washington County Court of Common Pleas affirmed SERB's decision. The common pleas court's opinion was journalized on February 1, 1993. On March 1, 1993, the Association appealed to the Fourth District Court of Appeals. The court of appeals, by a decision dated November 10, 1993, reversed the lower court's judgment and remanded the case to SERB for further consideration in light of the Ohio Supreme Court's then-recent decision in *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485, 1993 SERB 4-43 ("Adena").

This case then returned to SERB for the limited purpose of applying the new *Adena* standard to the facts that SERB had determined previously. No additional record evidence was presented by any party to the action, and no additional facts were found. In the Order and Opinion issued on October 14, 1994 [SERB 94-016 (10-14-94)], SERB held that under the *Adena* standard, the nonrenewal of Mr. Rauch's limited teaching contract was not due to his exercise of rights protected by O.R.C. Chapter 4117; SERB dismissed the complaint and the charge against the Respondent. The Association appealed SERB's Order to the Washington County Court of Common Pleas. On August 23, 1995, the common pleas court affirmed SERB's decision. This common pleas court opinion was journalized on September 6, 1995.

The Association filed a notice of appeal from the common pleas court to the Fourth District Court of Appeals on October 3, 1995. On October 15, 1996, the court of appeals reversed the judgments of both SERB and the common pleas court and remanded the case to SERB. The court of appeals held that upon remand, the School Board was collaterally estopped by the judgment in the federal court proceeding from relitigating the issue of its motivation for nonrenewing Mr. Rauch's contract. SERB and the School Board appealed this decision to the Ohio Supreme Court. In *Fort Frye Teachers Assn. v. SERB* (1998), 81 Ohio St.3d 392, the Ohio Supreme Court, by a 4-3 vote, affirmed the decision of the Court of Appeals and remanded this matter to SERB for a determination of whether an unfair labor practice occurred in violation of O.R.C. § 4117.11.

After reviewing the record, the parties' briefs, and the Hearing Officer's Proposed Order in the case, for the reasons stated in the attached opinion, incorporated by reference, Conclusion of Law No. 4 is amended to read: "The nonrenewal of Michael Rauch's limited teaching contract was not due, at least in part, to the exercise of rights protected by Ohio Revised Code Chapter 4117."; the Stipulations, Findings of Fact, and Conclusions of Law, as amended, in the Hearing Officer's Proposed Order issued on December 11, 1990, are adopted; the complaint is dismissed; and the unfair labor practice charge is dismissed with prejudice.

It is so directed.

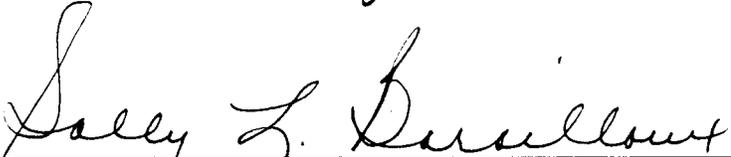
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



SUE POHLER, CHAIRMAN

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 State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county 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 after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 24th day of June,
1999.


SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

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

In the Matter of

State Employment Relations Board,

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Fort Frye Local School District Board of Education,

Respondent.

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the filing of briefs by the parties after this matter was remanded to SERB from the Ohio Supreme Court. For the reasons below, we find that the Fort Frye Local School District Board of Education did not commit an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(3) when it did not renew the employment contract of Michael Rauch.

I. BACKGROUND

In 1987, a successor collective bargaining agreement between the Fort Frye Local School District Board of Education ("Respondent" or "School Board") and the Fort Frye Teachers Association ("Association") was being negotiated. After the parties were unable to reach an agreement, a strike began on October 19, 1987. On November 2, 1987, the School Board reopened the schools utilizing replacement substitute teachers and Fort Frye teachers who crossed the picket line. A successor agreement was reached on November 16, 1987, the terms of which were substantially the same as the School Board's

final offer before the strike. The Association viewed this as a failure and its members in large part blamed the nonstriking teachers for weakening the strike.

The striking teachers decided that some manifestation of post-strike union solidarity was needed and collectively agreed to ostracize or shun the nonstriking teachers, where possible, while still performing their duties. The ostracism included glaring, refusing to speak in the hallways, unless necessary for the performance of professional duties or when the welfare of a student was involved, refusing to eat lunch together, and otherwise refusing to socialize with the nonstriking teachers. The Association never formally sanctioned these practices.

The school administrators' and School Board Members' desire to have the staff members put the strike behind them was frustrated by the shunning tactics. They viewed this activity on the part of the striking teachers as unprofessional. Believing that the problem would be better addressed by informal talks rather than formal reprimands, the administration never took any action to discipline the striking teachers for shunning the nonstriking teachers.

Michael Rauch had been employed by the School Board as an industrial arts teacher since 1986. Mr. Rauch participated in both the strike and the post-strike shunning activities. During the strike, Mr. Rauch spent much of his time on the main picket line and had several confrontations with members of the school administration and with nonstriking teachers and substitutes. The 1987-1988 school year was Mr. Rauch's second year with the School Board under a one-year limited contract.

Under the collective bargaining agreement between the School Board and the Association, limited contracts for teachers with less than four years of service did not contain a "just cause" requirement for nonrenewal. After a teacher had taught for four years, nonrenewal of limited contracts could only be for "just cause."

The school administration and members of the School Board received complaints from students, teachers, and parents about Mr. Rauch's conduct, expressing their dissatisfaction with his attitude and behavior and asking that his contract not be renewed. Specific incidents of misconduct included the following:

- (1) A substitute teacher complained that Mr. Rauch threatened physical harm to him when he inadvertently entered Mr. Rauch's classroom. Specifically, with clenched fist and in the presence of students, Mr. Rauch called the substitute teacher a "scab" and told him never to enter his classroom again.
- (2) Another substitute teacher complained after the strike that Mr. Rauch questioned her in the teachers' lounge about whether she had "scabbed" during a strike at another school district.
- (3) A student, who had written a letter to the Editor of the *MARIETTA TIMES* that attributed certain conduct during the strike to the Association, complained that Mr. Rauch directed nasty looks at him and walked in his path in an uncrowded hallway.
- (4) Another student, who is Superintendent Curry's daughter, made a complaint regarding Mr. Rauch's treatment. She stated that he would stand by her locker and stare at her. She also complained that Mr. Rauch made pejorative comments about her restaurant job.
- (5) A nonstriking teacher complained after the strike that Mr. Rauch glared at her in the school hallways and, in another incident, blocked her car on the school access road.
- (6) Another nonstriking teacher complained that Mr. Rauch sabotaged an air compressor so that the teacher's class was unable to use it.

Several school administrators spoke with Mr. Rauch on numerous occasions about these complaints and his attitude in general, but his behavior did not change. Principal Clayton Butler spoke to Mr. Rauch on approximately ten occasions during the first quarter of 1988. Many of the discussions were of a general nature regarding Mr. Rauch's feelings about the nonstriking teachers and his attitude toward teachers, students, and school

generally. Principal Butler indicated to Mr. Rauch that he did not need to socialize with the nonstriking teachers, but that Mr. Rauch needed to converse with and to have a more cooperative attitude toward the nonstriking teachers. In the context of these general discussions, Principal Butler also spoke specifically to Mr. Rauch about some of the above-referenced incidents. During late February 1988, Superintendent Ronald Curry spoke to Mr. Rauch about his attitude. Superintendent Curry did not bring up any alleged instances of misconduct during this meeting. Instead, the conversation centered around Mr. Rauch having to work cooperatively with other teachers. Also in February 1988, the Director of Student Services spoke to Mr. Rauch about his behavior and attitude, telling him that community and staff members were upset with him about such things as his glaring at individuals and the incident where he gave nasty looks to, and obstructed the path of, one of the students. Additionally, two School Board members, Herb Kasum and Kent Place, spoke with Mr. Rauch regarding his attitude and conduct. School Board Member Kasum, who cast the one vote for Mr. Rauch's renewal, telephoned him well before the vote by the School Board on his contract to discuss his attitude in general and to advise him to improve it. Mr. Place, who resigned his position on the Board at the meeting before the vote on Mr. Rauch's contract renewal, questioned Mr. Rauch about the air compressor and student incidents.

On March 31, 1988, Superintendent Curry sent a written notice to Mr. Rauch. This notice informed Mr. Rauch that Superintendent Curry intended to recommend to the School Board that Mr. Rauch's teaching contract not be renewed. The reason given for the intended recommendation was that Mr. Rauch's attitude and conduct did not meet the expectations of the School Board. Mr. Curry also sent similar notices to five other teachers. All of the teachers recommended for nonrenewal were striking teachers, including two teachers who ostracized the nonstriking teachers. The intended recommendation of nonrenewal for these two teachers was based on their individual performance and attitude.

After the notices were issued from Superintendent Curry, but before the School Board's vote on the renewal of their contracts, each of these teachers, including Mr. Rauch, was given an opportunity to meet with Superintendent Curry and a union representative. The purpose of these meetings was to open a dialogue between each teacher and Superintendent Curry, whereby the teacher could indicate his or her willingness to improve performance, attitude, and relationships between students and teachers. At their individual meetings, Mr. Rauch and the two other teachers who had ostracized nonstriking teachers made general statements to Superintendent Curry that they would attempt to improve their attitude, performance, and relationships with other teachers and students.

Following the meeting with Superintendent Curry, Mr. Rauch's attitude remained unchanged. On April 21, 1988, the School Board met to consider Mr. Curry's recommendations. At this meeting, Mr. Rauch was given an opportunity to address the School Board. Neither Mr. Rauch nor the School Board members discussed the above-referenced allegations of misconduct against him. Instead, Mr. Rauch made a presentation centering on the positive improvements that he had made in the industrial arts program during his two-year tenure.

Of the six teaching contracts being considered by the School Board members at this meeting, only the contracts of Mr. Rauch and one other teacher were actually nonrenewed. The stated reason for Mr. Rauch's nonrenewal was that his attitude and conduct as a teacher did not meet the expectations of the School Board. Only one School Board member, Herb Kasum, voted to renew Mr. Rauch's teaching contract. School Board Member Kasum testified that he was not influenced by the communications he received from community members, parents, or nonstriking teachers, and that he thought Mr. Rauch's classroom teaching performance outweighed any negative considerations. School Board Member Matthews based his vote to nonrenew Mr. Rauch both on Superintendent

Curry's recommendation and on information he had personally gathered. School Board Member Lang based her vote to nonrenew Mr. Rauch in large part upon community opposition to Mr. Rauch's renewal. Finally, School Board Member Farson based his vote to nonrenew Mr. Rauch largely on the above-referenced alleged instances of misconduct. School Board Member Farson knew that Principal Butler had spoken to Mr. Rauch on several occasions and believed that Mr. Rauch knew of at least some of the allegations against him. Of the remaining four teachers whose contracts were also being considered, the School Board members approved one teacher's resignation effective upon completion of the 1987-1988 school year and renewed the limited contracts of the other three teachers.

On April 22, 1988, the Association, on behalf of Mr. Rauch, filed an unfair labor practice charge against the School Board. The Association alleged that the Respondent nonrenewed Mr. Rauch's employment contract in retaliation for his engaging in activities protected under O.R.C. Chapter 4117. On October 26, 1989, SERB found probable cause to believe that the Respondent had committed an unfair labor practice and directed the matter to hearing. A hearing was held from June 25, 1990 through June 29, 1990. On December 11, 1990, the Hearing Officer's Proposed Order was issued. The parties filed objections to the proposed order, and the case was reviewed by SERB. On July 17, 1991, upon review of the entire record, the parties' exceptions to the proposed order, and the responses to the exceptions, SERB issued its Order and Opinion [SERB 91-005 (7-17-91)] in which it determined that an unfair labor practice had not been committed by the Respondent and dismissed the complaint and charge. On July 22, 1991, the Association filed a notice of appeal with the Washington County Court of Common Pleas.

On August 20, 1991, Mr. Rauch filed a complaint in the U.S. District Court for the Southern District of Ohio, alleging that the School Board violated 42 U.S.C. § 1983 by nonrenewing his teaching contract in retaliation for his exercise of speech and association

rights guaranteed by the First Amendment of the United States Constitution. On July 29, 1992, the federal jury returned a general verdict in favor of Mr. Rauch. The School Board's motion for judgment notwithstanding the verdict was denied by a memorandum order dated September 12, 1992. The School Board appealed the jury's general verdict, but dismissed its appeal on July 9, 1993.

On January 12, 1993, the Washington County Court of Common Pleas affirmed SERB's decision. The common pleas court's opinion was journalized on February 1, 1993. On March 1, 1993, the Association appealed to the Fourth District Court of Appeals. The court of appeals did not address the merits of the lower court's decision; instead, by a decision dated November 10, 1993, it reversed the lower court's judgment and remanded the case to SERB for further consideration in light of the Ohio Supreme Court's then-recent decision in *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485, 1993 SERB 4-43 ("*Adena*").

This case then returned to SERB for the *limited* purpose of applying the new *Adena* standard to the facts that SERB had determined previously. No additional record evidence was presented by any party to the action, and no additional facts were found. In the Order and Opinion issued on October 14, 1994, SERB held that under the *Adena* standard, the nonrenewal of Mr. Rauch's limited teaching contract was not due to his exercise of rights protected by O.R.C. Chapter 4117, and dismissed the complaint and the charge against the Respondent [SERB 94-016 (10-14-94)]. The Association appealed SERB's Order to the Washington County Court of Common Pleas. On August 23, 1995, the common pleas court affirmed SERB's decision. This common pleas court opinion was journalized on September 6, 1995.

The Association filed a notice of appeal from the common pleas court to the Fourth District Court of Appeals on October 3, 1995. On October 15, 1996, the court of appeals

reversed the judgments of both SERB and the common pleas court and remanded the case to SERB. The court of appeals held that upon remand, the School Board was collaterally estopped by the judgment in the federal court proceeding from relitigating the issue of its motivation for nonrenewing Mr. Rauch's contract. The court of appeals specifically stated as follows:

Our review of the collateral estoppel issue does not infringe upon SERB's jurisdiction to determine the ultimate issue in this case, i.e., whether the School Board's nonrenewal of Rauch's contract constituted an unfair labor practice. Based upon the judgment in the federal court proceeding, i.e., that Rauch's First Amendment rights, *which exist independently of R.C. Chapter 4117*, were violated, we merely hold that the board of education may not relitigate the factual issue of its motivation for nonrenewing Rauch's contract. *Fort Frye Teachers Assn. v. SERB*, 1996 SERB 4-43, 4-46 (4th Dist Ct App, Washington, 10-15-96), (footnotes omitted)(emphasis added).

SERB and the School Board appealed this decision to the Ohio Supreme Court. In *Fort Frye Teachers Assn. v. SERB* (1998), 81 Ohio St.3d 392, the Ohio Supreme Court, by a 4-3 vote, affirmed the decision of the Court of Appeals and remanded this matter to SERB for a determination of whether an unfair labor practice occurred in violation of O.R.C. § 4117.11.

II. DISCUSSION

The Ohio Supreme Court affirmed the court of appeals' determination that collateral estoppel applies to the determination by general jury verdict that the Respondent's motivation for terminating Mr. Rauch's employment was in violation of the First Amendment of the United States Constitution. As the court of appeals recognized, however, Mr. Rauch's First Amendment rights exist independently of O.R.C. Chapter 4117.

A threshold question in this remand is, therefore, how SERB is to apply collateral estoppel when determining the ultimate issue in this unfair labor practice case. As the

Ohio Supreme Court's opinion in this matter does not contain a syllabus, we look to the Court's prior decisions on the meaning of collateral estoppel as a guide in determining how to apply the doctrine in this case. In *Trautwein v. Sorgenfrei* (1979), 58 Ohio St.2d 493, the Court approved and followed its earlier statement of the law of collateral estoppel set forth in *Whitehead v. General Tel. Co.* (1969), at Syllabus 2, as follows:

A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the parties or their privies. The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action.

In *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. In *In re Fort Frye Local School Dist. Bd. of Ed.*, SERB 94-017, p. 3-104 (10-14-94), we recognized 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 un rebutted 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. *Id.*

The Complainant met its burden of establishing a prima facie case. First, Mr. Rauch was a public employee under O.R.C. § 4117.01(C), who was employed by the School Board under a one-year limited contract during the 1987-88 school year. Second, he engaged in protected activities. As a highly visible union supporter, Mr. Rauch played a prominent role in the 1987 strike; both Superintendent Curry and the Board Members were aware of his activities. Third, on April 21, 1988, the School Board took an adverse action against Mr. Rauch when it voted to accept Superintendent Curry's recommendation that Mr. Rauch's limited teaching contract be nonrenewed. Given these facts, and absent rebuttal, it is not unreasonable to infer that Mr. Rauch's teaching contract was nonrenewed due to his engaging in protected activities.

Under the *Adena* standard, when the burden of establishing a prima facie case has been met, a presumption of antiunion animus is raised. At this point, the Respondent is given the opportunity to present evidence that its actions were the result of other conduct by the employee not related to activity protected by O.R.C. Chapter 4117. The Complainant and the Association assert that we should apply collateral estoppel at this point and not consider the evidence in the record that may rebut the presumption that the Respondent's decision not to renew Mr. Rauch's contract was motivated by antiunion animus. In lieu of the record evidence, the Complainant and the Association argue that the federal jury verdict that the Respondent's motivation was "illicit" is all the evidence that

SERB needs to determine whether an unfair labor practice occurred. They further argue that the federal jury's verdict *requires* that we find that an unfair labor practice occurred. For the reasons that follow, we reject this argument.

As part of any factual resolution on the issue of motivation, *Adena* demands consideration of rights protected by O.R.C. § 4117.03 and employee actions that may or may not be protected by that section. In Mr. Rauch's lawsuit in federal district court, the jury determined that the nonrenewal of his teaching contract was in violation of rights protected by the U.S. Constitution. As the court of appeals recognized, the federal jury did not, and, indeed, could not, consider the facts presented to it in relation to O.R.C. Chapter 4117 because of SERB's exclusive jurisdiction. See *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police* (1991), 59 Ohio St.3d 167.

A review of paragraph 3 of the federal complaint reveals that the federal action was not limited to "associational" rights, but rather concerned the exercise of the First Amendment "rights of, but not limited to, freedom of speech and freedom of association." Paragraph 23 of the federal complaint alleged that the defendants' actions at issue in that complaint violated Mr. Rauch's "right to freedom of speech and freedom of association * * * as guaranteed by the First and Fourteenth Amendments of the United States Constitution."

While some overlap may exist between the rights to freedom of speech and freedom of association protected by the First Amendment of the United States Constitution and the rights protected by O.R.C. Chapter 4117, these provisions are not coextensive. The threshold basis for finding a First Amendment violation differs vastly from that mandated by the Ohio Supreme Court for finding an unfair labor practice. According to the U.S. Supreme Court, when determining whether an employer has infringed on a public employee's First Amendment interests, the threshold consideration is whether the activity in question is a matter of public concern, such that it is of interest to the community for

either social, political, or other reasons. *Connick v. Myers* (1983), 461 U.S. 138, 142. A matter of interest only to the public employee is not constitutionally protected. *Id.* Whether the activity addresses a matter of “public concern” is determined by an analysis of the content, form, and context of a given action and the entire record of the case. *Id.* at 147-148. If the activity does address a matter of public concern, the next step is to weigh the interests of the employee in expressing his opinion against the employer’s interest in regulating the activity. If the activity is protected because the employee’s interests outweigh the employer’s, the employee must then show that the activity was a substantial or motivating factor for the challenged governmental action. See *Lytle v. City of Haysville* (10th Cir. 1998), 183 F.3d 857, 863. If the employee meets this burden, the employer is then given an opportunity to demonstrate that it would have taken the same action regardless of the protected activity. *Id.*

In *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle* (1977), 429 U.S. 274, the U.S. Supreme Court described the constitutional inquiry as follows: “[the] question of whether speech of a government employee is constitutionally protected expression necessarily entails striking ‘a balance between the interests of the teacher, as a *citizen*, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” *Id.* at 284 (quoting *Pickering v. Twp. High School Dist. 205 Bd. of Edn.* (1968), 391 U.S. 563, 568) (emphasis added). These cases demonstrate that First Amendment protections are extended to a government employee as a private citizen, and that these protections are wholly unrelated to an employee’s right to bargain collectively or to engage in any other activity that would necessarily receive O.R.C. Chapter 4117 protection. Furthermore, the inquiry into matters of public concern, so necessary to a determination of First Amendment rights, is not part of the inquiry into whether a challenged action is an unfair labor practice. Whether an issue is a “public” matter is wholly irrelevant to determining whether an unfair labor practice based on antiunion animus occurred.

Mr. Rauch engaged in strike activity protected under O.R.C. § 4117.03. But he also engaged in *individual* post-strike behavior unrelated to those rights. The federal jury's general verdict, which was unaccompanied by interrogatories, does not indicate which of Mr. Rauch's activities the jury found to have motivated the nonrenewal of his contract. The factual basis for the jury's verdict cannot be known; indeed, the jury's general verdict more closely resembles a conclusion of law than a finding of fact. We cannot tell from the federal jury verdict which of Mr. Rauch's activities the jury found to have been both (a) protected by the First Amendment *and* (b) considered by the Respondent when it nonrenewed Mr. Rauch's contract. It necessarily follows that we cannot tell whether the activities the jury found to have been unconstitutionally considered by the Respondent are also activities protected by O.R.C. Chapter 4117. We simply cannot apply O.R.C. Chapter 4117, or the *Adena* standard, without examining the facts of record in this case.

In examining the facts presented, we are not giving the Respondent the opportunity to "relitigate" its motivation. The Respondent was given but one opportunity, in 1990, to present its rebuttal evidence.¹ *Adena* holds that the ultimate issue in an O.R.C. Chapter 4117 discrimination case is one of antiunion motivation. It is undisputed that only SERB has the initial authority to make that determination. This exclusive jurisdiction would be meaningless if it did not include the ability to review the facts presented at hearing in 1990 and apply them to the legal standard necessary to determine the ultimate issue in this case. Precluding SERB from evaluating the evidence in light of this ultimate issue is tantamount to stripping SERB of its exclusive jurisdiction — something the courts uniformly have held cannot be done. Furthermore, because our inquiry is essentially one of motivation, it would effectively eliminate this proceeding.

In *Weinfurtner v. Nelsonville-York School Dist. Bd. of Edn.*, 77 Ohio App.3d 348 (Ohio App.1991) ("*Weinfurtner*"), the Fourth District Court of Appeals was careful to point

¹The SERB hearing took place before the *filing* of the action in federal court.

out that SERB's jurisdiction over unfair labor practice cases cannot be usurped. That court, which also issued the decision affirmed by the Ohio Supreme Court and remanded to us in this case, permitted a 42 U.S.C. § 1983 case to go forward in state court over the defendant School Board's objection, reasoning that such a proceeding would not result in conflicting interpretations of O.R.C. Chapter 4117 precisely because "courts will *not* be expressly determining whether unfair labor practices have been committed in resolving the Section 1983 claims." *Weinfurter, supra* at 355 (emphasis added).

Allowing the federal jury's 42 U.S.C. § 1983 verdict to eliminate SERB's independent consideration of the evidence of motivation presented at the 1990 hearing, and precluding SERB from making its own determination of whether the Respondent's motivation violated O.R.C. Chapter 4117, would result in substituting a jury's determination in another action for our own, would result in a conflicting interpretation of O.R.C. Chapter 4117, and would deprive SERB of its exclusive jurisdiction. Furthermore, a SERB determination arrived at without consideration of the evidence of record would be an inaccurate and inconsistent adjudication: because of the lack of specificity in the jury's verdict, eliminating consideration of the facts of record in this case would render us unable to reach a decision correctly applying the *Adena* standard. Moreover, in examining the record, we are following the Ohio Supreme Court's statement of the law of collateral estoppel: we are not allowing the parties to "draw into question" or to dispute the jury's general verdict that the School Board violated Mr. Rauch's First Amendment rights when it nonrenewed his contract; rather, we are examining the record to find the *specific* facts necessary to *our* determination of whether, in nonrenewing Mr. Rauch's contract, the Respondent violated O.R.C. Chapter 4117.

Although Mr. Rauch was an active participant in the 1987 strike against the School Board and he was recommended for nonrenewal, five other teachers who also participated in this strike were recommended for nonrenewal at the same time as well, thereby negating any inference that Mr. Rauch was singled out for his strike activity. Of the six teaching

contracts in question, only two contracts, including Mr. Rauch's, were ultimately nonrenewed by the School Board.

It is also undisputed that Mr. Rauch participated in the social ostracism or shunning of the nonstriking teachers following the strike, and that the stated basis for his contract nonrenewal was that his attitude and conduct after the strike did not meet the expectations of the School Board. Again, Mr. Rauch was not singled out. The recommendation of nonrenewal for the contracts of two other teachers was also partially based on their attitudes. Like Mr. Rauch, those two teachers had participated in ostracizing nonstriking teachers. Unlike Mr. Rauch, however, their contracts were renewed by the School Board. After receiving notice of Superintendent Curry's intent to recommend nonrenewal of their teaching contracts to the School Board, the two teachers individually met with Superintendent Curry and a union representative to express their willingness to improve their performance, attitude, and relationships between students and teachers. Mr. Rauch also had a similar meeting with Superintendent Curry. The two teachers each pledged to Superintendent Curry that they would work to improve their attitudes. Mr. Rauch also made a similar commitment. Based on the fact that their contracts were renewed, the two teachers apparently kept their promises. Mr. Rauch, on the other hand, did not. We find this comparison among the three similarly situated teachers pivotal in our conclusion that the Respondent's motivation for nonrenewing Mr. Rauch was not based upon his previous exercise of protected activity, but instead was premised solely on his individual post-strike behavior and performance unrelated to his exercise of any guaranteed rights.

As previously stated, several allegations of misconduct were made against Mr. Rauch by students, teachers, and other individuals. The Complainant contends that although these allegations formed the basis for Superintendent Curry's recommendation of nonrenewal, Mr. Rauch was never informed of the allegations by Superintendent Curry or any other administrator. This position is not supported by the record, which in fact, plainly indicates just the opposite. Several school officials testified that they not only had

spoken with Mr. Rauch about his attitude in general, but also spoke with him about some of the specific allegations that had been made against him.

Principal Butler spoke to Mr. Rauch on approximately ten occasions during the first quarter of 1988. Although many of these discussions were of a general nature regarding Mr. Rauch's attitude, Principal Butler also spoke to him specifically about some of the incidents. The Director of Student Services also spoke to Mr. Rauch about his behavior and attitude, and the incident where he gave nasty looks to, and obstructed the path of, one of the students was specifically mentioned. Mr. Rauch was also questioned about the student incident by School Board Member Place, who resigned his position on the School Board at the meeting before the vote on Mr. Rauch's contract renewal. School Board Member Place also questioned Mr. Rauch about the incident involving the air compressor. In addition to testimony that these school officials spoke directly to Mr. Rauch about some of the incidents of misconduct, Superintendent Curry and School Board Member Kasum also spoke to him about his attitude and conduct in general. Thus, based on the foregoing, Mr. Rauch was given notice of the instances of misconduct that formed the basis for the nonrenewal of his contract.

The argument that Mr. Rauch's attitude and conduct became unsatisfactory only after he participated in the strike and that Superintendent Curry testified he would have probably recommended renewal of his contract before the strike is without merit. No evidence was offered to indicate that Mr. Rauch had engaged in instances of misconduct before the strike similar to the post-strike activities that formed the basis for the nonrenewal of his contract. Mr. Rauch's post-strike activities were not protected activities.² Thus, the record demonstrates that Mr. Rauch's own misconduct after the strike and his failure to reform, as promised, led the School Board to decide not to renew his teaching contract.

²Although an unfair labor practice charge was not filed against Mr. Rauch by a nonstriking teacher, it could be argued that his activities were actually prohibited activities under O.R.C. § 4117.11(B)(1).

The Complainant has contended, however, that at least one School Board member voted against Mr. Rauch because of his strike activity. School Board Member Lang did admit that her vote to nonrenew Mr. Rauch was based on his actions during the strike. This specific testimony, however, is only a small excerpt taken from her full testimony, and it does not paint a complete picture. Upon direct questioning, School Board Member Lang responded that she thought it inappropriate for Mr. Rauch to have referred to teachers who crossed the picket line as “scabs” and that his having done so would in part justify his being nonrenewed. Even if this testimony were indicative of antiunion sentiments, School Board Member Lang's one vote out of four was hardly sufficient to be outcome determinative on Mr. Rauch's contract renewal. Second, the complete record indicates that School Board Member Lang, like School Board Members Kasum and Matthews, based her vote to nonrenew Mr. Rauch's teaching contract in large part upon community opposition to him. School Board Member Lang testified that she received many complaints from community members, parents, and nonstriking teachers that were not related to Mr. Rauch's strike activities or any post-strike activities formally endorsed by the Association. Instead, most of the complaints were from parents in reference to Mr. Rauch ostracizing the nonstriking teachers and harassing students.

After thoroughly reviewing the record under the *Adena* standard, the facts adduced at the original hearing in this matter support our findings that (1) the Complainant presented sufficient evidence to establish a prima facie case and create a presumption of antiunion animus, (2) the Respondent presented sufficient evidence to rebut the presumption, and (3) based upon a preponderance of the evidence, the Respondent did not act, at least in part, to discriminate against Mr. Rauch for the exercise of his guaranteed rights. Quite simply, evidence of antiunion animus, as a basis for the nonrenewal decision, was not present. Post-strike activities that are not protected by O.R.C. Chapter 4117 led to the Respondent's decision to nonrenew. Consequently, an unfair labor practice did not occur.

III. PROCEDURAL ISSUE

Attached to the Association's July 31, 1998, brief in this matter is an affidavit attesting to additional damages incurred by Mr. Rauch as a result of the nonrenewal of his teaching contract. The Respondent has moved the Board to strike the affidavit on the ground of collateral estoppel. Specifically, the Respondent asserts that the issue of damages was already addressed by the federal jury verdict, and that the Association is not entitled to relitigate this issue before SERB. Because we have completely dismissed this matter on other grounds, we need not reach this issue.

IV. CONCLUSION

Having carefully reconsidered this matter upon remand, we find by a preponderance of the evidence that the Fort Frye Local School District Board of Education did not commit an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(3) when it did not renew the employment contract of Michael Rauch. The action taken by the Fort Frye Local School District Board of Education to nonrenew Mr. Rauch's teaching contract was premised on his unprotected, post-strike activities, not by his exercise of rights protected by O.R.C. Chapter 4117. Consequently, the complaint and the unfair labor practice are dismissed with prejudice.

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