

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Mentor,

Respondent.

Case No. 98-ULP-04-0171

**ORDER
(OPINION ATTACHED)**

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

On April 9, 1998, the Ohio Patrolmen's Benevolent Association ("Charging Party") filed an unfair labor practice charge against the City of Mentor ("Respondent"). On September 3, 1998, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(3) when Captain Reese threatened Patrol Officer Miller regarding Mr. Miller's grievances and when Mr. Miller's job evaluation rating was changed because he had filed a grievance over a 1997 disciplinary action. A Complaint and Notice of Hearing were issued on September 30, 1998.

A hearing was held on November 24, 1998. On January 28, 1999; the Administrative Law Judge's Proposed Order was issued, recommending that the Board find violations of O.R.C. Section 4117.11(A)(1), but not (A)(5). On February 19, 1999, the Respondent filed its exceptions to the proposed order. On February 22, 1999, the Complainant filed its exceptions to the proposed order.

After reviewing the record and all filings, the Board amends Conclusion of Law No. 4 to read: "By giving Mr. Miller an evaluation with two categories marked 'below standard,' the Respondent discriminated against Mr. Miller because he had exercised rights protected by Ohio Revised Code Chapter 4117 in violation of Section 4117.11(A)(3)." The Board adopts the Findings of Fact and Conclusions of Law, as amended, in the Proposed Order.

The City of Mentor is ordered to:

A. Cease and desist from:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(1) by threatening employees for filing grievances and otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Discriminating in regard to hire or tenure of employment or any other term or condition of employment on the basis of rights guaranteed by Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(3) and otherwise violating Ohio Revised Code Section 4117.11(A)(3).

B. Take the following affirmative action:

- (1) Change immediately Mr. Miller's 1997 performance evaluation comments to conform with the finding of the arbitrator that he failed to follow departmental procedures and to delete any references to the grievance;
- (2) Change immediately Mr. Miller's 1997 performance evaluation ratings to the ratings originally given by Sergeant Powers;
- (3) Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Mentor shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) in all of the usual and normal posting locations where the bargaining-unit employees of the City of Mentor, who are represented by the Ohio Patrolmen's Benevolent Association work; and
- (4) Notify the State Employment Relations Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

Order
Case No. 98-ULP-04-0171
June 17, 1999
Page 3 of 3

It is so directed.

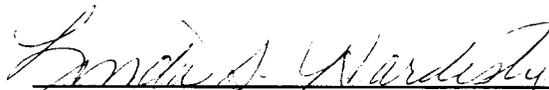
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



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 30th day of June, 1999.



LINDA S. HARDESTY, CERTIFIED 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 State Employment Relations Board and abide by the following:

The City of Mentor is hereby ordered to:

- A. Cease and desist from:
 - 1. Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(1) by threatening employees for filing grievances and otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
 - 2. Discriminating in regard to hire or tenure of employment or any other term or condition of employment on the basis of rights guaranteed by Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(3) and otherwise violating Ohio Revised Code Section 4117.11(A)(3).

- B. Take the following affirmative action:
 - 1. Change immediately Mr. Miller's 1997 performance evaluation comments to conform with the finding of the arbitrator that he failed to follow departmental procedures and to delete any references to the grievance;
 - 2. Change immediately Mr. Miller's 1997 performance evaluation ratings to the ratings originally given by Sergeant Powers;
 - 3. Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Mentor shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) in all of the usual and normal posting locations where the bargaining-unit employees of the City of Mentor, who are represented by the Ohio Patrolmen's Benevolent Association work; and
 - 4. Within twenty calendar days from the issuance of the Order, notify the State Employment Relations Board in writing of the steps that have been taken to comply therewith.

**SERB v. City of Mentor
Case No. 98-ULP-04-0171**

BY

DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for sixty 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 State Employment Relations Board.

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Mentor,

Respondent.

Case No. 98-UJP-04-0171

VERICH, Board Member:

This unfair labor practice charge comes before the State Employment Relations Board ("SERB" or "Complainant") upon the filing of exceptions and response to exceptions from the Administrative Law Judge's Proposed Order that was issued on January 28, 1999. For the reasons below, we find that the City of Mentor violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(3) when it threatened Patrol Officer Miller regarding his grievances and when it lowered Mr. Miller's performance evaluation ratings because he had filed a grievance concerning a 1997 disciplinary action.

I. BACKGROUND

The Ohio Patrolmen's Benevolent Association ("Union" or "OPBA") is the exclusive representative for a bargaining unit of Police Officers employed by the City of Mentor ("City" or "Respondent"). The City and the OPBA are parties to a collective bargaining agreement effective April 8, 1996 to April 11, 1999 ("Agreement"), containing a grievance procedure that culminates in final and binding arbitration. Section 29.6 of the Agreement states: "Discipline shall not be implemented until either: (1) the matter is settled, or (2) the employee fails to file a grievance within the time frame provided by this procedure, or

(3) the penalty is upheld by the arbitrator or a different penalty is determined by the arbitrator.”

Dean Miller is employed by the City as a Patrol Officer and is a member of the OPBA. In September 1997, Mr. Miller filed a grievance over a two-day suspension he received for an incident in which he was charged with insubordination and failure to follow a direct order. The grievance was the first ever filed by Mr. Miller. The grievance went to arbitration, and the award stated that Mr. Miller was not insubordinate. The arbitrator found that Mr. Miller had failed to follow departmental procedures and reduced the discipline from a two-day suspension to a written reprimand.

During March 1998, after Mr. Miller filed the grievance but before the arbitrator issued his award, the City issued its annual performance evaluation of Mr. Miller. He received a “below standard” rating in the areas of *Integrity and Organizational Ethics* and *Teamwork*. The evaluation also included the following comment: “Grievance (sic) pending regarding incident with supervisors. Due to insubordination charge, this reflects negatively in the area of working effectively with supervisors.” Mr. Miller had never before been marked below standard on any previous evaluations with the City.

Mr. Miller’s supervisor, Sergeant Thomas Powers, wrote the original evaluation; he did not believe that Mr. Miller’s performance was below standard. In Sergeant Powers’ opinion, Mr. Miller worked hard toward his assigned duties and shift goals, and he was quick to help when needed. Sergeant Powers marked Mr. Miller below standard because he was ordered to do so by Captain Jeffery Reese, who is an agent or representative of the City. Captain Reese also ordered Sergeant Powers to add the comment regarding insubordination even though this issue was still pending before the arbitrator.

On March 26, 1998, Mr. Miller filed a second grievance over the performance evaluation asserting that he was being disciplined before the matter was resolved, citing Sections 29.6 and 29.8 of the Agreement, and requesting removal of any reference to the pending disciplinary matter from his performance evaluation. On the same day, OPBA President Dan Grein telephoned Captain Reese in his office to request a meeting on the new grievance. Once Mr. Grein informed Captain Reese that Mr. Miller was filing the grievance regarding his performance evaluation, Captain Reese stated: "I am not even going to entertain that, and if he wants to pursue it, I will move his ass off his shift." Mr. Miller had enrolled in classes at Cleveland State University and a change in his shift would make it impossible for him to attend certain classes and to finish school that year. Captain Reese then told Mr. Grein to bring Mr. Miller to his office the following day for a grievance meeting.

On March 31, 1998, Mr. Miller filed a third grievance over the inclusion of his pending discipline on his performance evaluation for a different reason, asserting that the City violated Article V of the Agreement because it "used an unreasonable exercise of 'Management Rights'" when Captain Reese ordered that Mr. Miller's 1997 performance evaluation be modified from its original content. Also, on March 31, 1998, a meeting took place to discuss the filing of this new grievance. At the meeting, Captain Reese said that he would change the performance evaluation if the arbitrator overturned the pending discipline, which was the basis for the first grievance. Following this meeting, Mr. Miller withdrew both grievances over the evaluation based on Captain Reese's statement that the performance evaluation at issue would be changed to reflect any finding by the arbitrator. The arbitrator's award found specifically that Mr. Miller was not insubordinate but that he failed to follow departmental procedures; the award did not uphold the suspension, but reduced the discipline to a written reprimand. After the arbitrator's award was issued, the City did not make a change to Mr. Miller's performance evaluation, either as to the ratings or as to the comments.

II. DISCUSSION

The City is alleged to have violated O.R.C. §§ 4117.11 (A)(1) and (A)(3), which 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 or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

* * *

(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. O.R.C. § 4117.12(B)(3).

A. The City Violated O.R.C. § 4117.11(A)(3)

In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485, 1993 SERB 4-43 (“*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. The Ohio Supreme Court’s *Adena* opinion was interpreted and applied 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 activity under O.R.C. Chapter 4117. *Id.*

The City does not dispute that Mr. Miller is a public employee who was employed at relevant times by the City and that he filed grievances, which fact was known by a representative of the City, Captain Reese. After Mr. Miller filed a grievance over a suspension, his ratings on his performance evaluation were lowered to a "below standard" rating in two categories. Thus, the three elements for a prima facie case are established.

The City's rebuttal asserted that the "below standard" rating was due to discipline that Mr. Miller had received that, although reduced to a written reprimand and modified from insubordination to "failure to follow departmental procedures," was sustained by an arbitrator. In addition, the evidence demonstrates that Captain Reese simultaneously ordered numerous changes to the evaluations of other officers who did not file any grievances.

When the facts of this case are viewed in their entirety, the record establishes a causal link between Mr. Miller's protected activity and the City's lowering of his performance evaluation ratings. Mr. Miller's supervisor did not believe that Mr. Miller's performance was below standard when he wrote the original evaluation. Captain Reese ordered Sergeant Powers to mark Mr. Miller below standard and to add the comment regarding insubordination even though this issue was still pending before the arbitrator. The City has not explained satisfactorily how the "failure to follow departmental procedures" relates to the areas of *Teamwork* and *Integrity and Organizational Ethics*. Most significant, the evaluation mentions the pending grievance under the comments that explain the lowered rating, stating: "Grievence (sic) pending regarding incident with supervisor." Captain Reese has changed other employees' evaluations who have not filed grievances, but that fact, standing alone, does not overcome the conclusions to be drawn from the lowering of the ratings, the comments in the explanation, and the timing of the City's action. Therefore, we find by a preponderance of the evidence that the City was actually motivated by antiunion animus, either in whole or in part, when it lowered Mr. Miller's performance evaluation ratings.

B. The City Violated O.R.C. § 4117.11(A)(1)

The appropriate inquiry into whether an O.R.C. § 4117.11(A)(1) violation occurred is objective, rather than subjective. Neither the employer's intent nor the individual employees' subjective view of the employer's conduct will be considered in determining whether a violation has occurred; a violation will be found if, under the totality of the circumstances, it can be reasonably concluded that the employee was interfered with, restrained, or coerced in the exercise of O.R.C. Chapter 4117 rights by the public employer's conduct. *In re Springfield Local School Dist. Bd. of Ed.*, SERB 97-007 (5-1-97); *In re Pickaway County Human Services Dept.*, SERB 93-001 (3-24-93), *aff'd sub nom.* in *SERB v. Pickaway Human Services Dept.*, 1995 SERB 4-46 (4th Dist. Ct. App., Pickaway, 12-7-95) ("*Pickaway*").

Applying this standard to the case at issue, the first step is to determine whether filing a grievance is an exercise of an O.R.C. Chapter 4117 right of public employees. Filing grievances pursuant to a collective bargaining agreement falls under the statutory right of public employees to "[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." O.R.C. § 4117.03(A)(2). Moreover, the right to file grievances is one of the very few protected rights that are specifically mentioned in the statutory list of rights. O.R.C. § 4117.03(A)(5) specifically states that a public employee has the right to "[p]resent grievances and have them adjusted[.]" The special importance of the right to file grievances is demonstrated, as well, by the statutory requirement that any collective bargaining agreement must contain a grievance procedure. O.R.C. § 4117.09(B).

The second step is to determine whether the statements made by the City's agent or representative, Captain Reese, interfered with, restrained, or coerced Mr. Miller in the exercise of his right to file a grievance. The record reflects that Captain Reese attempted to dissuade Mr. Miller from pursuing his grievance. First, he stated to Mr. Grein, who was representing Mr. Miller at step 1, that "if [Mr. Miller] wants to pursue it, I will move his ass off his shift." Since Mr. Miller was taking classes during the day time, such a shift change could have interfered with his education.

A reasonable person would have taken these comments to be a threat under the circumstances. When an employer's agent makes statements that are reasonably and objectively understood to convey the message that the exercise of protected rights could result in adverse action, the employer's statements constitute an unlawful threat. *See, e.g., Council 82, AFSCME, AFL-CIO v. State of New York (Department of Correctional Services)*, 25 NY PERB ¶ 4541 (3-17-92); *Schenectady Police Benevolent Association v. City of Schenectady*, 25 NY PERB ¶ 4592 (6-30-92). By making statements with the natural consequence of discouraging Mr. Miller from pursuing his grievance, Captain

Reese unlawfully interfered with, restrained, or coerced Mr. Miller in exercising his protected statutory rights. See, e.g., *Reeds Creek Teachers Association, CTA/NEA v. Reeds Creek School District*, 20 PERC ¶ 27035 (CA PERC, 2-15-96); *Nauvoo-Colusa Education Association v. Nauvoo-Colusa Community Unit District #325*, 12 PERI ¶ 1039 (IL ELRB, 3-21-96).

The City argues that Captain Reese was not interfering with, restraining, or coercing Mr. Miller in his exercise of protected rights, but was only attempting to informally resolve a problem at the lowest level possible. This argument is not supported by the facts. The City also argued that no violation occurred since Mr. Miller clearly was not deterred from filing grievances, as evidenced by the fact that he did file grievances. This argument also has no merit. The law is well settled that the threat establishes the violation, not whether the individual employee was actually intimidated. *Pickaway, supra*. Under the objective test, the individual employee's subjective view of the employer's conduct is not relevant to determining whether an O.R.C. § 4117.11(A)(1) violation has occurred.

Thus, the Complainant has proven by a preponderance of the evidence that the City committed an unfair labor practice in violation of O.R.C. § 4117.11(A)(1) when the City attempted to stop an employee from exercising a protected right through the threatening statements made by Captain Reese to Mr. Miller.

III. CONCLUSION

For the reasons above, we find that the City of Mentor violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(3) when it threatened Patrol Officer Miller regarding his grievances and when it lowered Mr. Miller's performance evaluation ratings because he had filed a grievance concerning a 1997 disciplinary action.

Pohler, Chairman, and Gillmor, Vice Chairman, concur.