

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Norwood, Gary Hubbard, and Kevin Cross,

Respondents.

Case No. 98-ULP-09-0581

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich: October 7, 1999.

On September 29, 1998, Dennis K. Jones ("Intervenor") filed an unfair labor practice charge against the City of Norwood, Gary Hubbard, and Kevin Cross ("Respondents"). On February 25, 1999, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondents had violated Ohio Revised Code Sections 4117.11(A)(1), (A)(3), and (A)(4) by harassing and discriminating against Mr. Jones in retaliation for his exercise of guaranteed rights.

A hearing was held on May 17 and 18, 1999. On August 2, 1999, the Administrative Law Judge's Proposed Order was issued, recommending that the Board find violations of O.R.C. Sections 4117.11(A)(1), (A)(3) and (A)(4). On August 24, 1999, the Respondents filed exceptions to the proposed order. On August 31, 1999, the Complainant filed a motion to strike the Respondent's exceptions since the exceptions were not in compliance with Ohio Administrative Code Rule 4117-1-02(D). On September 7, 1999, the Complainant filed its response to the exceptions. On September 13, 1999, the Respondents filed a response to the motion to strike.

The motion to strike the Respondents' exceptions is denied. The document contains technical defects that are not prejudicial to any party.

After reviewing the record and all filings, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Proposed Order, incorporated by reference.

The City of Norwood, Gary Hubbard, and Kevin Cross are ordered to:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing Dennis K. Jones in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 or discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the rights guaranteed by Ohio Revised Code Chapter 4117, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Remove all references to discipline from January 1998 to August 1998 from Dennis K. Jones' personnel file, wherever maintained, including the August 11, 1998 letter from Paul Bazzano;
- (2) Offer reinstatement to Dennis K. Jones to the same position or to a position comparable to the position he held immediately before August 14, 1998, and remove all references to his resignation from his personnel file, wherever maintained;
- (3) Make Dennis K. Jones whole for all wages and benefits lost from the effective date of his resignation to the date the City of Norwood offers to reinstate him and for all wages and benefits lost because of his May 1, 1998 suspension, including the payment of interest on the wage amounts at the rate payable on such awards in the common pleas courts commencing from the date of the State Employment Relations Board's order in this case;
- (4) Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Norwood, Gary Hubbard, and Kevin Cross 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 Norwood, who are represented by the American Federation of State, County and Municipal Employees, Local 914 work; and

- (5) 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.

It is so ordered.

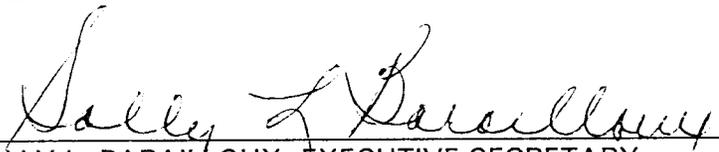
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



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 8th day of October, 1999.



SALLY L. BARAILOUX, EXECUTIVE SECRETARY



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

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 Norwood, Gary Hubbard, and Kevin Cross are hereby ordered to:

A. Cease and desist from:

Interfering with, restraining, or coercing Dennis K. Jones in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 or discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the rights guaranteed by Ohio Revised Code Chapter 4117, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4).

B. Take the following affirmative action:

1. Remove all references to discipline from January 1998 to August 1998 from Dennis K. Jones' personnel file, wherever maintained, including the August 11, 1998 letter from Paul Bazzano;
2. Offer reinstatement to Dennis K. Jones to the same position or to a position comparable to the position he held immediately before August 14, 1998, and remove all references to his resignation from his personnel file, wherever maintained;
3. Make Dennis K. Jones whole for all wages and benefits lost from the effective date of his resignation to the date the City of Norwood offers to reinstate him and for all wages and benefits lost because of his May 1, 1998 suspension, including the payment of interest on the wage amounts at the rate payable on such awards in the common pleas courts commencing from the date of the State Employment Relations Board's order in this case;
4. Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Norwood, Gary Hubbard, and Kevin Cross 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 Norwood, who are represented by the American Federation of State, County and Municipal Employees, Local 914 work; and
5. 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 Norwood, Gary Hubbard, and Kevin Cross, Case No. 98-UPL-09-0581

BY _____

DATE _____

TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERB 2012 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**

STATE EMPLOYMENT RELATIONS BOARD,	:	
	:	CASE NO. 98-ULP-09-0581
Complainant,	:	
	:	
and	:	
	:	
DENNIS K. JONES,	:	
	:	BETH C. SHILLINGTON
Intervenor,	:	Administrative Law Judge
	:	
v.	:	
	:	
CITY OF NORWOOD, GARY HUBBARD, AND KEVIN CROSS,	:	
	:	
Respondents.	:	<u>PROPOSED ORDER</u>
	:	

I. INTRODUCTION

On September 29, 1998, Dennis K. Jones filed an unfair labor practice charge against the City of Norwood ("City"), Gary Hubbard, and Kevin Cross (collectively, the City, Mr. Hubbard, and Kevin Cross are referred to as "Respondents"). On February 25, 1999, the State Employment Relations Board ("SERB," "Board," or "Complainant") determined that probable cause existed to believe that Respondents had violated §§ 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4)¹ by harassing and discriminating against Mr. Jones in retaliation for his exercise of guaranteed rights. Thereafter, a Complaint issued on April 5, 1999, and an Amended Complaint issued on April 16, 1999.

Mr. Jones moved to intervene in this action, through counsel, on April 22, 1999, and his motion was granted on April 27, 1999. A hearing was held on May 17 and May 18, 1999. Subsequently, Complainant and Respondents filed post-hearing briefs.

II. ISSUES

1. Whether Respondents violated §§ 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4) by harassing and discriminating against Mr. Jones in retaliation for his exercise of guaranteed rights.

¹All references to statutes are to the Ohio Revised Code, Chapter 4117.

2. Whether Respondents violated §§ 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4) by constructively discharging Mr. Jones in retaliation for his exercise of guaranteed rights.

III. FINDINGS OF FACT²

1. The City is a public employer as defined by § 4117.01(B). (S. 1)
2. Mr. Hubbard has served as the City's Director of the Department of Public Service since February 17, 1996. Mr. Hubbard is in charge of the City's departments of public works, streets, parks, paint, and water. At all relevant times, Mr. Hubbard has been an agent or representative of the City. (S. 3.)
3. The American Federation of State, County, and Municipal Employees, Local 914 ("AFSCME" or the "Union") is an employee organization as defined by § 4117.01(D). AFSCME is the exclusive representative for a bargaining unit of all employees of the City's Public Works Department. The City and AFSCME are parties to a collective bargaining agreement ("CBA") that culminates in final and binding arbitration. (S. 2,7)
4. Mr. Jones became employed by the City in 1974. Mr. Jones was a member of AFSCME and a "public employee" as defined by § 4117.01(C). (S. 4; T. 14)
5. Kevin Cross has been employed by Respondent as the Superintendent of the City's Department of Public Works since February 17, 1996. Mr. Cross is Mr. Jones's supervisor, and Mr. Hubbard is Mr. Cross's supervisor. (S. 3.)
6. On June 19, 1996, Mr. Cross issued a memorandum to all Public Works employees, stating as follows:

Any employee calling in sick for the day, should only talk to the Superintendent or his secretary. No one else will take the message, no one else is to deliver the message.

(Int. Exh. 8.)

²All references to the transcript of the hearing are indicated parenthetically by "T.," followed by the page number(s). All references to Complainant's and Intervenor's exhibits are indicated parenthetically by "C. Exh.," followed by the exhibit number. All references to Respondents' exhibits are indicated parenthetically by "R. Exh.," followed by the exhibit letter. All references to Intervenor's exhibits in the record are indicated parenthetically by "Int. Exh.," followed by the exhibit number. All references to the Joint exhibits in the record are indicated parenthetically by "Jt. Exh.," followed by the exhibit number. All references to the Stipulations of Fact are indicated parenthetically by "S." References to the transcript and/or exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for that related finding of fact.

7. Also on June 19, 1996, Mr. Cross issued a written warning to Mr. Jones for breaking proper procedure in notifying his supervisor of his absences from work on June 18 and June 19, 1996. Mr. Cross cited Article 14, Section 6 of the CBA in the written warning. This provision requires an employee who is unable to report to work to notify his immediate supervisor or other designated person within 15 minutes before he is scheduled to report to work. (C. Exh. 4; Int. Exh. 9.)
8. Mr. Jones has previously filed four grievances against the City; a previous unfair labor practice charge with SERB on June 12, 1998, against the City and Mr. Hubbard; and a complaint with the Equal Employment Opportunity Commission. Mr. Jones attended a SERB mediation during May 1998, concerning unfair labor practices filed against the City, Mr. Hubbard, and Mr. Cross. (S. 8.)
9. Mr. Jones filed grievance number 12329 on January 13, 1998; grievance number 12345 on May 5, 1998; a grievance alleging a violation of Article 12, section 2(B) of the CBA on August 7, 1998; and grievance number 6806 on August 21, 1998. Mr. Jones filed his EEOC complaint against the City on April 27, 1998. The City, Mr. Hubbard, and Mr. Cross knew or should have known of these filings by Mr. Jones. (S. 9, 10.)
10. Mr. Jones has been in counseling and therapy for manic depression or bipolar disorder since he was eight years old. The City's files contain documentation that Mr. Jones has had emotional difficulties. Mr. Jones has also requested information about the Public Employee Assistance Program from Mr. Cross, and has enrolled in that program. (T. 52, 138; R. Exh. K.)
11. On December 29, 1997, the City received a copy of an unfair labor practice charge filed by Dennis Cook, who was the Union steward.³ Also on December 29, 1997, Mr. Hubbard suspended Ray Erwin, who had no prior discipline, for not attending a meeting in his capacity as Union President. Mr. Hubbard did not follow the steps of progressive discipline outlined in Article 10 of the CBA or give Mr. Erwin a pre-disciplinary hearing on the three-day suspension as required by the CBA. When Mr. Erwin asked Mr. Hubbard why he was suspending him, Mr. Hubbard responded that he was "having fun." (T. 633, 640-641, 650; C. Exh. 4.)
12. During a two- or three-month time span beginning in October 1997, Mr. Cross and Mr. Hubbard issued three separate memoranda indicating that the hours for Public Works employees were being changed. The hours for Public Works employees had not changed in over 20 years. (T.380-381; Int. Exh. 16, 18, 21.)

³The Board may take administrative notice of the record in case number 98-ULP-06-0322, indicating that Mr. Cook filed approximately 20 grievances as Union steward from November 1997 to April 1998.

13. By a vote of the Union membership in attendance at a Union meeting on April 30, 1998, Mr. Cook was removed as Union steward. At this meeting, Mr. Jones addressed the membership in support of retaining Mr. Cook as Union steward. (T. 101-102.)
14. In 1996, Mr. Jones held the position of B1 Laborer on the water crew at Public Works. The description for this position had been created as a result of negotiations between the City and the Union and was intended to result in a pay level commensurate with the physically demanding work required of Mr. Jones in this position. (T. 220; Int. Exh. 7.)
15. Mr. Jones' leadman on the water crew was Roger Perkins, who was the Union President from September 1996 to September 1997. Mr. Jones was Union Vice President during this time. A leadman is a member of the bargaining unit who oversees the work of other employees on his crew while at the same time doing the work. Leadmen in the City receive their daily work orders from Mr. Cross. (T. 472; Int. Exh. 48.)
16. Before May 1996, Mr. Perkins was off work following a heart attack. When he returned to work, Mr. Hubbard and Mr. Cross instructed Mr. Perkins to "drop the hammer" on Mr. Jones by assigning Mr. Jones the most difficult jobs and denying him equipment needed to complete these jobs correctly. Mr. Perkins complied, as Mr. Hubbard and Mr. Cross threatened to discipline him if he did not. On several occasions, Mr. Jones was required to dig holes without the use of a helper or backhoe to move the dirt and without necessary water pumps. Mr. Jones was also left in an open hole by himself all day without a radio for communication with Public Works. Mr. Jones complained to both Mr. Cross and Mr. Hubbard, but neither took any action to remedy the situation. (T. 19-21, 109, 220-224.)
17. Mr. Jones complained to AFSCME Staff Representative Walter Edwards about the working conditions on the water crew, but Mr. Edwards told Mr. Jones that no action could be taken without "documentation," and that Mr. Jones' testimony alone was not sufficient. (T. 108-109, 285-286.)
18. In late 1997, Mr. Jones asked Mr. Cross for a transfer to another position. Mr. Cross transferred Mr. Jones to a position as a truck driver on the street crew, which resulted in a decrease in Mr. Jones' pay. Mr. Jones' B1 Laborer position on the water crew was not filled immediately because no other employee had the qualifications for the position as described in the position description. After the Union complained to the City that the position had not been filled, the position description was revised to require fewer years of work experience and less heavy lifting. Mr. Hubbard then gave the position to Mr. Zimmerman. Mr. Zimmerman received the equipment and helpers needed to carry out the duties of the revised B1 Laborer position. (T. 24-25, 109, 754; Int. Exh. 7, 15.)

19. On January 13, 1998, after Mr. Zimmerman replaced Mr. Jones, Mr. Jones filed a grievance claiming age discrimination in violation of Article 5 of the CBA. Mr. Jones never received a hearing on the grievance as required by Article 9 of the CBA. Mr. Cross sent Mr. Jones a letter denying the grievance. (T. 71; C. Exh. 5.)
20. On January 29, 1998, Mr. Cross charged Mr. Jones with Neglect of Duty under Article 14, Section 11 of the CBA for requesting to use sick leave in excess of the amount he had thus far accrued for calendar year 1998. Mr. Cross claimed that the City was implementing a new procedure in 1998 in which employees accrued sick leave on a biweekly incremental basis rather than starting the year with a 14-day leave balance. Previously, in 1996, Mr. Cross had asked the City Auditor to allow Mr. Jones to use his vacation time in lieu of sick leave when Mr. Jones' sick leave balance was low. After a hearing before Mr. Hubbard, the charges were dropped and Mr. Jones was permitted to repay the sick time used to the City as he accrued it on a biweekly basis. (T. 72, 758; Jt. Exh. 1; R. Exh. Q.)
21. On April 27, 1998, having received no action on his age discrimination grievance, Mr. Jones filed an age discrimination charge with the Equal Employment Opportunity Commission ("EEOC") arising out of his replacement by Mr. Zimmerman on the water crew. (C. Exh. 6.)
22. Article 12 of the CBA sets forth a vacation policy for Public Works employees. However, the City has not applied this policy consistently. At times, employees have been permitted to use vacation in lieu of sick leave and to request vacation leave two weeks in advance. However, in denying a vacation request submitted by Union member Randy Harris, Mr. Cross cited the provision in Article 12 that requires vacation requests for a given calendar year to be submitted via an annual vacation calendar by March 1 of that year, although employees had not been made aware that this procedure was going to be followed by the City and the vacation calendar itself was not in a conspicuous location. (T. 90, 763; C. Exh. 4.)
23. On April 29, 1998, Mr. Hubbard informed Mr. Jones of a pre-suspension hearing for alleged insubordination arising out of an incident with Mr. Cross that occurred on April 28, 1998. On April 28, 1998, Mr. Jones read a letter sent by Mr. Cross to Mr. Harris, denying Mr. Harris' vacation request for the reason that the request was not submitted on time in accordance with City policy. Mr. Jones interpreted the letter as indicating that he would not be able to use any of his five weeks of vacation for 1998. Therefore, angry over the citation to policy in the letter, Mr. Jones approached Mr. Cross, who was seated at his secretary's desk in the Public Works garage, placed the letter on the desk and asked Mr. Cross about the City's vacation policy. Mr. Cross claimed that Mr. Jones threw the piece of paper in his face and used profanity when addressing him; Mr. Jones and Mr. Harris, who witnessed the incident, stated that Mr. Jones did not use profanity; Mr. Zimmerman, who did not see Mr. Jones present the letter to Mr. Cross but overheard part of the conversation, recalled that Mr. Jones was upset but could not recall precisely what words he used. Nonetheless, on May 1,

1998, following the pre-disciplinary hearing, Mr. Hubbard sent Mr. Jones a letter informing Mr. Jones that he believed Mr. Cross's version of the incident and suspending Mr. Jones for 30 days, with 20 of the days held in abeyance in recognition of his lengthy tenure with the City. However, Mr. Hubbard went on to state as follows:

If you ever engage in conduct of this nature again during the course of your employment with the City of Norwood, you will then serve the remainder of the 15 [sic] days that I have suspended and possibly up to and including dismissal.

I expect everyone in the Public Works Department to act in an orderly and civil manner. For those who cannot do so, I might suggest that they seek anger/stress management or another place of employment.

Mr. Jones had no prior discipline in effect at this time. (T. 175-176, 458-459, 664-666; Jt. Exh. 1; C. Exh. 2.)

24. In April 1999, Mr. Smith, a bargaining unit employee hired by Mr. Hubbard, was issued a ten-day suspension for admittedly threatening to shoot Mr. Cross. Mr. Cross filed criminal charges against Mr. Smith with the Norwood Police Department; these charges were later dropped. From September 1998 to March 1999, Mr. Smith received numerous oral and written warnings, including an oral warning for driving the backhoe with his feet in the air. By his own admission, Mr. Smith had also had numerous accidents while driving the backhoe, for which he had received no discipline. Previously, without holding a pre-disciplinary hearing, Mr. Cross had issued Mr. Smith a three-day suspension for dropping his trousers and exposing his boxer shorts inside the Public Works garage. The City revoked Mr. Smith's three-day suspension after consultation with the Union, and Mr. Smith was permitted instead to apologize. Mr. Hubbard also talked informally with Mr. Smith on a number of occasions about his performance problems, rather than disciplining him. Neither the City nor Mr. Hubbard has sent Mr. Smith to a psychologist or to anger-management counseling as a result of Mr. Smith's behavior at work. (T. 413, 421, 431-434, 439-441, 450, 668.)
25. Mr. Jones filed a grievance challenging his 30-day suspension, alleging that the progressive disciplinary procedure outlined in the CBA had not been followed and that he had received disparate treatment. Mr. Jones received one hearing on this grievance at step 3 before Safety Director Paul Bazzano. Article 9 of the CBA states that the mayor is to hear step 3 grievances; however, the mayor was on a medical leave at the time, and the City substituted Mr. Bazzano without consultation with the Union. (T. 76, 657, 663; C. Exhs. 4,5.)
26. Dennis Cook is a Street Sweeper 2 Operator at Public Works. Mr. Cook has been a Union member since its inception in 1986 and has worked for the City since 1975.

- He has held several Union offices, most recently that of Union steward. During the time that he was Union steward, Mr. Cook served as the leadman on the street crew for approximately four weeks. In April 1998, Mr. Cook was removed from the leadman position. Mr. Cross asserted that Mr. Cook was removed because of performance problems, while Mr. Hubbard stated that Mr. Cook was removed because of a 1996 settlement of a grievance over the awarding of the position of Backhoe Operator, which Mr. Cook had argued he was entitled to but which Mr. Hubbard awarded to Andy Stapleton because Mr. Stapleton had 15 years of backhoe experience while Mr. Cook had 4. Mr. Hubbard cited the provision of the 1996 settlement agreement in which Mr. Cook had agreed that he was "not entitled to operate the backhoe." The backhoe is a piece of equipment the leadman of the street crew must operate. (T. 514-515, 700, 748; C. Exh. 15.)
27. Leo Osterday then became leadman of the street crew. Mr. Osterday's mother is the secretary in the City's law department. Mr. Osterday was hired by Mr. Hubbard in January 1997. His only backhoe training was received on the job with the City. (T. 480, 501.)
 28. As leadman of the street crew, Mr. Osterday received the crew's daily work assignments from Mr. Cross. The CBA provides that seniority is the governing factor in work assignments. However, Mr. Osterday did not assign tasks to the crew based upon seniority. Mr. Osterday frequently used profanity in the workplace and referred to Mr. Jones as "bitch," "baby boy," and "cry baby." He also informed other Public Works employees that he wanted to fight Mr. Jones and wished that Mr. Jones would instigate such an incident. When Mr. Jones asked Mr. Osterday for water and bathroom breaks, Mr. Osterday informed Mr. Jones that he would not say yes or no, but rather that breaks could be taken at the risk of Mr. Jones's job. Mr. Cross was aware of Mr. Osterday's use of profanity, as well as the use of profanity by Mr. Smith and Public Works employee Larry Partin, but Mr. Cross did not discipline these men. (T. 36, 630-631.)
 29. In late July or early August 1998, Mr. Osterday told Mr. Jones, in the presence of Mr. Hubbard, to clean the bathrooms at Public Works, although Mr. Jones's job classification was Truck Driver. Public Works does not have a janitor. Previously, bathrooms had been cleaned, if at all, by a prisoner work detail. Mr. Jones had more seniority than all but six Public Works employees. Mr. Osterday handed Mr. Jones several cleaning tools, including a brush the size of a toothbrush, saying "don't be afraid to use this." One of the restrooms Mr. Jones had to clean was covered with feces and urine. (T. 39.)
 30. Also in late July or early August 1998, Mr. Jones, Mr. Perkins, and Mr. Cook, each of whom had filed grievances and unfair labor practice charges against the City, were assigned to clean up the grassy area on the side of the Norwood lateral. The Norwood lateral is a limited access expressway with a posted speed limit of 55 miles per hour. Drivers frequently exceed the posted limit. The grassy sides of the Norwood lateral incline approximately 45 degrees from the roadway; there is a concrete median and a narrow berm. Mr. Jones asked Mr. Cross if the men would be provided with safety barricades while cleaning. Mr. Osterday conferred with Mr. Cross and then followed

Mr. Jones, Mr. Perkins, and Mr. Cook in an air-conditioned truck while they cleaned up the side of the road. At one point Mr. Osterday drove away and returned with Mr. Smith, who sat in the truck with Mr. Osterday. No barricades were in place. (T. 31-33, 94-95.)

31. Also in late July or early August 1998, Mr. Hubbard and Mr. Cross scheduled Mr. Cook and Mr. Perkins for a pre-disciplinary hearing for working at a job site without having the proper safety barricades in place. However, according to both Mr. Hubbard and Mr. Cross, each of whom is only vaguely familiar with the City-implemented safety manual, it is actually the leadman's responsibility to ensure that proper safety barricades are used. (T. 679, 787.)
32. On July 30, 1998, Mr. Cross issued Mr. Jones an oral warning for leaving work early without notifying Mr. Cross. On approximately the same day, Mr. Cross issued a memorandum to all Public Works employees stating that "FROM THIS DAY FORWARD ANYONE TAKING OFF AFTER CLOCKING IN FOR THE DAY MUST NOTIFY THE SUPERINTENDENT OF PUBLIC WORKS OR IN HIS ABSENCE, THE SERVICE DIRECTOR. THIS MUST BE DONE EITHER BY PHONE RADIO OR IN PERSON." The oral warning was issued after Mr. Jones left work a half-day early on July 27, 1998. On that day, Mr. Jones told Mr. Osterday that he was leaving early because the City owed him one-half day of holiday pay for Norwood Day, a declared holiday by the mayor which had taken place the previous week while Mr. Jones was on vacation. Mr. Osterday told Mr. Jones to notify Mr. Cross, but Mr. Jones did not do so. Up to at least 1996, the City had credited a half-day of holiday pay to each employee for Norwood Day, whether the employee came to work that day or was on vacation. On Norwood Day, employees come in for a half-day and clean up after the previous evening's festivities. They then are given the rest of the day off. The City's payroll records for 1997 and 1998 do not reflect holiday pay for any employee for Norwood Day. Instead, the time cards reflect that each employee who came to work worked eight hours on Norwood Day, even though it is undisputed that the employees were released from work early. On August 7, 1998, Mr. Jones filed a grievance over the oral warning. Mr. Cross denied the grievance on the basis that Norwood Day is not listed as a holiday in the CBA. (T. 43, 336; C. Exh. 7; Int. Exh. 31.)
33. On August 7, 1998, Mr. Hubbard issued Mr. Jones an oral warning for failing to wear the proper City uniform. According to Mr. Hubbard, Mr. Jones was wearing "jogging pants-type shorts" rather than the City uniform shorts. The Union had previously notified the City that not all Union members had been issued a pair of uniform shorts. Mr. Jones' uniform pants did not fit because he had lost weight and he was waiting to receive the new uniform pants he had ordered. James Grubb, a bargaining unit employee, has come to work without the proper uniform. Mr. Grubb had requested and received permission from Mr. Cross to wear other pants because he had incurred an allergic reaction to the uniform pants. (T. 45, 315, 435, 554, 639-640, 719.)

34. On August 13, 1998, Mr. Jones received Mr. Bazzano's response to the grievance over Mr. Jones's 30-day suspension. Mr. Bazzano's letter stated in relevant part as follows:

It is my recommendation that you voluntarily enroll yourself and successfully complete an Anger Management Counseling Program. As a result of your work related conduct and your demeanor during the grievance hearing it appears that counseling would be in your and the city's best interest.

You are to enroll in an Anger Management Counseling program by September 1, 1998, by 5:00 p.m. Upon enrolling, you are to advise Superintendent Kevin Cross of the dates and times your attendance is required and with whom. Upon completion of the program, you are to provide Superintendent Kevin Cross with documentation to verify program completion.

Therefore, I will reduce your suspension to a period of three days, contingent upon your cooperatiion [sic] with the terms aforementioned.

I strongly believe that you need to understand that any future incidents involving a verbal or physical confrontation with any city employee or your inability to cooperate toward the overall mission of the Public Works Division [sic] will not be tolerated.

(C. Exh. 9.)

35. Upon receiving this letter, Mr. Jones became severely distraught. After the City sent Mr. Cook to a psychologist in 1996, Mr. Hubbard shared Mr. Cook's personal and confidential mental health records with several bargaining unit members, including Mr. Jones and Mr. Perkins. Mr. Hubbard read portions of the records aloud and mocked them. The records were also posted on the bulletin board at the Public Works garage. After reviewing Mr. Bazzano's decision, Mr. Jones stayed up all night, pacing. He felt that he could not return to work. On the morning of August 14, 1998, Mr. Jones called Mr. Cross's office and left a message on the answering machine, stating in a quiet, even tone of voice, "This is Dennis Jones. I quit. You can take the job and shove it up your fucking ass. Thank you." (T. 52, 54-55, 523; C. Exh. 10; R. Exh. H, I.)
36. Mr. Cross was excited and pleased when he heard this message later in the morning of August 14, 1998. He contacted Mr. Hubbard, who contacted the City's law department. Mr. Cross was told to write a letter accepting Mr. Jones's resignation, and to hand-deliver the letter to Mr. Jones right away. Mr. Cross requested Mr. Erwin, whose job duties included handling the mail at Public Works, to accompany him in the car and the two men drove over to Mr. Jones's last known address, which was the residence of Mr. Jones's sister, Kelly Chandler. When the men arrived at the

house, Mr. Jones was not there and Ms. Chandler was on the telephone with Mr. Jones's doctor. Mr. Jones had given Ms. Chandler a suicide note that morning, telling her that he had quit his job and had no reason to live. Mr. Erwin gave Ms. Chandler the letter. Mr. Cross remained inside the car. Ms. Chandler approached the car and tried to talk to Mr. Cross about how Mr. Jones could get his job back, but Mr. Cross would not look at her. He stared straight ahead and told her to call Mr. Hubbard. Ms. Chandler attempted to call Mr. Hubbard, leaving several messages for him with the City which he did not return. (T. 205, 208-210, 655; C. Exh. 10.)

37. Also on August 14, 1998, Mr. Hubbard ordered Mr. Cook to undergo a psychiatric examination, listing among his reasons the unfair labor practice charge Mr. Cook had filed and several disciplinary infractions that the City had agreed to remove from Mr. Cook's file as a result of a SERB mediation. (T. 706; Int. Exh. 33.)
38. Mr. Jones was reported missing and was found by the police. Ms. Chandler took him home and convinced him to go to the hospital. He was admitted to Good Samaritan Hospital on August 15, 1998, where he remained for two weeks. He was diagnosed with a psychiatric disorder as a result of emotional stress, and continued with outpatient treatment following his discharge. (T. 57, 93; Int. Exhs. 35, 38, 42.)
39. Mr. Jones responded to the letter Mr. Cross delivered to Ms. Chandler, stating that he had had a nervous breakdown, did not intend to resign his job, and that he would provide medical records upon his return to work. However, the City informed Mr. Jones that it intended to uphold his resignation. Mr. Jones was not permitted to return to work. (C. Exhs. 11, 12.)

IV. ANALYSIS AND DISCUSSION

A. The City Violated §§ 4117.11(A)(1), (A)(3), and (A)(4)

Respondents are alleged to have violated §§ 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4)⁴, which state in relevant part as follows:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
 - (1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Chapter 4117. of the Revised Code[;]

* * *

⁴Section 4117.11(A)(1) represents an alleged derivative violation of §§ 4117.11(A)(2) and (A)(3) in this instance. In re Amalgamated Transit Union, Local 268, SERB 93-013 (6-25-93) at n. 14.

- (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[;]
- (4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code[.]

Due to a preponderance of evidence in the record in support of the allegations in the Complaint, and for the reasons contained in the analysis and discussion that follows, Respondents are found to have violated §§ 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4).

In State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn., 66 Ohio St.3d 485, 498, 1993 SERB 4-43, 4-50 (1993)(“Adena”), the Ohio Supreme Court articulated the following test to be applied by SERB to determine whether an individual has been the victim of discrimination on the basis of protected activity under § 4117.11(A)(3):

[T]he “in part” approach must be broad enough to take into account the actual or true motive of the employer. Thus, only when the employer’s decision regarding the employee was actually motivated by antiunion animus must a ULP be found. In determining actual motivation in the context of the “in part” test, the requirements of R.C. Chapter 4117 are best fulfilled when SERB considers the evidence before it in the framework of a single inquiry, focusing on the intent of the employer.

Improper employer motivation may be inferred from circumstantial as well as direct evidence. Discriminatory motivation may reasonably be inferred from a variety of factors, such as the employer’s express hostility toward unionization combined with knowledge of employees’ union activities; inconsistencies between the proffered reason for discipline or discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; an employer’s deviation from past practices in implementing discipline; and proximity in time between the employees’ union activities and their discipline. In re Fairland Local School Dist Bd of Ed, SERB 98-013 (6-17-99); In re Columbus Bd of Health, City of Columbus, SERB 96-003 (3-26-96), at 3-21; Turnbull Cone Baking Co. v. NLRB, 778 F.2d 262, 267 (6th Cir. 1985), cert. denied, 476 U.S. 1159 (1985)(citing NLRB v. E.I. DuPont De Nemours, 750 F.2d 524, 529 (6th Cir. 1984).

To make out a prima facie case of discrimination under § 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 Respondent; (2) that he or she engaged in concerted, protected activity under Chapter 4117, which fact was either known to

Respondent or suspected by Respondent; and (3) that Respondent took adverse action against the employee under circumstances which could, if left un rebutted by other evidence, lead to a reasonable inference that Respondent's actions were related to the employee's exercise of concerted, protected activity under Chapter 4117. In re SERB v. Fulton County Engineer, SERB 96-008 (6-24-96).⁵

In this case, it is undisputed that the first element of the prima facie case is established. Respondents admitted that Mr. Jones was a public employee and employed at all relevant times by the City. As to the second element, the record reflects that Mr. Jones served as Union Vice President in 1996, and that in 1998 he engaged in the protected activities of filing grievances, filing an unfair labor practice against the City, and participating in a mediation at SERB. In considering the third element of the prima facie case, Mr. Jones was subjected to disciplinary action in January 1998, just after he filed a grievance; in May 1998, after he filed an EEOC charge on the same facts that gave rise to his January 1998 grievance and at approximately the same time as he participated in a SERB mediation; and in July and August 1998, following his May 1998 filing of a grievance and his June 12, 1998, filing of an unfair labor practice charge and his August 7, 1998, filing of a grievance. The day after he received the City's Step 3 response to his May 1998 grievance, Mr. Jones left an answering machine message that the City interpreted as a resignation of his position. Complainant and Intervenor allege that this resignation was actually a constructive discharge of Mr. Jones. The timing of these events clearly establishes a prima facie case.

The Respondents unsuccessfully attempted to rebut the prima facie case by arguing that they were motivated only by legitimate disciplinary findings. Of paramount importance to this Administrative Law Judge is the City's selective enforcement of the CBA. When comparing the treatment accorded to Mr. Jones with the treatment accorded to other employees, it is apparent that the City selectively follows progressive discipline, depending upon whether the employee involved has pursued rights protected under Chapter 4117.

When employee Michael Dykes drove a City truck into the side of a Fifth Third Bank branch and then drove away without reporting the incident, Mr. Hubbard noted that the incident was Mr. Dykes's first offense and wrote a lengthy discourse on progressive discipline to justify the issuance of a mere oral warning. (Int. Exh. 49.) Mr. Smith has yet to be disciplined for his "one million" accidents in the backhoe. Mr. Jones was given an oral warning for being out of uniform, while Mr. Smith was permitted to apologize for dropping his trousers at work. Right after Mr. Jones filed a grievance alleging age discrimination, Mr. Cross threatened to discipline him for excessive sick leave use while in 1996 Mr. Cross requested that Mr. Jones be allowed to use vacation in lieu of sick leave. The City has also used Mr. Jones's conduct as the occasion to articulate a new City policy while at the same time holding Mr. Jones to the new policy for a prior incident. (F.F. 6, 32.) While the City argues that it negotiated Mr. Smith's apology and suspension with the Union, this cannot

⁵The determination of the § 4117.11(A)(4) allegation is essentially subject to the same standard and is subsumed in the following analysis and discussion.

absolve it of liability, as the City offers no explanation for why it did not accord Mr. Jones the same opportunity. Indeed, Mr. Jones grieved his warnings and suspension, thus making the climate ripe for such negotiation through the grievance process.

Mr. Hubbard and Mr. Cross testified to different, conflicting understandings of why Mr. Cook was removed as lead man of the street crew, thus leaving unrebutted the inference that Mr. Cook was removed because he was a grievance-filing Union steward. This is further circumstantial evidence of anti-union animus.

But the most blatant example of disparate treatment in this case arises in the comparison of the treatment of Mr. Smith and Mr. Jones. Mr. Smith--who smiled eagerly and was amused at himself on the witness stand as he recounted his misdeeds at Public Works and showed only slight embarrassment at his threat to shoot his boss--received informal "talks" with Mr. Hubbard in lieu of discipline on several occasions, was permitted to apologize and have discipline revoked, received progressive discipline on the form of at least six oral and written warnings before he threatened to shoot his boss, and then received only a 10-day suspension. Mr. Smith was not required to attend counseling, and he was not threatened with heftier discipline if he erred again. Mr. Jones was given a 30-day suspension for an admittedly lesser offense--even if Mr. Cross's version of the incident is believed. While 20 days of the suspension were held in abeyance and the suspension was reduced through the grievance process, this mitigation was conditioned upon Mr. Jones's future infraction-free performance and completion of anger-management counseling--stipulations never placed on Mr. Smith.

In In re Warren County Sheriff, SERB 88-014 (9-28-88), the Board analyzed the substantial body of state and federal case law on constructive discharge and set forth the elements of a constructive discharge in violation of §§ 4117.11(A)(1) and 4117.11(A)(3), as follows:

- (1) The employer has imposed or knowingly allowed intolerable working conditions;
- (2) The employer's conduct was motivated at least in part by anti-union animus or other intent to discriminate against an employee for exercise of rights guaranteed by O.R.C. Chapter 4117; and
- (3) A reasonable person subjected to such circumstances would have resigned.

This is a strict standard. The Board noted that constructive discharge will be found "only in the extraordinary case." Noting that the statutory scheme of Chapter 4117 provides the desired course of action through which employees may seek redress of prohibited employer action, the Board stated that "[e]mployees faced with discriminatory conduct by an employer should, if at all possible, resort to the legal remedies available through ... Chapter 4117 and should avoid a self-help resignation in anticipation of a subsequent finding of constructive discharge." Id. at 3-78.

Interpreting Warren County Sheriff in light of the prima facie case analysis articulated by the Board in Fulton County Engineer, "adverse action" culminating in a constructive discharge is established if the City imposed upon Mr. Jones working conditions so intolerable that a reasonable person subjected to such circumstances would have resigned. Complainant has met its burden of establishing that the City's pattern of conduct from 1996 to 1998 constituted a constructive discharge of Mr. Jones.

The decision whether Mr. Jones was constructively discharged must be made in light of all of the circumstances. Profanity was tolerated at Public Works; seniority was not respected. In the presence of Mr. Hubbard, Mr. Jones was ordered to clean the bathrooms with a brush the size of a toothbrush. Mr. Jones had reported poor working conditions to his supervisors and requested a transfer, only to find that his replacement was given improved working conditions while Mr. Jones's grievance was ignored. Instead of receiving a hearing on his grievance, Mr. Jones was threatened with discipline for using sick leave. After filing an unfair labor practice charge and another grievance, Mr. Jones was given an oral warning for being out of uniform, with no inquiry being made as to whether he had been issued the appropriate attire. Whether Mr. Jones was entitled to holiday pay for Norwood Day or not, he was given an oral warning for violating a *prospective* policy that employees must notify Mr. Cross when leaving early. Other Union members who filed grievances and unfair labor practices were similarly subjected to the whims of Mr. Cross and Mr. Hubbard. Mr. Cook's health was scrutinized. Mr. Cook and Mr. Perkins were threatened with discipline for an alleged violation for which the leadman was responsible.

Following these events, Mr. Jones was ordered by Mr. Bazzano to enroll in an anger management counseling program and to notify the City of the results. It is easy to see how this put Mr. Jones over the edge. He had witnessed Mr. Hubbard's disclosure and mocking of Mr. Cook's mental health records. Mr. Jones had a history of mental health problems and reasonably feared that his records would be disclosed in a similar manner.

Mr. Jones had already attempted unsuccessfully to resolve his problems with the City through the grievance process and through an unfair labor practice filing. Indeed, his efforts to use the grievance process to obtain relief ultimately resulted in a nervous breakdown. Under these circumstances, it was objectively reasonable for him to resign. Moreover, Mr. Jones was not in control of his mental state and behavior at the time he placed the call to Mr. Cross on August 14, 1998. Once he was hospitalized, he wrote a letter explaining his mental state and indicating that he did not want to resign his position with the City. Yet, the City responded that it intended to hold Mr. Jones to his "resignation." This Administrative Law Judge's experience with Mr. Jones in the stressful context of witness testimony revealed that he is a soft spoken, rather than belligerent or threatening, individual. Even his answering machine message to Mr. Cross, while the words themselves were inappropriate, was communicated in a quiet tone of voice. Therefore, in consideration of these factors, it is recommended that the Board order the City to offer reinstatement to Mr. Jones, with full back pay and interest.

B. Respondents' Argument That the Arbitrator's Award Precludes a Finding of Constructive Discharge is Without Merit

Respondent's argument that the decision of Arbitrator Richard Gombert that Mr. Jones was not constructively discharged (R. Exh. X) precludes SERB from reaching a different conclusion is without merit. In In re Upper Arlington Ed Assn, SERB 92-010 (6-30-92), SERB held that when an unfair labor practice charge has been filed, SERB will consider only three courses of action, which are as follows: (1) dismiss the matter for such usual reasons as lack of jurisdiction, lack of probable cause to believe the law has been violated, and untimeliness; (2) find probable cause exists and issue a complaint, which will be done whenever statutory application and interpretation are at the center of the dispute; and (3) retain jurisdiction and defer the matter for resolution by grievance-arbitration, which will be done where a refusal to bargain has been alleged and where the contract and its meaning are the center of the dispute and it appears arbitral interpretation will resolve both the unfair labor practice and the contract interpretation issues. Deferral to an arbitrator's decision *after probable cause has been found and a Complaint has been issued* is not one of SERB's three options. Even if deferral were an option under these circumstances, it is not appropriate in this case in that contract interpretation does not resolve the unfair labor practices at issue. The arbitrator never mentions Chapter 4117 nor any case of any kind in reaching his conclusions, and it is undisputed that protected union activity was never mentioned during the arbitration.

Moreover, this Board's duty is to interpret Chapter 4117, not the decision of an arbitrator. See, e.g., Cleveland Bd of Ed v. SERB, 1998 SERB 4-57 (8th Dist Ct App, Cuyahoga, 8-27-98). This Board is not legally bound to accept an arbitrator's interpretation of a contract in an unfair labor practice case. This Board is also not compelled to give deference to an arbitrator's award. In re SERB v. Youngstown City School District Bd of Ed, SERB 95-010 (6-30-95).

V. CONCLUSIONS OF LAW

1. Respondent City of Norwood is a "public employer" as defined by § 4117.01(B).
2. Respondent Gary Hubbard is an agent or representative of the City.
3. Respondent Kevin Cross is an agent or representative of the City.
4. The American Federation of State, County, and Municipal Employees, Local 914 is an "employee organization" as defined by § 4117.01(D).
5. Charging Party/Intervenor Dennis K. Jones at all relevant times was employed by the City, was a member of AFSCME, and was a "public employee" as defined by § 4117.01(C).

6. Respondents violated §§ 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4) by harassing, discriminating against, and constructively discharging Mr. Jones in retaliation for his exercise of guaranteed rights.

VI. RECOMMENDATIONS

Based upon the foregoing, it is recommended:

1. The State Employment Relations Board adopt the Findings Of Fact and Conclusions Of Law set forth above.
2. The State Employment Relations Board issue an ORDER, pursuant to Ohio Revised Code section 4117.12(B)(3), requiring the City of Norwood, Gary Hubbard, and Kevin Cross to do the following:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing Dennis K. Jones in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 or discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the rights guaranteed by Ohio Revised Code Chapter 4117, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1), 4117.11(A)(3), and 4117.11(A)(4).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for 60 days in all of the usual and normal posting locations where bargaining-unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Norwood, Gary Hubbard, and Kevin Cross shall cease and desist from the actions set forth in paragraph A and shall take the affirmative action set forth in paragraph B.
- (2) Remove all references to discipline from January 1998 to August 1998 from Mr. Jones's personnel file, including the August 11, 1998, letter from Paul Bazzano. Offer reinstatement to Dennis K. Jones to the same or to a position comparable to the position that he held immediately before August 14, 1998, and remove all references to his resignation from his personnel file.
- (3) Make Dennis K. Jones whole for all wages and benefits lost from the effective date of his resignation to the date the City offers to reinstate him; and for all wages and benefits lost because of his May 1, 1998, suspension.

- (4) Pay interest on the wage amounts in number (B)(3) above at the rate payable on such awards in the common pleas courts commencing from the date of the State Employment Relations Board's order in this case.
- (5) Notify the State Employment Relations Board in writing within 20 calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

ISSUED and **SUBMITTED** to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and **SERVED** on all parties listed below by Certified Mail, return receipt requested, this 2nd day of August, 1999.

/s/ BETH C. SHILLINGTON
Administrative Law Judge

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