

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Lawrence County Board of Mental Retardation and Developmental Disabilities,

Respondent.

Case No. 98-ULP-12-0748

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
January 6, 2000.

On December 17, 1998, the Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 69 ("Local 69") and Philip Johnson (collectively "Intervenor") filed an unfair labor practice charge against the Lawrence County Board of Mental Retardation and Developmental Disabilities ("Respondent"). On May 6, 1999, 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)(I) and (A)(3).

A hearing was held on August 23 and 25, 1999. On October 25, 1999, the Proposed Order was issued. On October 26, 1999, the Supplement to the Proposed Order was issued. On November 15, 1999, the Intervenor filed exceptions to the Proposed Order. On November 17, 1999, the Complainant filed exceptions to the Proposed Order.

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. If an employer takes actions against individuals for engaging in protected activities, the Board will impose an appropriate remedy. This case also demonstrates, however, that SERB will not protect individuals for actions that are not protected activities. During the time period after the Respondent took actions against Mr. Johnson in violation of O.R.C. Sections 4117.11 (A)(1) and (A)(3), Mr. Johnson showed a blatant disregard for the Respondent's policies regarding attendance and reporting off from work. Mr. Johnson

intentionally flaunted the policies outside the area of protected activity. As a direct result of his intentional actions, Mr. Johnson was suspended and later terminated. Mr. Johnson was given additional and direct advice by the Respondent at the time of his notice of suspension that his actions were improper, as well as the proper manner in which to handle any further absence. Even with this notification, Mr. Johnson continued to disregard the specific instructions of the Respondent, openly working for another employer at the same time he was unavailable to the Respondent, and acting outside the scope of protected activity. These actions resulted in his termination, which was not in violation of O.R.C. Chapter 4117.

The Lawrence County Board of Mental Retardation and Developmental Disabilities is ordered to:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing Philip Johnson 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 exercise of rights guaranteed by Ohio Revised Code Chapter 4117, and from otherwise violating Ohio Revised Code Sections 4117.11 (A)(I) and 4117.11 (A)(3).

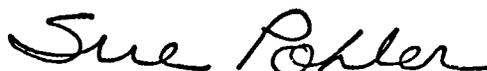
B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty days in all 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 Lawrence County Board of Mental Retardation and Developmental Disabilities shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B);
- (2) The Respondent shall restore Mr. Johnson to his original bus route assignment, with back pay for any loss of income caused by the route change;
- (3) The Respondent shall rescind the written reprimand of August 4, 1998. However, the Respondent's order of a ten-day suspension dated September 3, 1998, and the order of removal dated September 14, 1998, for unexcused absences are both upheld; 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.

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 31st day of January
2000.



SALLY L. BARAILLOUX, EXECUTIVE SECRETARY



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 Lawrence County Board of Mental Retardation and Developmental Disabilities is hereby ordered to:

A. Cease and desist from:

Interfering with, restraining, or coercing Philip Johnson 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 exercise of rights guaranteed by Ohio Revised Code Chapter 4117, and from otherwise violating Ohio Revised Code Sections 4117.11 (A)(l) and 4117.11 (A)(3).

B. Take the following affirmative action:

- (1) Post for sixty days in all of the usual and normal posting locations where the bargaining-unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Lawrence County Board of Mental Retardation and Developmental Disabilities shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B);
- (2) The Lawrence County Board of Mental Retardation and Developmental Disabilities shall restore Philip Johnson to his original bus route assignment, with back pay for any loss of income caused by the route change;
- (3) The Lawrence County Board of Mental Retardation and Developmental Disabilities shall rescind the written reprimand of August 4, 1998. However, the Lawrence County Board of Mental Retardation and Developmental Disabilities' order of a ten-day suspension dated September 3, 1998, and the order of removal dated September 14, 1998, for unexcused absences are not rescinded; 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.

SERB v. Lawrence County Board of Mental Retardation and Developmental Disabilities
Case No. 98-ULP-05-0224

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.

SERB OPINION 2000-001

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

STATE EMPLOYMENT RELATIONS BOARD,	:	
	:	CASE NO. 98-ULP-12-0748
Complainant,	:	
	:	
v.	:	GERALD L. PURSLEY
	:	Chief Administrative Law Judge
LAWRENCE COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,	:	
	:	
Respondent.	:	PROPOSED ORDER

I. INTRODUCTION

On December 17, 1998, the Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 69 ("Local 69" or "Union") and Philip Johnson filed an unfair labor practice charge against the Lawrence County Board of Mental Retardation and Developmental Disabilities ("Respondent" or "Employer") alleging that the Respondent had violated §§ 4117.11 (A)(1), (A)(2), (A)(3), and (A)(8)' by interfering with, restraining, or coercing Mr. Johnson and other employees in the bargaining unit, by disciplining Mr. Johnson in retaliation for his exercise of rights guaranteed under Chapter 4117, and by taking actions that were designed to discourage others from actively participating in the Union.

On June 24, 1999, the Complaint and Notice of Unfair Labor Practice Hearing and Prehearing Orders, and the Administrative Law Judge's Prehearing Order were issued. The Complaint recited a finding of probable cause by the State Employment Relations Board ("SERB" or "Complainant") that §§ 4117.11 (A)(1) and (A)(3) had been violated by the Employer's termination of Mr. Johnson's employment for neglect of duty. Local 69 moved to intervene in this action on July 12, 1999, and the motion was granted on August 23, 1999. The hearing was held on August 23 and 25, 1999. Post hearing briefs were filed on October 4, 1999.

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

II. ISSUES

1. Whether the Respondent violated §§ 4117.11 (A)(1) and (A)(3) by harassing and discriminating against Mr. Johnson in retaliation for his exercise of guaranteed rights.
2. Whether the Respondent violated §§ 4117.11 (A)(l) and (A)(3) by discharging Mr. Johnson in retaliation for his exercise of guaranteed rights.

III. FINDINGS OF FACT

1. The Respondent is a “public employer” as defined by § 4117.01 (B). (S. 1)
2. Local 69 is an “employee organization” as defined by § 4117.01 (D). Local 69 is the exclusive bargaining representative for all full-time and part-time employees of the Respondent in the classifications of bus driver and mechanic. (S. 2)
3. Philip Johnson has been employed by the Respondent since 1996 as a nine-month bus driver, is a member of Local 69, and is a “public employee” as defined by § 4117.01(C). (S. 3)
4. The Respondent and Local 69 are parties to a collective bargaining agreement (“CBA”) effective June 23, 1998 to June 30, 2001, containing a grievance procedure that culminates in final and binding arbitration. Following approximately one year of negotiations, fact finding, SERB mediation, and a strike from April 30, 1998 to June 22, 1998, the parties reached their agreement on or about June 23, 1998. (S. 6)
5. Philip Johnson was initially hired by the Respondent to drive a school bus as an independent contractor for which he was paid \$.45 cents per mile less the cost of fuel. (T. 31)
6. While attending a bus drivers’ meeting in November 1996, Mr. Johnson asked his supervisor, Ms. Secrest, if he and the other drivers would be paid for the Thanksgiving Day holiday. Ms. Secrest responded by asking Mr. Johnson if he would be working on Thanksgiving Day. When Mr. Johnson replied that he would not be working since the school was closed, Ms. Secrest advised him that if he did not work, he would not be paid. Mr. Johnson then asked Ms. Secrest whether she was paid for Thanksgiving Day to which she replied that it was none of his business. For his questioning Ms. Secrest, Mr. Johnson was given a written reprimand for insubordination. (T. 19, 22; Jt. Exh. 2)

7. Following the bus drivers' meeting in November 1996, Mr. Johnson suggested to his fellow drivers and mechanics that they unionize. (T. 22)
- a. Mr. Johnson contacted OAPSE about representing the drivers and mechanics. OAPSE was unanimously elected the exclusive representative for a bargaining unit of eight bus drivers and two mechanics. (T. 23)
9. After organizing efforts began, it was determined that the Respondent had improperly failed to make contributions for the bus drivers to the Public Employees Retirement System ("PERS"). The Respondent was required to make payment to PERS in excess of \$300,000. (T. 326,462)
10. Mr. Johnson was elected president of the local union, and the local began contract negotiations with the Respondent in July 1997. Mr. Johnson served on the union negotiating committee, attending and speaking at all of the negotiation sessions. (T. 24-25)
11. When negotiations were unsuccessful, impasse was declared, and a fact-finding hearing was conducted. (T. 26)
12. The union rejected the fact-finder's report. When mediation through SERB was unsuccessful, the union went on strike in April 1996. (T. 26-27)
13. During the strike, the Respondent hired replacement drivers and mechanics. Mr. Johnson participated in the strike and picketing. (T. 27)
14. Paul Brown, an employee who worked as a janitor and substitute bus driver before the strike, was promoted to the position of Transportation Supervisor during the strike. Supervisor Brown trained the replacement drivers and also drove buses during the strike. Mr. Johnson and others referred to Supervisor Brown as a "scab" during and after the strike. (T. 63, 257)
15. As a result of mediation sessions at SERB, the labor dispute was settled in June 1998. (T. 28)
16. The Respondent's Superintendent, Jimmy Thacker, knew that Mr. Johnson was a leader in organizing the Union. Superintendent Thacker testified that he was unhappy when Mr. Johnson and other union members went on strike. (T. 406,407, 463)

Post-Strike Events

17. After the strike was settled, all the Union members except Mr. Johnson returned to work. Mr. Johnson did not return to work at that time because, unlike the other union members, he worked a nine-month schedule. (T. 29)
18. On August 13, 1998, all drivers attended a preschool year meeting at the Employer's board office. Present representing the Respondent were Transportation Director Paul Mollett and Supervisor Brown. (T. 29)
19. At this meeting, the drivers were told to report any absences to Supervisor Brown, who was introduced as having been appointed to the newly created position of Transportation Supervisor. (T. 29)
20. Before the Transportation Supervisor position was created, all drivers reported directly to Mr. Mollett. (T. 276)
21. Bus routes were handed out to all drivers at the August 13, 1998 meeting. (T. 109)
22. Upon receiving his route assignment, Mr. Johnson became aware that his route had been changed from previous years. His new route required that he transport adults, rather than school-age children, and that he serve a new geographic area. (T. 109-110)
23. Mr. Johnson is the only driver to have ever had his previous route completely changed. (T. 169)
24. When he received his route assignment sheet, Mr. Johnson tossed the paper back on the table and said, "This ain't my damn route." He also stood up on at least two occasions during the meeting, but sat back down when he was advised that the meeting was not over. Another driver, Don Mays, who was seated next to Mr. Johnson, stood up and stated, "This shit's not right." (T. 109, 145, 167)
25. The school-age route previously driven by Mr. Johnson was assigned to Gregg Fox who, because of his prior service as substitute bus driver, was paid a higher hourly rate than Mr. Johnson. (T. 34-35)
26. The CBA contains a sidebar agreement that states: "Mike Fraley and Gregg Fox (individuals with the most seniority shall be able to select first) shall be offered vacant routes as the routes become available. Both Fraley and Fox shall be offered routes before [sic] the Board offers routes to anyone not currently employed by the Board." (Jt. Exh. 1)

27. The Respondent claims the reason for changing Mr. Johnson's route was that Mr. Johnson drove the route too slowly, and it was, therefore, more efficient to assign Gregg Fox to the route. Supervisor Brown also testified that the route change was made because a parent had complained that Mr. Johnson let kids move around on the bus, stick their arms out the windows, and eat things on the bus. This complaint was made by an MR/DD Board Member. This same board member complained that Mr. Johnson and Mr. Mays had stayed too long at a "BP" station in Proctorville while on break. As a result of this complaint, Superintendent Thacker counseled both employees but no discipline was administered. (T. 228, **300,455456**)
28. The Respondent had never advised Mr. Johnson that he was driving too slowly on his route. (T. 513)
29. In the past, the Respondent counseled at least one driver on a couple of occasions that she was driving too slowly and disciplined her. This employee had driven a bus for 25 years and received no discipline until after the strike. (T. 258-259, 408)
30. At the conclusion of the August 13, 1998 meeting, Mr. Johnson confronted Supervisor Brown and asked him, "Who died and left you God" and further stated that Supervisor Brown "thought he was king" and that Supervisor Brown was "Thacker's flunkie." (Jt. Exh. 3)
31. Subsequently, Supervisor Brown prepared an incident report wherein he stated that Mr. Johnson had "become very verbal almost to the point of insubordination during the meeting." (T. 265-266; Jt. Exh. 3)
32. When the discipline against Mr. Johnson was reduced to writing in the form of a written reprimand, it was for insubordination for using abusive and threatening language against a supervisor. (Jt. Exh. 4)
33. Mr. Johnson was served with the written reprimand on September 3, 1998, when he returned to attend a pre-disciplinary meeting. (Jt. Exh. 4.)

Sick Leave Issue

34. The first day of school was August 18, 1998, which was also the first day Mr. Johnson was scheduled to work. (T. 240)
35. Mr. Johnson called off sick on August 18 and 19, 1998, complaining of nausea and diarrhea. Mr. Johnson believed he had a virus that had to run its course and for which medical treatment would be fruitless. (T. 37)

36. On August 20, 1999, Mr. Johnson reported to work but became sick while preparing his bus for the morning run. Mr. Johnson told Lacey Lucas, a mechanic working in the bus garage, that he was still sick and unable to work. Mr. Johnson was in the bathroom at the bus garage when Mr. Lucas radioed Supervisor Brown to advise him that Mr. Johnson was sick and unable to drive. Supervisor Brown radioed back to Mr. Lucas stating (according to both Mr. Lucas and Mr. Johnson), "tell him not to come back to work 'til he gets a doctor's statement." Mr. Johnson asserts that he understood Supervisor Brown's order to mean that he must produce a doctor's statement releasing him for work before he would be allowed to return to work, and since he was still sick at the time, he could not produce such a statement; he was, therefore, unable to return to work. (T. 36-37, 40, 48)
37. Nothing in either the CBA or the Respondent's Policies and Procedures Manual allows the Respondent to require a doctor's statement. However, unrebutted testimony by both Supervisor Brown and Personnel Director Elizabeth Murray indicated that it had been the Employer's "standard practice" to require a doctor's statement for sick leaves of more than three days." (T. 242, 370-371)
38. Mr. Johnson went home sick and was absent on August 21, 24, 25, 26, 27, 28, and 31, and September 1, 1998. He never called in to report off work during this entire period. (R. Exh. 14)
39. On or about August 19, 1998, Supervisor Brown had a conversation with an aide, Diane White. Ms. White told Supervisor Brown that she had a conversation with Philip Johnson on August 17, 1998, and Mr. Johnson stated he would not be driving by her house the next day because he "would be sick with the flu." Supervisor Brown gave this information to Personnel Director Murray, who called Ms. White in and asked her to put her statement in writing. (T. 250; R. Exh. 24)²
40. On August 20, 1998, Superintendent Thacker sent Mr. Johnson a memo that stated in part: "I am requiring you to provide a doctor's statement that you are too ill to perform the essential functions of your position. By providing that statement, you'll remove all doubts and disprove reports that you are not ill, but only withholding your services to express your displeasure at the new assignment." Mr. Johnson received the memo on August 26, 1998. (T. 378; Jt. Exh. 6)

²Testimony involving this conversation and the introduction of R. Exh. 24, were strongly objected to by the Complainant and Intervenor at the hearing on the grounds that the statements were hearsay and prejudicial. The testimony was received and the exhibit admitted for the single purpose of establishing that Ms. White related the substance of the conversation to the Respondent, not for the truth of any matter asserted therein.

41. Beginning Friday, August 21, 1998, Mr. Johnson started working for a used-car lot during hours he would have worked for the Respondent. Mr. Johnson claimed that he could work at the used-car lot while he was still unable to drive a bus because he still suffered from diarrhea, and the car lot had restroom facilities readily available. He could not, however, leave a bus loaded with MR/DD children unattended to use a restroom. (T. 41)
42. Mr. Johnson made arrangements to work part-time at the car lot sometime before actually starting there. He was, in fact, able to work at the car lot from September 2 through September 4, 1998, and also run his bus route. Mr. Johnson was "very honest" when asked about his outside employment. (T. 42, 417-418)
43. Superintendent Thacker, upon hearing that Mr. Johnson was working at a car lot while off sick from the Employer, hired a private investigator to confirm that Mr. Johnson was in fact working at the car lot. The Respondent had never before hired a private investigator for employee disciplinary matters. (T. 452)
44. On August 26, 1998, Superintendent Thacker sent notice of a pre-disciplinary hearing to Mr. Johnson. The notice charged Mr. Johnson with "dishonesty, sick leave abuse, misrepresentation in an attempt to obtain an MR/DD benefit, and greater than three unexcused absences." The notice accused Mr. Johnson of, "calling off sick from work for three consecutive days without a doctor's excuse after telling coworkers that you were planning to be ill, and failing to report to work for three additional consecutive days without contacting your employer." Specifically, Mr. Johnson was charged with various violations of the Respondent's Personnel Policy and Procedures Manual and violations of Article 13(A)(3)(d), (e), (f), and (h) of the CBA. The hearing on these charges was scheduled for September 1, 1998. Mr. Johnson received this notice on August 27 or August 28, 1998. (T. 69; Jt. Exh. 8)
45. On September 1, 1998, Mr. Johnson attended the pre-disciplinary hearing along with the OAPSE Staff Representative and his union steward. Personnel Director Murray served as the hearing officer with Transportation Director Mollett and Supervisor Brown appearing on behalf of the Respondent. (T. 44)
46. The Respondent did not provide Mr. Johnson with a copy of the Personnel Policies and Procedures Manual until September 3, 1998, after the pre-disciplinary hearing was concluded. (T. 45; R. Exh. 26)
47. At the September 1, 1998 pre-disciplinary hearing, Mr. Johnson stated that the reason he did not call off work on August 27 and 28, 1998, was because Supervisor Brown told him not to report to work without a doctor's excuse. He felt he could not get a doctor to release him for work since he was still ill. Mr. Johnson further stated

that by August 31, 1998, he was no longer too ill to drive bus, but since he still did not have a doctor's statement, he could not report to work. He did not call to report off work on August 31, 1998. He also did not report off work on the morning of September 1, 1996, even though he was no longer ill. (T. 123-I 24, 362)

48. At the September 1, 1996 pre-disciplinary hearing, Transportation Director Mollett told Mr. Johnson that if he would obtain a doctor's statement he could return to work. Mr. Johnson obtained a doctor's statement that afternoon and returned to work on September 2, 1996. (T. 49-50, 347)
49. Mr. Johnson drove his assigned route on September 2, 3, and 4, 1996. He also worked at the used-car lot on those days. (T. 50)
50. Mr. Johnson was never informed that the doctor's statement he provided was not acceptable. (T. 346)
51. Following the pre-disciplinary hearing on September 2, 1998, Personnel Director Murray recommended that Mr. Johnson be suspended for at least ten days without pay for failure to report to work or produce a valid physician's statement of illness. She also recommended that further discipline be considered for the five unexcused absences that occurred after Mr. Johnson received the memo from Superintendent Thacker on August 26, 1998. (Jt. Exh. 9)
52. On September 4, 1998, Superintendent Thacker upheld Ms. Murray's recommendation, suspending Mr. Johnson without pay from September 8, 1996 through September 21, 1996, for violating Board policies "in accordance with ORC 124.34 and Article 16 of the MR/DD and OAPSE union No. 069 contract: three consecutive unexcused absences from work." (Jt. Exh. 11)
53. On September 4, 1996, Superintendent Thacker also sent Mr. Johnson notice of a second pre-disciplinary hearing scheduled for September 8, 1996, for "neglect of duty through five consecutive absences." The notice further accused Mr. Johnson of "working for another agency while withholding your services from the Board, and withholding your services from the Board to support your grievance regarding a change made in your bus route." The notice alleged violations of Lawrence County Board of MR/DD Policies and Procedures Manual, Section 5.5.3 (f) Group II # 22, OAPSE Local #069 contract Article 13(A)(3)(e), (f), and (h), and Ohio Administrative Code Chapter 123:1-31-03. The notice also informed Mr. Johnson that he was "being considered for removal." (Jt. Exh. 12)
54. The second pre-disciplinary hearing was held on September 8, 1998, with the same individuals in attendance as the first pre-disciplinary hearing. Again, Mr. Johnson maintained that he could not return to work without a doctor's excused because of

what Supervisor Brown told him on August 20, 1998. Mr. Johnson stated that he was too ill to drive a bus during the week of August 24-28, 1998, because he still had diarrhea. Yet he was able to work at the car lot during this period because of restrooms were available to him. Mr. Johnson further stated that although he was well enough to drive bus on Monday, August 31, 1998, he could not report to work without a doctor's excuse. He also did not report to work on September 1, 1998, because he did not have a doctor's excuse, and he was scheduled to attend the pre-disciplinary hearing at 10:30 a.m. that day. On neither August 31 nor September 1, 1998, did Mr. Johnson report off. Mr. Johnson denied withholding services from the board. (T. 69-70)

55. On September 13, 1998, Personnel Director Murray sent her findings and recommendation to Superintendent Thacker. She found that Mr. Johnson's absences from August 26 through September 1, 1998, were unexcused and recommended that he be removed from his position as a bus driver "for neglect of duty." (Jt. Exh. 14)
56. On September 14, 1998, Superintendent Thacker issued notice to Mr. Johnson that he was terminated from his employment with the Lawrence County Board of MR/DD effective September 21, 1998, "for the following violation of board policies in accordance with O.R.C. 124.34 and Article 16 of the MR/DD and OAPSE union #069 contract: Neglect of duty based on five consecutive unexcused absences from work (August 26, 1998 through September 1, 1998)." (Jt. Exh. 15)
57. On September 28, 1998, Mr. Johnson filed a grievance challenging his removal and asking for reinstatement with back pay. The grievance was ultimately arbitrated with the result that on July 22, 1999, the arbitrator denied the grievance in its entirety. (R. Exh. 25)

Disciplinary Actions Against Employees

58. The following employees have been terminated by the Respondent for the reasons stated:
 - A. Chris Stubbs-neglect of duty for failure to arrive at work on time to run routes and letting the bus run out of fuel.
 - B. Mary Russel-refused a direct order to prepare meals for the preschool program.
 - C. Richard Collins-insubordination for yelling at and threatening the Superintendent and others.
 - D. Jerry Alfred-neglect of duty for leaving work and not returning.
 - E. C.J. Anderson-took sick leave and never returned.
 - F. Ira Wilson- neglect of duty for failing to show up and run his routes.

- G. Lacy Lucas-falsification for reporting off sick and attending training for another employer.

(T. 459-461)

- 59. The following is the entirety of the Respondent's disciplinary actions taken against Mr. Johnson:

- A. Written reprimand for alleged insubordination dated November 21, 1996;
- B. Written reprimand issued to Mr. Johnson regarding alleged insubordination dated August 17, 1998;
- C. Ten-day suspension for alleged failure to report to work or produce a valid physician's statement of illness;
- D. Termination based on alleged neglect of duty and five consecutive unexcused absences.

(S. 12)

- 60. Relevant sections of the collective bargaining agreement:

Article 13: LEAVES

A. Sick Leave

1. Upon approval of the Superintendent, bargaining unit members may use sick leave for absences as provided in Section 124.38 of the Ohio Revised Code, and under the procedures contained in this Article.

3. The following are additional features of the cumulative sick leave plan: * * *

d. In the case of absence due to personal illness or pregnancy, illness in the immediate family, injury to exposure to contagious diseases which could be communicated to others, the employee must furnish a written signed statement on forms prescribed by the Board to justify the use of sick leave. If medical attention is required, the employee's statement shall list the name and address of the attending physician and the dates when he was consulted. * * *

h. When reporting off, bargaining unit members shall notify the Superintendent according to the following schedule:

- 1. By 6 a.m. if assigned to morning run,
- 2. By 12 noon if assigned to an afternoon run, and
- 3. No later than two hours prior to any scheduled run.
- 4. Mechanics shall notify the Superintendent by 6 a.m.

* * *

Article 15: WORK RULES

A. Except as modified by this agreement, the Board or Superintendent in order to carry out its statutory mandates and goals, maintains the right to promulgate and enforce work rules, policies, procedures and directives, consistent with Chapter 4117. For the purpose of this article, all of the above shall be considered inclusive in the terminology of work rules. Work rules which affect employees of this bargaining unit may cover subjects not addressed in this agreement. The employer shall not promulgate and enforce work rules which unilaterally change wages, hours or terms of this Agreement.

Article 17: GRIEVANCE PROCEDURE

F.2.a. The second step of the grievance procedure starts with the written appeal of the supervisor's response given in Step One (F-I-b). This appeal must be made within ten (10) calendar days to the Superintendent.

F.2.b. Within ten (10) calendar days of the appeal, the Superintendent will hold a meeting with the grievant and, within five (5) working days from the close of said meeting, will render a decision to the employee in writing.

IV. ANALYSIS AND DISCUSSION

The Respondent is alleged to have violated §§ 4117.11 (A)(1) and (A)(3), 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[;]
 - * * *
 - (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[.]

Based upon the preponderance of evidence in the record and for the reasons that follow, the Respondent is found to have violated §§ 4117.11 (A)(1) and (A)(3).

In State Employment Relations Bd. v. Adena Local School District Board of Education (1993), Syllabus 2, 66 Ohio St.3d 485, 1993 SERB 4-43, 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):

Under the "in part" test to determine the actual motivation of employer charged with an unfair labor practice, the proponent of the charge has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. When the proponent meets this burden, a prima facie case is created which raises a presumption of antiunion animus. The employer is then given opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity, to rebut the presumption. The State Employment Relations 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 § 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 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 that could, if left un rebutted by other evidence, lead to a reasonable inference that the Respondent's actions were related to the employee's exercise of protected activity under Chapter 4117. In re Fort Frye Local School Dist. Bd. of Ed., SERB 94-017 (10-14-94).

In this case, it is undisputed that the first element of the prima facie case is established. The Respondent stipulated that Philip Johnson is a public employee employed at all relevant times by the Respondent. As to the second element, no serious dispute exists as to whether Mr. Johnson engaged in protected activity under Chapter 4117. He was the leader in bringing the Union to Lawrence County MR/DD. He was elected the first president of Local 69. He was a member of the negotiating committee that negotiated the first collective bargaining agreement, and he initialed each provision of the agreement as the parties reached agreement. Mr. Johnson also participated in the strike that was called by the Union; he also served on the picket lines. The Respondent was well aware of Mr. Johnson's engagement in such activities. The record is replete with such acknowledgment by all levels of management from Mr. Johnson's immediate supervisor, Paul Brown, to Superintendent Thacker. In considering the third element, Mr. Johnson was subjected to disciplinary action in August 1998, after his first meeting upon returning to work after the strike; in September 1998, he was given a ten-day suspension without pay for failure to report to work or produce a valid physician's

statement; and in the same month, his employment was terminated for five consecutive unexcused absences.

At issue, however, is the seminal event allegedly giving rise to Mr. Johnson's negative attitude toward the Respondent and leading to his subsequent absences: the changing of his bus route. A preliminary determination must be made regarding whether that act constituted an adverse action against Mr. Johnson. The Respondent argues that since the change in routes did not result in a loss of pay or benefits, it was not an adverse action against Mr. Johnson. I disagree.

The school-age route that Mr. Johnson drove before his reassignment was a larger route and since drivers are paid based on hours worked, any reduction in route is a reduction in pay.³ Thus, the third element of the prima facie case is established by three disciplinary actions as well as the bus route change. Since all of these events occurred in rapid succession almost immediately upon Mr. Johnson's returned to work after the strike, a prima facie case is plainly established.

A. Changing the Bus Route

It remains to be determined whether the Respondent presented evidence sufficient to rebut the inference that the Respondent's actions were related to Mr. Johnson's engaging in protected activity under Chapter 4117. The Respondent concedes that the "initial impression" supports a finding that changing Mr. Johnson's bus route "must have been in retaliation for Johnson's engaging in protected activities." (Respondent's Posthearing Brief, p. 4).

The announcement of the route change was made less than one month after the Union and the Employer signed a collective bargaining agreement following a protracted process that included a strike. Furthermore, Mr. Johnson was the Union president involved in the initial organizing campaign, contract negotiations, and even in picketing. The Respondent asserts, however, that "this evidence is purely circumstantial" and has been rebutted by the evidence presented.

To rebut the reasonable inference that it changed Mr. Johnson's route, at least in part, due to antiunion animus, the Respondent presented evidence that Mr. Johnson's route was changed for reasons of efficiency, past misuse of breaks, and because of "complaints from parents." (Respondent's Posthearing Brief, p. 7). For reasons discussed below, the Respondent's justifications are unconvincing.

³R. Exh. 14 shows that Mr. Johnson averaged 6.62 hours per day on the school-age route and 5.52 hours per day on the newly assigned adult route. Thus, Mr. Johnson lost over an hour of pay per day.

The Respondent's claim of improved efficiency is based on time studies purportedly done by Supervisor Brown and on an analysis of drivers' time cards. A conflict in testimony exists as to when these "time studies" were done. Supervisor Brown testified first that they were done in November or December 1997, at the request of the Board. (T.224). Later, he testified they were done after he became Transportation Supervisor in April 1998. (T. 277). Superintendent Thacker testified that the studies were done after the Board requested them sometime in March 1998. (T.455). According to the studies, however, Mr. Johnson was taking anywhere from 45 minutes to an hour per day longer than Supervisor Brown when Supervisor Brown drove the route. (T. 225). When Greg Fox drove the route, he averaged 5.95 hours driving time compared to Mr. Johnson's 6.62 hours. (R. Exh. 14). The Respondent concluded that Mr. Johnson was driving his route too slowly in order to receive more in hourly pay. But the Respondent never informed Mr. Johnson that he was driving too slowly so he could either correct the problem or explain why he took longer. This omission is especially curious given the fact that another driver, Carolyn Attis, was not only told that she was driving her route too slowly, she was disciplined for slow driving. (F.F. 30). Moreover, testimony was presented that when Mr. Johnson drove the school route, he transported two children in wheelchairs requiring operation of a lift to provide them with ingress and egress to the bus. Gregg Fox transported no children in wheelchairs. (T. 515-516). This may or may not have explained any additional time Mr. Johnson took on the route. But nobody asked him. Finally, if the Respondent thought Mr. Johnson was "padding" hours, merely assigning him to another route would accomplish no cost savings since he would presumably continue the same practice on his new route.

The justification that Mr. Johnson misused breaks is similarly questionable. Superintendent Thacker apparently did not consider the infractions serious enough to warrant more than counseling. (F.F. 28). More importantly, the record contains no evidence to show that he repeated this conduct after the counseling by the Superintendent.

Finally, the record shows "complaints" from only a single "parent" regarding how kids allegedly misbehaved on Mr. Johnson's bus and that "parent" also happened to be a member of the MR/DD Board. This board is the same MR/DD Board that had to pay out over \$300,000 to PERS partly as a result of Mr. Johnson's union organizing efforts. (F.F. 9). This board is the same MR/DD Board that had to suffer through a seven-week strike by the Union. In short, the record shows that Mr. Johnson transported a number of children on his bus each school day for approximately two years without a single complaint from parents, with the exception of the cited MR/DD Board member. Even the arbitrator who denied Mr. Johnson's grievance for reinstatement found:

[T]here is no question in the Arbitrator's view that the Employer was hard pressed to justify Grievant's wholly changed bus route on grounds of operational efficiencies. All in all it looks very much like the Employer singled Grievant out for "special treatment[.]" * * *

There is no question either, in the view of the Arbitrator, that taking Grievant's route away from him, the route he had been assigned to drive from the date he first commenced his employment at the Board, and giving him a wholly new route consisting of only adult clients, was more than a coincidence since grievant happened to be the local union president and the only bus driver ever to have a completely new route assigned him. (R. Exh. 25, p. 66)

I find that the Respondent has failed to rebut the inference that its actions were related to Mr. Johnson's protected activities.

B. Disciplinary Actions

1. Written Reprimand

The Respondent has also failed to rebut the inference that its action in disciplining Mr. Johnson for his conduct at the August 1998 drivers' meeting was related to Mr. Johnson's protected activities. The best evidence that Supervisor Brown did not believe Mr. Johnson's conduct at the meeting was insubordinate comes out of his own report on the incident. (Jt. Exh. 3). Supervisor Brown's incident report states: "During the bus drivers meeting, Phil Johnson became very verbal, almost to the point of insubordination." (emphasis added). Yet, one day later when the written reprimand is issued, Supervisor Brown concludes that "Johnson behaved in an insubordinate manner toward myself and the Transportation Director." (Jt. Exh. 4). When given an opportunity to explain this apparent discrepancy during the hearing, Supervisor Brown first says Mr. Johnson was not insubordinate at the meeting but became insubordinate after the meeting, then reversed himself and claimed Mr. Johnson was insubordinate during the meeting because he said, "[T]his ain't my damn route" and he would not sit down. (T. 267-269). Whatever else such conduct may be, it is not "use of abusive or threatening language toward supervisors" in violation of the MR/DD Personnel Policies Manual section 5.5.3 as cited by Supervisor Brown in his reprimand of August 14, 1998. The record does not support the Employer's claim that Mr. Johnson exhibited insubordinate behavior at the meeting or that he committed a violation of the Board's Personnel Policies. (R. Exh. 25, p. 69).

2. Suspension and Termination

It is against the background recited above that one must consider further conduct of Mr. Johnson and disciplinary actions taken against him by the respondent. After having been removed from his bus route and wrongfully disciplined, Mr. Johnson contracted flu-like symptoms of vomiting and diarrhea. After calling off sick the first two days of the new school year, Mr. Johnson reported for work of August 20, 1998, only to experience the same symptoms, he was forced to go home. When Supervisor Brown was told over the

radio that Mr. Johnson was going home sick, Supervisor Brown stated that Mr. Johnson was "not to come back to work until he gets a doctor statement."⁴ Mr. Johnson interpreted Supervisor Brown's order to mean that he would not be allowed to return to work until he got a release to return to work from a doctor. Mr. Johnson reasoned that since he was still sick, he could not get such a release and was, therefore, unable to return to work. (F.F. 37).

On Aug. 20, 1998, Superintendent Thacker sent Mr. Johnson the memo requiring him to provide the doctor's statement "that you are too ill to perform the essential functions of your position." (F.F. 40). This memo was motivated by reports that Mr. Johnson was not ill. (F.F. 39). The Respondent argues that it had the right to require Mr. Johnson to produce a doctor's statement or, in the alternative, even if it did not have that right, it had routinely required such statements in the past so it could not be guilty of bad faith or disparate treatment of Mr. Johnson. (Respondent's Posthearing Brief, pp. 10-1 1).

The CBA is quite clear as to what the Respondent can require in case of employee's personal illness. Article 13:A.3.d. of the CBA provides that "if medical attention is required, the employee's (written, signed) statement shall list the name and address of the attending physician and the date when he was consulted." Nothing in this language allows the Employer to require a doctor's statement. Moreover, attention is drawn to paragraph 3.a. of the same Article, wherein it states that "in case of absence due to the illness in the employee's immediate family, sick leave may be used with a doctor's statement citing the need for the bargaining unit members' presence." (emphasis added). Thus, the parties knew full well how to include a doctor's statement requirement for the employee's personal illness if that was their intent. Furthermore, the Respondent's reliance on the sick leave provision of their personnel policies is misplaced in view of the language contained in Article 38:B of the CBA, which states: "[T]his agreement shall supersede any rules, regulations, or practices of the board which shall be contrary to or inconsistent with its terms. The provisions of this agreement shall be considered part of the established policies of the board."

The Respondent's alternative argument, that if it routinely violated the CBA by requiring the statement of a physician for employees' personal illnesses it could not be guilty of discriminatory or disparate treatment, is novel but unpersuasive. The CBA entered into by the parties had been in effect for slightly less than two months when Mr. Johnson's troubles started. Article 38:B of the CBA makes it clear that the agreement supersedes rules, regulations or practices of the board that are contrary or inconsistent with its terms. Therefore, if the Employer had a past practice of requiring a physician's statement, the past practice ended on June 23, 1998, the effective date of the CBA.

⁴Supervisor Brown denies making this statement. He insists that he said Mr. Johnson needed to have a doctor's statement when he returned to work. I find Mr. Johnson's and Mr. Lucas' version of what was said more credible.

Far more problematic for Mr. Johnson, though, is the fact that he did not report off work after August 20, 1998, and his employment at the used-car lot while off sick. The CBA clearly requires employees like Mr. Johnson to report off by 6:00 a.m. if assigned to a morning run and by noon if assigned to an afternoon run. (Jt. Exh.1, Article XIII.h.) Mr. Johnson's claim that he understood Supervisor Brown's order not to return to work without a doctor's statement to somehow relieve him of his duty to call off as required by the CBA is simply not believable. Nor is it believable that Mr. Johnson could work at the used-car lot from August 21-28, 1998, but he was not able to drive a bus during this entire period .⁵

I find that Mr. Johnson deliberately refrained from complying with his reporting obligation to notify his employer of his daily absences and that his claim that he was able to work at the used-car lot because of his access to a restroom is simply not credible. For this conduct, Mr. Johnson must share responsibility for his troubles with his employer.

Based upon the testimony taken at the hearing on this matter, I find that Mr. Johnson's conduct was a means of getting back at the Employer for the way in which he perceived the Employer had mistreated him. But the employer must accept some degree of responsibility because of its mistreatment of Mr. Johnson. Having already found that this mistreatment of Mr. Johnson was motivated, at least in part, by antiunion animus, a remedy must be fashioned that holds each party responsible for its misconduct.

D. REMEDY

Because Mr. Johnson's bus route reassignment was motivated, in part, by the Respondent's anti-union animus, Mr. Johnson should be restored to the bus route for school-age children, and he should receive back pay for any loss of income caused by the route change.

Similarly, because the record does not support the Employer's claim that Mr. Johnson used abusive or threatening language toward supervisors at the August 13, 1998 bus drivers' meeting, the written reprimand dated August 14, 1998, should be rescinded.

Mr. Johnson's failure to report off work, however, is inexcusable under almost any circumstance, and it is clearly inexcusable where, as here, it is the result of Mr. Johnson's attempt to get back at his employer for his perceived mistreatment.

⁵Mr. Johnson admitted that he was no longer ill on August 31 or September 1, 1998, but did not report for work because he did not have a doctor's statement.

Moreover, Mr. Johnson's deliberate refusal to notify the Respondent of his daily absences resulted in the Respondent's clients on Mr. Johnson's route not being transported, thus denying them the service to which they were entitled on at least one occasion. Supervisor Brown testified that on Friday, August 21, 1998, "The route didn't get run. The people had to stay home" because Mr. Johnson failed to call-off work and no sub drivers were available. (T. 243)

V. CONCLUSIONS OF LAW

1. The Lawrence County Board of Mental Retardation and Developmental Disabilities, is a "public employer" within the meaning of § 4117.01 (B).
2. Philip Johnson was a "public employee" at all relevant times within the meaning of § 4117.01 (C).
3. The Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 69 is an "employee organization" as defined by § 4117.01 (D).
4. The Respondent violated §§ 4117.1 I(A)(I) and (A)(3) by changing Mr. Johnson's bus route and initiating disciplinary actions against him due to his engaging in protected activities under Chapter 4117.

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 Section 4117.12(B)(3), requiring the Lawrence County Board of Mental Retardation and Developmental Disabilities to:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing Philip Johnson in the exercise of rights guaranteed in Chapter 4117, or discriminating 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, and from otherwise violating Sections 4117.11 (A)(I) and 4117.11 (A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Post for sixty days in all 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 Lawrence County Board of Mental Retardation and Developmental Disabilities shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B);
2. The Respondent shall restore Mr. Johnson to his original bus route assignment, with back pay for any loss of income caused by the route change;
3. The Respondent shall rescind the written reprimand of August 4, 1998. However, the Respondent's order of a ten-day suspension dated September 3, 1998, and the order of removal dated September 14, 1998, for unexcused absences are not rescinded; 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.

ISSUED and **SUBMITTED** to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-I -15 and **SERVED** on all parties listed below by Certified U.S. Mail, return receipt requested, this 25th day of October, 1999.

/s/GERALD L. PURSLEY
Chief Administrative Law Judge