

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Brimfield Township, Portage County,

Respondent.

Case No. 2000-ULP-04-0242

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
April 26, 2001.

On April 19, 2000, the Freight Drivers, Dockworkers and Helpers, Teamsters Local 24 ("Charging Party") filed an unfair labor practice charge against Brimfield Township, Portage County ("Respondent"). On August 17, 2000, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1), (A)(3), and (A)(4), and directed the matter to hearing.

On November 2, 2000, a hearing was conducted. On January 10, 2001, the Administrative Law Judge issued a Proposed Order recommending that the Board find that the Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1), (A)(3), and (A)(4) when it suspended Mr. Rolland Hoover for six days. On February 1, 2001, the Complainant filed exceptions to the Proposed Order. On February 27, 2001, the Respondent filed a motion for leave to file counter-exceptions instantaneously because the Respondent's counsel had not received the Complainant's exceptions due to an incorrect address in the certificate of service. On February 28, 2001, the Administrative Law Judge granted the motion. On March 12, 2001, the Respondent filed its response to the exceptions.

After reviewing the record, exceptions, and response, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge's Proposed Order; dismisses the complaint; and dismisses with prejudice the unfair labor practice charge.

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It is so ordered.

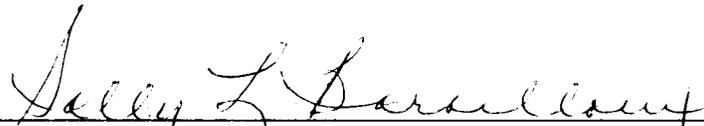
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



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 30th day of April, 2001.



SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

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

STATE EMPLOYMENT RELATIONS BOARD,	:	
	:	CASE NO. 00-ULP-04-0242
Complainant,	:	
	:	KAY A. KINGSLEY
v.	:	Administrative Law Judge
	:	
BRIMFIELD TOWNSHIP, PORTAGE COUNTY,	:	
	:	<u>PROPOSED ORDER</u>
Respondent.	:	

I. INTRODUCTION

On April 19, 2000, the Freight Drivers, Dockworkers and Helpers, Teamsters Local 24 ("Union") filed an unfair labor practice charge against Brimfield Township, Portage County ("Respondent" or "Township"), alleging that the Respondent violated §§ 4117.11(A)(1), (A)(3), and (A)(4).¹ On August 17, 2000, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause existed to believe that the Respondent committed an unfair labor practice by suspending bargaining-team member Rolland Hoover for six days in retaliation for his engaging in protected activity.

On September 20, 2000, a Complaint was issued. A hearing was conducted on November 2, 2000, wherein testimonial and documentary evidence was presented. All parties filed post-hearing briefs on December 7, 2000.

II. ISSUE

Whether the Respondent suspended Rolland Hoover for six days in retaliation for his protected Union activity, in violation of §§ 4117.11(A)(1), (A)(3), and (A)(4).

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

III. FINDINGS OF FACT²

1. Brimfield Township is a “public employer” as defined by § 4117.01(B). (S.)
2. The Freight Drivers, Dockworkers and Helpers, Teamsters Local No. 24 is an “employee organization” as defined by § 4117.01(D). (S.)
3. Mr. Rolland Hoover has been an employee of the Township’s road department for three years and is a “public employee” as defined by § 4117.01(C). (S.)
4. As early as April 1999, Mr. Hoover started inquiring into union representation for the road department. At a Township meeting in March 1999, Mr. Hoover raised an objection as to the amount of a pay raise and the lack of dialogue between management and the road department. When the Township did not respond, the road department employees decided to organize. (T. 10-13, 84-85)
5. After the Union was certified, Mr. Hoover was the only bargaining-unit member to participate in the negotiating sessions. The Township’s Board of Trustees was aware of his participation. (S.)
6. The Township and the Union had their first negotiating session on December 30, 1999. (S.)
7. The bargaining unit consists of three employees. (T. 11)
8. At the start of contract negotiations, the parties discussed whether Mr. Steve Detwiler, Road Department Supervisor, and Mr. Hoover would take earned time, vacation, or compensatory time for negotiations. (T. 35-37, 86)
9. After the initial meeting, the Board of Trustees decided that Mr. Detwiler did not have to take earned time because attendance at the meetings was part of his job. (T. 87, 121)

²All references to the transcript of the hearing are indicated parenthetically by “T.,” followed by the page number(s). All references to the Complainant’s exhibits are indicated parenthetically by “C. Exh.,” followed by the exhibit number. All references to the Joint Exhibits are indicated parenthetically by “Jt. Exh.,” followed by the exhibit number. All references to the Respondent’s exhibits are indicated parenthetically by “R. Exh.” All references to the Stipulations of Fact are indicated parenthetically by “S.” References to the transcript 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

10. Before April 1999, the Respondent did not require a two-week notice to use vacation time. After April 1999, a two-week notice in writing was required. (T. 33-34, 156-157)
11. On March 9, 2000, Mr. Hoover called Mr. Dennis Grund, the supervisor under Mr. Detwiler, and took a sick day on the day he attended a Union meeting to prepare a final contract offer to the Township. (T. 24-25)
12. Mr. Hoover knew about the March 9, 2000 Union meeting two days before the meeting, which did not allow him enough time to request vacation. (T. 66)
13. On March 9, 2000, Mr. Hoover had 34.73 hours compensatory time available, which did not require a two-week notice to utilize. (T. 54)
14. At the March 9, 2000 meeting, Mr. Jarrell Williams, State Teamsters Director, received a telephone call from Assistant County Prosecutor, Linda Hastings, ("Ms. Hastings"), which he transferred to the speaker phone during the meeting. (T. 31)
15. Mr. Hoover made no effort to conceal his presence at the meeting from Ms. Hastings during her phone call. (T. 31)
16. Upon his return to work on March 10, 2000, Mr. Hoover turned in a time sheet reflecting March 9, 2000, as a sick day. (T. 67; R. Exh. A)
17. Several days later, Mr. Detwiler asked Mr. Hoover if he had been sick on March 9, 2000. Mr. Hoover responded "No," and told Mr. Detwiler that he had gone to a Union meeting. (T. 26)
18. On March 17, 2000, Mr. Hoover received a six-day suspension without pay and no pay for the "sick day." The reason for the suspension was described as two acts of dishonesty: making a false statement to Mr. Grund and falsifying a time card. The discipline also was issued for an abuse of absenteeism, using sick leave for unauthorized purposes. (C. Exh. B)
19. Mr. Hoover appealed the suspension to the Township's Board of Trustees. The Board of Trustees voted to uphold the suspension. (T. 29-30, 133)
20. Section 7, Corrective Action, in Brimfield Township's personnel policies and procedures manual provides as follows:

7.3 CAUSES FOR CORRECTIVE ACTION

An employee may be disciplined for inefficiency, dishonesty, drunkenness, immoral conduct, abuse of absenteeism,

insubordination, and violation of established rules of the Township Board of Trustees. Reference is made to section 124.35 of the Ohio Revised Code.

7.4 STEPS TO BE TAKEN

Steps to be taken that [sic] adequately administer this section include the following:

1. If the employee is in violation of the aforementioned, the supervisor shall first warn the employee verbally and suggest ways to improve the situation.
2. If the condition continues to exist, the employee shall then receive a written explanation of the situation along with corrective actions to be taken.
3. If the condition continues to exist, the employee shall be given three (3) days off. This also shall be in writing and must be filed in the employee's personnel file.
4. If the condition continues to exist, then the employee shall be given six (6) days off. This also shall be in writing and filed in the employee's personnel file.

The action in Step A may be written. All other steps must be in writing.

5. If the employee continues the violation, he or she shall be dismissed. The employee shall be notified of the termination with the reasons for the action provided in writing.
6. The right of dismissal remains the sole prerogative of the Board of Trustees, and this procedure may be accelerated depending on the gravity of the offense.

21. In his March 17, 2000 Notice of Disciplinary action to Mr. Hoover, Mr. Detwiler stated:

The acts of dishonesty and abuse of absenteeism for which you are charged justify an acceleration of the disciplinary progression.

(C. Exh. B)

22. Mr. Detwiler ruled out oral and written reprimands and the three-day suspension, believing the only appropriate options under the policy and procedural manual were the six-day suspension or termination. (T. 128)
23. In making his decision, Mr. Detwiler relied on the fact that he viewed the incident as involving two separate instances of lying, first to a supervisor and second on a time card. (T. 128, 160)
24. Mr. Hoover's prior disciplinary record consists of a written reprimand on February 23, 2000, for backing the Township truck into a car containing a female and a small child and causing damage to the vehicle. (T. 39, R. Exh. F)
25. The only other accident involving a Township vehicle and another car occurred when the private vehicle struck the Township vehicle. (T. 161)
26. After the March 9, 2000 incident, Mr. Hoover received a written reprimand for failing to make a timely report to Mr. Detwiler about compliance with the Board-issued requirement that all road department employees were to have a Class A license with full endorsements including Combination, Tanker, and Haz-Mat. Although Mr. Hoover obtained his CDL license within 60 days, he did not provide this information within 60 days to Mr. Detwiler or anyone else. (T. 43-47, 152; C. Exh. I)
27. Mr. Hoover appeared at SERB on several occasions in conjunction with Case No. 99-ULP-07-0407, an unfair labor practice case that was settled before hearing.

IV. ANALYSIS AND DISCUSSION

The Township is alleged to have violated §§ 4117.11(A)(1), (A)(3), and (A)(4), which provide 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[;]
- (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[;]
- (4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117[.]

Due to a lack of a preponderance of evidence in the record in support of the allegations and for the reasons contained within the analysis and discussion to follow, the Respondent is found to have not violated §§ 4117.11(A)(1), (A)(3), or (A)(4).

The standard of review by SERB to determine whether a § 4117.11(1) violation has occurred has been clearly stated.³ More recently, in In re Hamilton County Sheriff, SERB 98-002 (1-23-98), aff'd sub nom. Hamilton County Sheriff v. SERB, No. A98-00714 (Mag. Dec., CP, Hamilton, 10-9-98), SERB restated this standard:

This inquiry is objective, rather than subjective; neither the employer's intent nor the individual employee's subjective view of the employer's conduct would be considered by SERB in determining whether an O.R.C. Section 4117.11(A)(1) violation has occurred; and a violation will be found if, under the totality of the circumstances, it can be reasonably concluded that the employees were interfered with, restrained, or coerced in the exercise of their O.R.C. Chapter 4117 rights by the public employer's conduct.

It is not in dispute that Mr. Hoover's activities as a Union steward, participating in negotiation sessions and appearing at SERB in conjunction with the filing and eventual settlement of an unfair labor practice, are protected rights under § 4117.03(A). Public employees have the right to form, join, assist, or participate in any employee organization of their own choosing under § 4117.03(A)(1), and to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid and protection" under § 4117.03(A)(2).

³See, e.g., In re Pickaway County Human Services Dept., SERB 93-001 (3-24-93), aff'd, SERB v. Pickaway Human Services Dept., 1995 SERB 4-46 (4th Dist. Ct. App., Pickaway, 12-7-95); In re Springfield Local School Dist. Bd. of Ed., SERB 97-007 (5-1-97).

The question then is whether, under the totality of the circumstances, Mr. Hoover was interfered with, restrained, or coerced by the Township in the exercise of his Chapter 4117 rights. 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 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, if left un rebutted by other evidence, could lead to a reasonable inference that the Respondent's actions were related to the employee's engaging in protected activity under Chapter 4117. In re SERB v. Fulton County Engineer, SERB 96-008 (6-24-96).

Stipulation Number 5 establishes the first element concerning Mr. Hoover. Stipulation Numbers 6 and 7 satisfy the second element. Also, Mr. Hoover acted as Union steward for the local chapter. He was named as a witness in an earlier unfair labor practice charge, Case No. 99-ULP-07-0407, filed July 14, 1999, which, after his attendance

at numerous meetings at SERB, was settled on January 28, 2000. These activities are protected under §§ 4117.03(A)(1) and (A)(2).

The Respondent took adverse action against Mr. Hoover by suspending him for six days. If left un rebutted, this action could lead to a reasonable inference that the Respondent's actions were related to the employee's engaging in protected activity.

The Respondent successfully rebuts any presumption of anti-union animus by proving that its actions were merely punishment for Mr. Hoover's offense. The punishment may be harsher than the Union, Complainant, another employer, or even this Administrative Law Judge would have recommended, but SERB will not question the severity of the punishment so long as it was not meted out because of Mr. Hoover's protected activity.

The Complainant argues that Mr. Hoover did not receive a copy of the Township's policies and procedures manual immediately upon his employment and that this shows anti-union animus. It is evident from the record, however, that both Mr. Hoover and Mr. Richards had a copy when they made their initial proposal to the Township in December 1999, quoting the original sick leave policy from the handbook. This is not a case in which Mr. Hoover needed to have studied some complex or hidden portion of the manual in order to avoid a violation. His own testimony shows that he knew what he was doing was wrong. "It was just a dumb decision; I could have used a comp day. I was trying to save the comp days, thinking, you know, I've got some other things I might want to do . . . and was just kind of being selfish with a little bit of time for me." (T. 82, Hoover). He simply underestimated his employer's opinion as to the seriousness of the offense. "I didn't really see that it was any big fiasco." (T. 50, Hoover)

The Complainant then goes on to argue that the Respondent did not follow its own policies and procedures in imposing discipline, thereby showing anti-union animus. Section 7.3 of the policies and procedures manual provides that an employee can be disciplined for, among other things, dishonesty and abuse of absenteeism. Section 7.4 of the policies and procedures manual provides for a verbal warning, a written warning, three days off, and then six days off if the condition causing the need for discipline persists. The section goes on to provide that the procedure may be accelerated depending upon the gravity of the offense. Mr. Detwiler explained his use of the acceleration clause by saying that he viewed Mr. Hoover's violation as two separate offenses, lying about taking a sick day and falsifying a time card. Mr. Detwiler determined that in his opinion the magnitude of the offense ruled out his use of an oral or written reprimand or a three-day suspension, leaving him with a choice of a six-day suspension or termination. He added that this offense had not been committed in the 21 years he had been with the Township, that he did not do it, and that he did not expect any of his employees to do it.

Mr. Detwiler also considered Mr. Hoover's previous record of sick time use. The Complainant argued that this factor was irrelevant, because the record did not contain any proof that Mr. Hoover was not sick at the time such leave had been used. This argument misstates the issue. It is contrary to reason to argue that a factor in giving employees the benefit of the doubt cannot be the legitimate use of sick time.

An issue of disparate treatment of other similarly situated employees is not present. The record reflects no documented circumstances of sick leave abuse in the previous twenty-one years of Township history. The Township is entitled to take a strong stand on such a violation, whether from inexperience with dealing with the issue or from a deliberate, reasoned decision to punish severely for this offense. It is the Township's prerogative. While Mr. Hoover could have lied when asked if he was really sick or he could have attempted to conceal his presence at the meeting, he did neither. An employer may or may not choose to take these mitigating factors into consideration in imposing discipline. In this case, the Township did not. Mr. Hoover knowingly did something wrong and received a harsher punishment than expected, but within the existing disciplinary policy. Unless this Administrative Law Judge finds circumstantial evidence of anti-union animus, for example that the Employer deviated from past practice or the policies and procedures manual when imposing such punishment for the offense in question, the fact is that the employee knowingly committed the offense and took his chances on the employer's punishment.

The Complainant also cites two unrelated instances of discipline, one occurring before the incident in question, and one occurring after the incident in question. Mr. Hoover received a written reprimand for backing his snowplow into a car behind him containing a motorist and her young child. Because this was described as a safety violation that concluded in a harmful event (an accident causing damage to a non-Township vehicle), a written reprimand was issued. The Complainant alleges this was the only discipline issued to a Township employee for an accident. The record reflects that it was the only accident involving damage to a private vehicle by a Township vehicle. Certainly nothing precludes an employer from issuing discipline under these circumstances.

To show an alleged continuing course of conduct, the Complainant cites an incident subsequent to the March 9, 2000 discipline wherein Mr. Hoover and others were given sixty days to get a Class A license. Mr. Hoover obtained the license within the 60 days, but as of May 23, 2000, he had not reported his compliance to anyone. His lackadaisical attitude toward reporting his compliance to his employer is reflected in his testimony. "I figured I'd just give it back to my boss when he asked for it." (T. 47 Hoover). "I didn't go chasing after him to give him something ... and it's like okay, when you're ready for it you'll let me know." (T. 49, Hoover). His only response after the May 23 request for information was to put a note and a copy of his driver's license on his boss's desk; the note stated: "Driver license issues referred to Teamsters Local 24. If any questions, contact Steward or Local 24 Dave

Richards.” The mention of a union and referral of a matter to a union official combined with a negative response on the part of the Township does not automatically make anti-union animus. The Township was attempting, after four months, to ascertain whether Mr. Hoover had complied with the license requirement. The Township was reacting to Mr. Hoover’s failure to timely respond to its inquiry as opposed to reacting to Mr. Hoover’s referral of the matter to the Union.

The factors necessary to infer discriminatory employer motivation are not present in this case. The record is devoid of any express hostility by the Township toward unionization. The record contains no inconsistencies between the proffered reasons for discipline and other actions of the Township. Nothing in the record shows that Mr. Hoover was treated differently than other employees or that the Township deviated from past practice in disciplining him. Mr. Hoover’s behavior created a case of first impression in the Township. The Township came down hard, but it had every right to do so.

In short, Mr. Hoover was disciplined for calling in sick and using sick leave when he was not sick. He could have used compensatory time for his absence, but he chose otherwise. Reasonable minds may disagree over the level of discipline, but the Township had the authority to determine the appropriate level and to impose it. The Complainant did not demonstrate by a preponderance of the evidence that the Township violated §§ 4117.11(A)(1), (A)(3), or (A)(4).

V. CONCLUSIONS OF LAW

1. Brimfield Township is a “public employer” as defined in § 4117.01(B). (S. 1)
2. The Freight Drivers, Dockworkers and Helpers, Teamsters Local 24 is an “employee organization” as defined by § 4117.01(D).
3. The Respondent’s actions in suspending Mr. Hoover for six days did not violate §§ 4117.11(A)(1), (A)(3), or (A)(4).

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully 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 dismiss with prejudice the unfair labor practice charge and the complaint.