

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo Area Regional Transit Authority,

Respondent.

Case No. 2002-ULP-06-0431

ORDER
(OPINION ATTACHED)

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
May 22, 2003.

On June 18, 2002, Ms. Lynette Taylor filed an unfair labor practice charge with the State Employment Relations Board ("Board" or "Complainant") alleging that the Toledo Area Regional Transit Authority ("Respondent") violated Ohio Revised Code Sections 4117.11(A)(1), (A)(3), and (A)(4). On September 19, 2002, the Board found probable cause to believe an unfair labor practice had been committed and directed the unfair labor practice case to hearing.

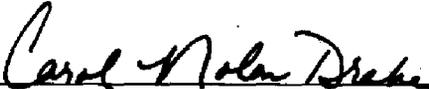
A hearing was conducted on December 17, 2002, and December 30, 2002. On February 18, 2003, a Proposed Order was issued by the Administrative Law Judge, recommending that the Board find that the Respondent had not violated Ohio Revised Code Sections 4117.11(A)(1), (A)(3), and (A)(4) when it did not promote Ms. Taylor. On March 6, 2003, the Complainant filed exceptions to the Proposed Order. On March 21, 2003, the Respondent filed its response to the exceptions.

After reviewing the record, the Proposed Order, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Proposed Order, incorporated by reference; dismisses the complaint; and dismisses with prejudice the unfair labor practice charge.

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It is so ordered.

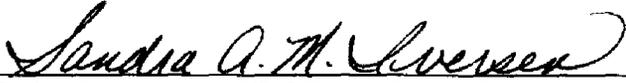
DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



CAROL NOLAN DRAKE, 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 a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 23rd day of May, 2003.



SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT

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

STATE EMPLOYMENT RELATIONS BOARD,	:	
	:	CASE NO. 02-ULP-06-0431
Complainant,	:	
	:	
v.	:	KAY A. KINGSLEY
	:	Administrative Law Judge
TOLEDO AREA REGIONAL TRANSIT AUTHORITY,	:	
	:	
Respondent.	:	<u>PROPOSED ORDER</u>

I. INTRODUCTION

On June 18, 2002, Ms. Lynette Taylor filed an unfair labor practice charge against the Toledo Area Regional Transit Authority ("Respondent" or "TARTA"), alleging that the Respondent violated Ohio Revised Code §§ 4117.11(A)(1), (A)(3) and (A)(4).¹ On September 19, 2002, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause existed to believe that the Respondent committed an unfair labor practice by failing to promote Ms. Taylor to full-time employment.

On October 16, 2002, a Complaint was issued. A hearing was conducted on December 17, 2002, and December 30, 2002, wherein testimonial and documentary evidence was presented. All parties filed post-hearing briefs on January 17, 2003.

II. ISSUE

Whether the Respondent failed to promote Ms. Taylor to full-time employment in retaliation for her exercise of guaranteed rights in violation of §§ 4117.11(A)(1), (A)(3), and (A)(4).

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

III. FINDINGS OF FACT²

1. The Toledo Area Regional Transit Authority is a “public employer” as defined by § 4117.01(B). (S.)
2. The Amalgamated Transit Union, Local 697 of Toledo, Ohio (“ATU”) is an “employee organization” as defined by § 4117.01(D) and is the exclusive representative of a bargaining unit of TARTA’s employees, including part-time bus operators. (S.)
3. Ms. Taylor is employed by TARTA as a part-time bus operator, is a member of the ATU, and was, at all relevant times, a “public employee” as defined by § 4117.01(C). (S.)
4. Part-time bus operators are assigned to work 20 hours or less per week. (T. 19; Jt. Exh. 1).
5. Ms. Taylor started bus operator training with TARTA on November 17, 1997. She started driving a bus for TARTA on December 17, 1997. (T. 27-29)
6. The ATU and TARTA are parties to a collective bargaining agreement (“CBA”) effective November 1, 2001 through October 31, 2005, containing a grievance procedure that culminates in final and binding arbitration. (S.; Jt. Exh. 1)
7. The CBA provides in Section 31, at p.37: “Part-time bus operators will be given consideration for full-time openings and if accepted must go through the complete eligibility requirements as established by TARTA for all applicants for full-time positions.” (T. 30; Jt. Exh. 1)
8. Ms. Taylor is the most senior part-time bus operator who has not been chosen to take full-time bus operator training. (S.)
9. Ms. Taylor filed unfair labor practice charges (“ULPs”) with SERB regarding TARTA’s failure to promote her to full-time status and other related issues on

² All references to the transcript of the hearing are indicated parenthetically by “T.,” followed by the page number(s). All references to Complainant’s exhibits are indicated parenthetically by “C. Exh.,” followed by the exhibit number. All references to Intervenor’s exhibits 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 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.

April 9, 2001, in case number 2001-ULP-04-0220; on June 25, 2001, in case number 2001-ULP-06-0402; on January 4, 2002, in case number 2002-ULP-01-0010; and on February 1, 2002, in case number 2002-ULP-02-0069. These charges were dismissed for lack of probable cause, and SERB determined that the failure to promote was due to reasons other than protected activity. (Jt. Exh. 2)

10. Ms. Taylor was not accepted for the June 2002 and October 2002 training classes for full-time drivers. Ms. Taylor had not been accepted for training classes for full-time drivers held in 1998, 1999, or 2000. (T. 334)
11. In February 2001, Ms. Taylor and two other part-time drivers, Ms. Regina Green and Ms. Lillian Powell, attempted to file an ATU member complaint form regarding the full-time employment issue through TARTA. Ms. Taylor's only connection with the ATU member complaint form was the fact that she signed it. ATU did not file the grievance but a meeting was held with the ATU Business Agent, Mr. John Destatte, Respondent's Superintendent of Transportation, Mr. John Stewart, and Ms. Taylor, wherein Ms. Taylor was told she was not the most qualified candidate. (T. 120, 148, 161, 411-412; C. Exh. 1)
12. Ms. Green is no longer employed by TARTA. After being involved in a personal injury accident, she failed to appear at a related deposition, attempted to get a bus route while under suspension, and made an improper 911 call. (T. 221-223)
13. Although the CBA does not provide any specific criteria for promotion from part-time to full-time, the Employer looks at attendance records, accident records, complaint records, discipline records, scores in the Bus Operator Selection Survey Test ("Boss Test")³, and input from station office personnel who interact with the drivers on a daily basis. (T. 31, 36, 121-122)
14. The Superintendent of Transportation makes the decision as to who qualifies for the full-time training and also when there is a need for a training class. Mr. Stewart was the Superintendent of Transportation from January 1, 1990 until August 1, 2002, and made the decision for the June 2002 class. Mr. Gerald Austin was the interim Superintendent of Transportation from September 1, 2002 until October 10, 2002, and made the decision for the October 2002 class. (T. 30, 32-33, 231, 261)

³ The Boss Test is a selection device developed for transit employees that measures and gives scores for attendance, safety, customer service, time urgency, safe driving behavior, hazardous thought patterns, temperament, social involvement, timeliness, and self confidence. It is given to all bus operators, both full-time and part-time, while they are in training. The highest score on the Boss Test is 1, representing a high likelihood of success as a bus operator, and 5 is the lowest score, representing a low likelihood of success as a bus operator. The only categories actually utilized are attendance, safety, and customer service, in which a higher score is better than a lower score. (T. 36-40; C. Exh. 11)

15. Ms. Taylor scored a 5 on her Boss Test. (R. Exh. 5-0, 5-1)
16. Ms. Taylor had seven accidents in five years of driving and was absent 35 days in 1999 and 75 days in 2000. (T. 5-12, 5-14, 5-49; R. Ex. 5)
17. Bus operators moving from part-time to full-time status must familiarize themselves with all TARTA routes. To do so, they are assigned to ride buses on the various routes, some driven by full-time operators, some driven by part-time operators. The bus operators answer the student operators' questions about the route; because of such additional duty, they are paid 30 cents more per hour in accordance with the CBA when they have student riders on buses. The bus operators' routes, not their skill levels, are the only criterion used to determine on which buses the student operators ride. (T. 43-44, 266-271, 291-292; Jt. Exh. 4)
18. TARTA allows eligible employees to participate in a yearly competition called a Bus Roadeo ("ROADEO"), which is sponsored by the American Public Transportation Association ("APTA"). APTA rules dictate who is eligible to participate. APTA's criteria for ROADEO include accidents and attendance, but they are not the same as TARTA's criteria for selection for full-time bus operator training. Approximately half of the TARTA drivers qualify for the ROADEO on a yearly basis. In order to participate, one must have been a bus operator for one calendar year prior to the ROADEO date. Ms. Taylor was ROADEO eligible in 2000, but she did not participate due to another job commitment. (T. 47, 105-106, 129, 149, 169)
19. At a Step 2 grievance meeting with Mr. Destatte and Ms. Taylor, TARTA's Human Resource Director, Mr. Gerald Bowsher, told Mr. Destatte that he viewed the filing of ULPs and grievances on the same issue as borderline harassment because it required TARTA to defend essentially same charge in two separate venues. (T. 55-56, 114, 116, 230, 241-242)
20. Ms. Peaches Bankston is a part-time bus operator for TARTA. She started in part-time training in April 2001, and went into training for full-time status in August 2001. After beginning full-time employment, she had some problems and asked to be temporarily reassigned to part-time. She then filed a complaint against TARTA through the Union and was successful in returning to full-time driving. She was demoted to part-time again for disobeying an order. She talked to Mr. Stewart and was allowed to go back to full-time training in June 2002, but was not promoted to full-time status. (T. 59-62, 66-73, 75-76, 81-80, 84, 86)
21. In July 2002, Ms. Bankston filed a grievance over her last attempt to go back to full-time training. The grievance is still pending. (T. 65, 90)
22. Mr. Destatte sent Mr. Stewart a letter on March 25, 2002, asking TARTA to identify the specific criteria used to determine who would be promoted from part-time to full-

- time status. Mr. Stewart's response simply referred Mr. Destatte to the CBA. (T. 98-99; C. Exh. C-2, C-3)
23. Ms. Taylor sent Mr. Stewart a letter on June 13, 2002, asking why she was not promoted from part-time to full-time status. Mr. Stewart responded by memo of June 18, 2002, referring to Section 31 of the CBA and indicating that other candidates better fit TARTA's needs. (C. Exh. 7, 8)
 24. On April 18, 2002, Mr. Destatte filed a ULP with SERB in case number 2002-ULP-04-0283, alleging that TARTA refused to provide information regarding the selection process as well as with regard to other procedures and policies. SERB dismissed the ULP with prejudice for lack of probable cause to believe that a violation had occurred. (T. 119-120)
 25. Ms. Taylor has worked three part-time jobs while employed by TARTA. She worked at Montgomery Ward until March 2001, and at Toledo Building Services in early 2002. She has worked at Sunset Village since May 2002. (T. 170-173)
 26. TARTA asked Ms. Taylor to work part-time during the summer of 2000, but she declined because she was working at Montgomery Ward. (T. 174-175, 224)
 27. Although Ms. Taylor was passed over for promotion from part-time to full-time status in 1998, 1999, 2000, and in early 2001, she did not file either a grievance or ULP at SERB until April 2001. (T. 180-181)
 28. Of the three people selected for the October 2002 full-time training class, two had fewer absences than Ms. Taylor. One had one more absence but no accidents, complaints, or disciplines; moreover, his attendance issues had occurred earlier in the year and appeared to be resolved. All three selections had fewer accidents, fewer complaints, fewer disciplines, and had better Boss Test scores. (T. 285-287; R. Exh. 5-0)
 29. In his decision not to promote Ms. Taylor to full-time status, Mr. Austin did not take into consideration her declining to work the summer of 2000 at TARTA. (T. 323-324)
 30. Of the six people selected for the June 2002 training class, all had fewer absences and accidents than Ms. Taylor. Five people had fewer complaints; the person who had the same number of complaints as Ms. Taylor had no disciplines and a Boss Test score of 3 while Ms. Taylor had four disciplines and a Boss Test score of 5. (T. 340-344; R. Exh. 5-0)

31. Mr. Stewart did consider Ms. Taylor's unwillingness to work for TARTA in the summer of 2000 when he made his decision not to promote her to full-time status. (T. 362-363, 401-402)

IV. ANALYSIS AND DISCUSSION

At hearing, counsel for TARTA argued that the trier of fact could not consider events outside the ninety-day statute of limitations for filing an unfair labor practice charge. TARTA sought to exclude evidence relating to previous promotional classes in July 2001, November 2001, and March 2002 for which the Charging Party was not selected. This evidence was allowed pending final decision after briefing. The statute of limitations is not the same standard as that for the admission of evidence. Section 4117.12(B) states in part: "The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board, unless the person aggrieved thereby is prevented from filing the charge by reason of service in the armed forces, in which event the ninety-day period shall be computed from the day of his discharge." This provision simply means that an unfair labor practice must be filed within ninety days of its occurrence. This provision does not preclude admission of relevant evidence from outside the ninety-day window that may be probative to the issue of whether an unfair labor practice occurred.

TARTA 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.⁴ 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 Ms. Taylor's activities, filing ULPs and grievances, 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).

The question then is whether, under the totality of the circumstances, Ms. Taylor was interfered with, restrained, or coerced by TARTA in the exercise of her 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.

To demonstrate 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

⁴See, 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).

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 engaging in protected activity under Chapter 4117. In re SERB v. Fulton County Engineer, SERB 96-008 (6-24-96).⁵

Ms. Taylor filed unfair labor practices over not being promoted to full-time status and related issues on four occasions other than the instant charge. These activities are protected under §§ 4117.03(A)(1) and (A)(2). TARTA responded to these unfair labor practices during the investigation stage and was obviously aware that Ms. Taylor had filed them, which satisfies the second element.

The Respondent took adverse action against Ms. Taylor by failing to promote her to full-time status. 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, however, successfully rebuts any presumption of anti-union animus by proving that its actions in not promoting Ms. Taylor to full-time were based upon its conclusion that other candidates were better suited for full-time training. The CBA gives TARTA wide discretion in determining who will be accepted for full-time training. It states only that "part-time bus operators will be given consideration for full-time openings." Right or wrong, TARTA has succeeded in negotiations in resisting the Union's desire to insert definite criteria into this section. T.121-122, 213-214.

TARTA takes this "victory" very seriously, often asserting to its practical detriment during the course of these proceedings that "we don't have to give a reason." Under ordinary circumstances, although it may not play well in terms of open communication between an employer and its workforce, this assertion is correct, so long as the reason is not a discriminatory one. Complainant has established a prima facie case of discrimination by TARTA against Ms. Taylor for assertion of Chapter 4117 rights. As a result, TARTA must show that its motivation in failing to promote Ms. Taylor was not discriminatory.⁶

Ms. Taylor scored lowest on the Boss Test. Ms. Taylor had seven accidents in five years of part-time driving. Her attendance record was poor. She was absent thirty-five days in 1999 and seventy-five days in 2000. She had deficiencies in every category, unlike the other part-time drivers who were considered and selected. Ms. Taylor was also not

⁵ Section 4117.11(A)(1) represents an alleged derivative violation of § 4117.11(A)(3) in this instance. In re Amalgamated Transit Union, Local 268, SERB 93-013 (6-25-93) at n. 14.

⁶This situation is not the same as saying that TARTA *must* offer specific reasons or criteria. TARTA correctly points out that the CBA gives it the right to give consideration without articulating specific criteria. But TARTA must understand the practical risk of its management style. Failure to simply and rationally state the basis for its full-time bus operator selections might cause the Union to continue to raise the specter of discrimination, leading to costly litigation, which a healthy dose of communication could cure.

chosen for promotion before she filed unfair labor practice charges. She was treated no differently after filing her ULPs than before. Her work record remained substantially the same. The other employees who were chosen for full-time training may not have filed any unfair labor practice charges, but they also were not consistently deficient in as many categories as was Ms. Taylor. Moreover, the determination of the § 4117.11(A)(4) allegation essentially is subsumed within the above analysis and discussion. Having found that the Respondent did not violate § 4117.11(A)(3) by failing to promote Ms. Taylor, but instead had legitimate “business” reasons for its treatment of Ms. Taylor, likewise, the Respondent’s actions do not constitute a violation of § 4117.11(A)(4). For the foregoing reasons, the Respondent has successfully rebutted the Complainant’s prima facie case and presumption of anti-union animus. The unfair labor practice charge and complaint should be dismissed.

V. CONCLUSIONS OF LAW

1. Toledo Area Regional Transit Authority is a “public employer” as defined in § 4117.01(B). (S. 1)
2. The Amalgamated Transit Union, Local 697 of Toledo Ohio is an “employee organization” as defined by § 4117.01(D).
3. The Respondent’s actions in failing to promote Lynette Taylor did not violate §§ 4117.11(A)(1), (A)(3), or (A)(4).