

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

State of Ohio, Rehabilitation Services Commission,

Respondent.

Case No. 2003-ULP-06-0307

**ORDER
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
April 21, 2005.

On June 10, 2003, Maria R. Coccia, M.D., Ph.D., (“Charging Party”) filed an unfair labor practice charge against the State of Ohio, Rehabilitation Services Commission (“Respondent”). On November 6, 2003, the State Employment Relations Board (“SERB” or “Complainant”) determined that probable cause existed for believing the Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process. On March 18, 2004, the Administrative Law Judge issued a Proposed Order, recommending that SERB find that the Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(3) when it did not renew the Charging Party’s contract and that the Charging Party, as a former independent contractor for the State of Ohio, did not have standing to file the charge. The Complainant and the Charging Party filed exceptions to the Proposed Order. The Respondent filed a response to the exceptions.

After reviewing the Proposed Order, exceptions, response to exceptions, and all other filings in this case, the Board adopts the Findings of Fact and Conclusions of Law in the Proposed Order and finds that the Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(3) and that the Charging Party did not have standing to file the charge for the reasons set forth in the attached Opinion, incorporated by reference. Therefore, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

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It is so ordered.

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

/s/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 6th day of May, 2005.

/s/ DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

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OPINION

GILLMOR, Vice Chairman:

This matter comes before the State Employment Relations Board (“Board” or “Complainant”) upon the issuance of a Proposed Order on March 19, 2004, and the filing of exceptions to the Proposed Order by the Charging Party, Maria R. Coccia, M.D., Ph.D., (“Dr. Coccia”) and the Counsel for Complainant, and a response to the exceptions by the Respondent, State of Ohio, Rehabilitation Services Commission. For the reasons that follow, the Board finds Dr. Coccia lacks standing to file the charge, overrules the exceptions, dismisses the complaint, and dismisses with prejudice the unfair labor practice charge.

BACKGROUND

The State of Ohio is a “public employer” as defined by Ohio Revised Code (“O.R.C.”) § 4117.01(B). The Rehabilitation Services Commission (“RSC”) is a commission of the State of Ohio. Dr. Coccia was a medical consultant under contract to provide services for RSC. “Medical consultants” under contract with RSC were included within a Request for Recognition filed with the Board by the Doctors Professional Association (“DPA”).

On a Friday evening in September 2002, Dr. Coccia observed a Board notice in her work area at RSC that related to the DPA's Request for Recognition. Dr. Kathleen Johnson, RSC's Medical Director, was looking for places to post additional copies of the notice. The notice stated that the DPA sought to represent the medical consultants and advised the medical consultants that if they had any objections to the Request for Recognition, their objections must be filed with the Board by October 8, 2002.

Dr. Coccia suggested additional posting locations to Dr. Johnson. While Dr. Johnson posted the additional copies, Dr. Villanova, another medical consultant, told Dr. Johnson to "be sure to tell the higher-ups that he had nothing to do with" the DPA's organizing effort. Dr. Johnson responded that "it was out of her hands." Dr. Villanova commented that he should not have to call anyone when he did not have anything to do with the organizing effort. Dr. Coccia testified that Dr. Johnson asked Dr. Coccia to encourage other doctors not to join the DPA, and that Dr. Johnson pointed to the language on the Board notice regarding filing objections with the Board.

From November 2002 through January 2003, Dr. Coccia discussed the possibility of organizing with other medical consultants. Dr. Coccia spoke with other RSC medical consultants about the possibility of joining another union instead of the DPA. When Dr. Coccia's last contract with RSC expired on June 30, 2003, RSC did not renew it.

On December 20, 2002, the Board determined in the DPA representation proceeding, SERB Case No. 2002-REP-09-0180, that the medical consultants are independent contractors and not "public employees" within the meaning of O.R.C. Chapter 4117, and dismissed the Request for Recognition. On July 16, 2003, the Court of Common Pleas of Franklin County, Ohio, affirmed the Board's dismissal. The Tenth District Court of Appeals affirmed the common pleas court's decision. *Doctors' Professional Assn. v. State Emp. Relations Bd.*, 2004-Ohio-5839 (10th Dist Ct App, Franklin, 11-4-2004).

On June 10, 2003, Dr. Coccia filed the unfair labor practice charge in this case against the RSC. On November 6, 2003, the Board found probable cause to believe that a violation occurred, authorized the issuance of a complaint, and directed that a hearing be held to determine whether Dr. Coccia had standing to file an unfair labor practice charge and, if so, whether the Respondent violated O.R.C. §§ 4117.11(A)(1) and (A)(3) by not renewing Dr. Coccia's contract as a medical consultant because she engaged in activities protected under O.R.C. Chapter 4117. On December 10, 2003, a complaint was issued. On January 21, 2004, the parties' joint motion to bifurcate the issues to be presented at hearing was granted, and a hearing was held to determine whether Dr. Coccia had standing to file an unfair labor practice charge. On March 19, 2004, the Administrative Law Judge issued a Proposed Order recommending that the Board find that Dr. Coccia lacked standing to file this charge and the Respondent did not violate O.R.C. §§ 4117.11(A)(1) and (A)(3) when it did not renew Dr. Coccia's contract as a medical consultant, and also recommending that the Board dismiss the complaint and dismiss with prejudice the charge.

DISCUSSION

O.R.C. § 4117.11 provides 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 the 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.

The Board has determined that RSC's medical consultants are not "public employees" within the meaning of O.R.C. Chapter 4117. The first question to address is whether Dr. Coccia has standing to file and pursue an unfair labor practice charge alleging

that RSC violated O.R.C. §§ 4117.11(A)(1) and (A)(3) when it did not renew her medical consultant contract.¹ Dr. Coccia alleged RSC did not renew her contract because she engaged in activities protected under O.R.C. Chapter 4117.

To demonstrate a prima facie case of discrimination under O.R.C. § 4117.11(A)(3), the Complainant must establish the following elements: (1) the employee at issue is a public employee and was employed at relevant times by the Respondent; (2) the employee engaged in concerted, protected activity under O.R.C. Chapter 4117, which fact was either known by the Respondent or suspected by the Respondent; and (3) 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 concerted, protected activity under O.R.C. Chapter 4117. *In re Warren County Sheriff*, SERB 88-014 (9-28-88) ("*Warren County Sheriff*"); *In re Ft. Frye Local School Dist Bd of Ed*, SERB 94-017 (10-14-94) ("*Ft. Frye*").

In the Proposed Order, the Administrative Law Judge stated: "SERB has already determined that Dr. Coccia was not a 'public employee.' Accordingly, the first prong of the prima facie case cannot be met." This analysis is accurate under the test for a prima facie case set forth in *Warren County Sheriff* and *Ft. Frye*. But the analysis also demonstrates that this test is too narrow in its application under O.R.C. § 4117.11(A)(3). Although this statute makes it an unfair labor practice to discriminate in the hiring of employees, the prima facie test applies only if "the employee at issue is a public employee and was employed at relevant times by the Respondent." Under the prima facie test in *Warren County Sheriff* and *Ft. Frye*, a public employer could commit an unfair labor practice only if it discriminated in the hiring of an individual who is *already* employed by the employer.

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

Thus, to carry out the intent in O.R.C. § 4117.11(A)(3), the test for a prima facie case is hereby revised as follows:

To demonstrate a prima facie case of discrimination under O.R.C. § 4117.11(A)(3), the Complainant must establish the following elements: (1) the individual at issue is a public employee and was employed at relevant times by the Respondent, or the individual was an applicant for hire for a position as a “public employee”; (2) the individual engaged in concerted, protected activity under O.R.C. Chapter 4117, which fact was either known by the Respondent or suspected by the Respondent; and (3) the Respondent took adverse action against the individual under circumstances that could, if left un rebutted by other evidence, lead to a reasonable inference that Respondent’s actions were related to the individual’s exercise of concerted, protected activity under O.R.C. Chapter 4117.

As a medical consultant for RSC, Dr. Coccia was an independent contractor – and not an employee – of RSC. Consequently, she does not meet the first element of the current test for prima facie case. At all relevant times herein, Dr. Coccia was not an applicant for hire for a position as a “public employee.” Thus, Dr. Coccia does not meet the first element of the test for a prima facie case under the new test, either.

Examining the second element of the test, Dr. Coccia has not engaged in concerted, protected activities under O.R.C. Chapter 4117. O.R.C. § 4117.03(A) describes the activities in which public employees have the right to engage. These protected activities are rights inuring to public employees. Dr. Coccia engaged in activities that *could* fall under O.R.C. § 4117.03(A) if done by a public employee. But since the medical consultants are independent contractors and Dr. Coccia is not a “public employee,” her actions could not fall within “concerted, protected activities under O.R.C. Chapter 4117.” Therefore, the second element of the test is not met.

Under the third element of the test, Dr. Coccia experienced an adverse action when RSC did not renew her contract. But, again, since the medical consultants are independent contractors and Dr. Coccia is not a “public employee,” this adverse action did not occur

under circumstances that could, if left un rebutted by other evidence, lead to a reasonable inference that RSC's actions were related to the individual's exercise of concerted, protected activity under O.R.C. Chapter 4117.

Dr. Coccia did not meet all of the elements to establish a prima facie case. She was not a public employee or an applicant for hire to a position as a public employee; she did not engage in concerted, protected activity under O.R.C. Chapter 4117; she cannot demonstrate that the adverse action occurred under the circumstances required by the third element for a prima facie case.

It is against this backdrop – the inability to establish a prima facie case of a violation of O.R.C. § 4117.11(A)(3) – that the analysis of standing must begin. O.R.C. § 4117.12 provides the procedural mechanism to adjudicate alleged unfair labor practices. Paragraph (B) of that section establishes that the Board shall investigate when “anyone files a charge” with the Board.

The Board has used common-law principles to determine who can file and pursue an unfair labor practice charge. In *In re City of Canton*, SERB 90-006 (2-16-90) (“*Canton*”), the Board examined standing under O.R.C. Chapter 4117. The theory of standing evolved as a way to ensure that a live dispute exists so that the case will not present a hypothetical or abstract question or an ill-defined controversy. This result is achieved by inquiring whether the initiating party has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of jurisdiction and to justify exercise of remedial powers on his or her behalf. *Canton*, supra at 3-145, citing *Warth v. Seldin* (1975), 422 U.S. 490, 498. “It is reasonable for the Board to seek comparable assurance that there is an active dispute to be resolved rather than a hypothetical issue and to ensure that the charging party possesses a direct interest, relevant knowledge of alleged harm,

and a right to be protected.” Canton, supra (emphasis added).²

Standing arises from an invasion of legal rights. As neither a public employee nor an applicant for hire to a position as a public employee, Dr. Coccia has alleged no invasion of any legal right under O.R.C. Chapter 4117 inuring to her benefit. Dr. Coccia lacks standing to allege that the Respondent violated O.R.C. §§ 4117.11(A)(1) and (A)(3) by not renewing her contract as a medical consultant, and she cannot demonstrate that she engaged in activities protected under O.R.C. Chapter 4117. Consequently, she can neither allege nor establish that rights guaranteed to her under O.R.C. Chapter 4117 were violated. Accordingly, the unfair labor practice charge should be dismissed for lack of standing.

CONCLUSION

For the reasons set forth above, the Board finds that Maria R. Coccia, M.D., Ph.D., as a former independent contractor for the State of Ohio, lacks standing to allege that the nonrenewal of her contract was an unfair labor practice that violated O.R.C. §§ 4117.11(A)(1) and (A)(3). The Board further finds that the Counsel for Complainant and Dr. Coccia did not establish a prima facie case of discrimination under O.R.C. §§ 4117.11(A)(1) and (A)(3). Therefore, the Board overrules the objections of the Counsel for Complainant and Dr. Coccia, dismisses the complaint, and dismisses the unfair labor practice charge with prejudice.

Drake, Chairman, and Verich, Board Member, concur.

² It should be noted that effective January 2, 2005, Ohio Administrative Code Rule 4117-7-01(A) was amended so that it now provides in relevant part: “A charge that an unfair labor practice has been or is being committed may be filed by any person *with standing. To have standing, the charging party must possess a direct interest, relevant knowledge of the alleged harm, and a right to be protected.*” (New language shown in italics).