

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Hamilton County Commissioners and Ralph Linne,

Respondents.

Case Nos. 2007-ULP-08-0425 & 2007-ULP-10-0551

**ORDER
(OPINION ATTACHED)**

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: June 17, 2010.

On August 23, 2007, and October 25, 2007, Jerry L. Graham filed unfair labor practice charges against the Hamilton County Commissioners and Ralph Linne (collectively "Respondents"). On April 19, 2008, the State Employment Relations Board ("the Board" or "Complainant") consolidated the cases, determined that probable cause existed for believing that Respondents had committed or were committing unfair labor practices, authorized the issuance of a complaint, referred the matter to hearing to determine whether Respondents violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(3), but not (A)(4), by engaging in actions for the purpose of terminating Mr. Graham's employment and by terminating Mr. Graham's employment, and directed the parties to unfair labor practice mediation.

On March 4, 2009, a hearing was held. On April 27, 2009, the Administrative Law Judge issued the Proposed Order, recommending that the Board find that Respondents violated O.R.C. §§ 4117.11(A)(1) and (A)(3). Respondents filed exceptions to the Proposed Order. Counsel for Complainant filed a response to the exceptions. The Board sua sponte directed the parties' representatives to appear before the Board for an oral argument, which was held on November 12, 2009.

On November 23, 2009, Counsel for Complainant filed a Notice of Supplemental Authority. On December 11, 2009, Respondents filed a Motion to Strike the supplemental authority. On December 21, 2009, Counsel for Complainant filed a memorandum in opposition to the motion to strike. On December 31, 2009, Respondents filed a reply to the memorandum in opposition.

After reviewing the Proposed Order, exceptions, responses to exceptions, and all other filings in this cases, for the reasons set forth in the attached Opinion, incorporated by reference, the Board denied the Respondents' motion to strike; amended Finding of Fact No. 15 by moving it to No. 13 and then renumbering Nos. 13 and 14 as Nos. 14 and 15; amended Conclusion of Law No. 3 to read: "The Respondents did not engage in actions for the purpose of terminating Mr. Graham and did not terminate Mr. Graham in retaliation for his exercise of rights guaranteed in Ohio Revised Code §§ 4117.11(A)(1) and (A)(5)."; and adopted the amended Findings of Fact and amended Conclusions of Law in the Administrative Law Judge's Proposed Order, finding that the Respondents did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when Jerry L. Graham was terminated, following a pre-disciplinary hearing, during his probationary period; the complaint is dismissed; and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

BRUNDIGE, Chairperson, VERICH, Vice Chairperson, and SPADA, Board Member, concur.


N. EUGENE BRUNDIGE, CHAIRPERSON

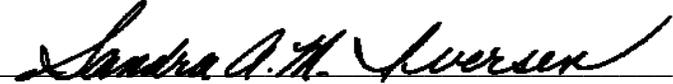
TIME AND METHOD TO PERFECT AN APPEAL

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 setting forth the order appealed from and the grounds of appeal 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. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

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PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 21st day of June, 2010.



SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT

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OPINION

Brundige, Chairperson:

This matter comes before the State Employment Relations Board (“the Board” or “Complainant”) upon the issuance of the Administrative Law Judge’s Proposed Order, the filing of exceptions to the Proposed Order by Hamilton County Commissioners and Ralph Linne (collectively “Respondents”), the response to the exceptions by Counsel for Complainant, and the oral arguments presented on November 11, 2009. For the reasons that follow, we find that Respondents did not violate Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(3).

I. BACKGROUND

The Greater Cincinnati Building and Construction Trades Council of Hamilton County (“the Council”) is the deemed-certified exclusive representative for skilled-trades employees employed by the Employer. Ironworkers Local 44 (“Local 44”) is a subsidiary of the Council. The Hamilton County Commissioners (“the Employer”) and the Council are parties to a collective bargaining agreement effective through March 31, 2008 (“CBA”), which contains a grievance process that culminates in final and binding

arbitration. Ralph Linne is the County Facilities Director and, at all relevant times, acted as an agent or representative of the Employer.

Jerry L. Graham was employed by the Employer as a Facilities Maintenance Worker, starting in 1997, and later as an Ironworker. While he was employed as a Facilities Maintenance Worker, he was in a bargaining unit represented by the International Union of Operating Engineers, Local 20 ("IUOE Local 20"), where he was a union steward for three years and was also on the bargaining committee. He filed three grievances: one in 1992, one in 1998, and one in 1999.

On March 6, 2006, Ron Weitz retired from an Ironworker position, a position contained in the Local 44 bargaining-unit and covered by its CBA with the Employer. On April 14, 2006, the Employer sent a letter to Joe Zimmer, Executive Secretary of the Council, indicating that the Employer was in the process of deciding if it would fill the Ironworker position.

On or about April 11, 2007, the Employer and Local 44 resolved the unfair labor practice charge by entering into a Memorandum of Intent ("MOI") in exchange for Local 44 withdrawing a pending unfair labor practice charge (Case No. 2006-ULP-11-0547). The MOI provided that the then-vacant Ironworker's position would remain within the bargaining unit as an Ironworker position and that the position would be filled by an Ironworker mutually agreeable to the Employer and the Union.

The Ironworker position's job-description form listed ironwork as 70% of the job duties. On April 23, 2007, the job description was revised to include certain locksmith duties such as repairing and rebuilding locks and making keys. Previously the keys, locks and repairs were duties belonging to the Carpenters.

On May 7, 2007, Mr. Graham was awarded the Ironworker position and began serving a 180-day probationary period. Mr. Graham believed he was qualified for the Ironworker position because of his 20 years' experience as a welder and fabricator and his experience teaching high school welding. The Ironworker position previously held by Mr. Weitz had not been filled at time of hearing.

On August 7, 2007, Mr. Graham was given a mid-probationary evaluation by his supervisor, David Spitznagel. In the evaluation, Mr. Graham received all "Did Not

Achieve” marks except for one “Partially Achieve.” Mr. Graham received no training or improvement plan after his mid-probationary evaluation.

Upon receiving the first evaluation of Mr. Graham, Mark Donnelly, Mr. Spitznagel’s supervisor, told Mr. Spitznagel to “come back and do it again and be honest with it.” Mr. Donnelly instructed Mr. Spitznagel to add Mr. Graham’s bad performance into the second evaluation. Mr. Spitznagel testified that the second evaluation of Mr. Graham was an accurate reflection of his performance. Mr. Graham received no discipline, write-ups, or indication that his work was unsatisfactory prior to his performance evaluation. Prior to this performance evaluation, Mr. Graham had not received a negative performance evaluation from the Employer.

The Employer did not provide Mr. Graham with any structured training in his new position. The Employer had promised Mr. Graham additional training on cutting keys; this training never occurred because approval had not been obtained for the class prior to Mr. Graham’s mid-probationary evaluation and subsequent termination. Mr. Graham reported to work early and attempted to learn locksmith duties on his own time from a co-worker.

While in the Ironworker position, Mr. Graham received and completed approximately 300 work assignments. Mr. Graham kept a journal of all his job assignments. The Employer was not satisfied with Mr. Graham’s work on a jail pod door. The Employer complained about the delay in a hand-railing repair made by Mr. Graham. Mr. Graham testified that the repair was actually delayed due to safety concerns raised by management.

Mr. Graham admitted that he probably would have repaired a handrail differently if he were to repair it today. While Mr. Graham was trying to remove the lock from the bottom of a revolving door, the door glass shattered. Mr. Graham put caution tape around the door, relocked it, and redirected traffic. Mr. Graham used WD-40 once on a lock, but did not do so again after he was instructed not to do so.

Following a pre-disciplinary hearing, Mr. Graham was terminated on August 24, 2007, during his probationary period, which was set to end on or about November 3, 2007. Upon his termination, Mr. Graham requested to be returned to his old position as

a Facilities Maintenance Worker with the Employer, but he was not put back in his old position. Mr. Graham could not grieve his termination because he was a probationary employee. The Employer had not terminated anyone during a probationary period in more than 29 years.

In April 2008, Mr. Graham obtained new employment at an hourly rate of \$17.17. His hourly rate as Ironworker was \$27.38 per hour for 40 hours and also worked overtime. Mr. Graham also received unemployment compensation benefits totaling \$11,206.

II. DISCUSSION

The Respondents are alleged to have violated O.R.C. §§ 4117.11(A)(1) and (A)(3), 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 the rights guaranteed in Chapter 4117 of the Ohio Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

(3) Discriminate in regard to hire or tenure of employment or any term of rights guaranteed by Chapter 4117[.]

The Respondents argue that Mr. Graham was terminated while in probationary status as an Ironworker for unsatisfactory job performance. While different persons can reach different conclusions regarding that determination and its fairness, Mr. Graham finds himself in the same situation as others who have chosen to leave one position for another that contains a probationary period. Absent the finding of a violation of O.R.C. Chapter 4117, it is the prerogative of an employer to make such judgments.

The Complainant has the burden of demonstrating by a preponderance of the evidence that an unfair labor practice has been committed. O.R.C. § 4117.12(B)(3). To demonstrate a prima facie case of discrimination under O.R.C. § 4117.11(A)(3), the Complainant must establish the following elements: (1) that the individual at issue is a

public employee and was employed at all relevant times by the respondent, or the individual was an applicant for hire for a position as a “public employee”; (2) that the individual engaged in protected activity under O.R.C. Chapter 4117, which fact was either known by the respondent or suspected by the respondent; and (3) that the respondent took adverse action against the individual under circumstances that could, if left unrebutted by other evidence, lead to a reasonable inference that the respondent's actions were related to the individual's exercise of concerted, protected activity under O.R.C. Chapter 4117. *In re Rehabilitation Services Commission*, SERB 2005-004 (4-21-2005).

Mr. Graham was a public employee, employed by the Respondent Employer at all relevant times, thus fulfilling the first element of the test. Mr. Graham engaged in protected activity covered under O.R.C. Chapter 4117, thus fulfilling the second element of the test. But while the first two elements have been met, the third has not been proven.

The test is not merely *if* adverse action has been taken. The test is whether the Respondent Employer *actually* took adverse action against the individual under circumstances that could lead to a reasonable inference that the Respondent Employer's actions were related to the individual's exercise of concerted, protected activity under O.R.C. Chapter 4117. In this case, a thorough review of the record and evidence does not lead to such an inference.

Mr. Graham filed a total of three grievances, the most recent in 1999. If the Employer planned to take adverse action against Mr. Graham for filing grievances, it certainly could have found an opportunity without waiting for ten years. While Mr. Graham served as a Union Steward for three years for IUOE Local 20, the record is devoid of any actions taken by him while a steward that raised the ire of management enough for its members to conspire to retaliate against Mr. Graham once he moved into this new position. Likewise, the record indicates no transactions while Mr. Graham was a member of the bargaining committee of IUOE Local 20 that would lead to retaliation or any evidence that any other bargaining-team members were retaliated against.

It must be noted that all three factors alleged for protected activity took place within another bargaining unit, represented by a different exclusive representative (IUOE Local 20). If anti-union animus were to be found, against which union would it be directed?

The matter of the proper implementation of the Memorandum of Intent (“MOI”) is not the question before SERB. To believe that Mr. Graham was removed because the employer entered into some clandestine conspiracy to first settle an unfair labor practice (“ULP”) charge against IUOE Local 20, then to select Mr. Graham for the position named in the MOI, and then to remove him so the Employer could renege on the ULP settlement entered into with the Ironworkers, is an interesting thesis..

But there must be at least *some* evidence that such an elaborate effort has been taken in order for this Board to find a statutory violation. If that evidence exists, it is not in the record before us. When the facts of this case are viewed in their entirety, the record does not establish *any* causal link between Mr. Graham’s protected activity and the Employer’s action. Thus, the Complainant failed to establish a prima facie case for an O.R.C. § 4117.11(A)(3) violation.

Even if a prima facie case had been established, Charged Party has persuasively rebutted the presumption of a statutory violation. The lack of nexus (and temporal proximity in the matter of the filing of the grievances) would provide a persuasive rebuttal to a prima facie case under these facts. A neutral finder of fact may have empathy for Mr. Graham and his situation. The record indicates that Mr. Graham may have not gotten a “fair shake” in his new position; however, it is not the task of this Board to dispense industrial justice as it appears to us. Rather, we are to enforce O.R.C. Chapter 4117, and the record is devoid of any evidence of antiunion animus or discriminatory intent toward Mr. Graham.

When a violation of O.R.C. § 4117.11(A)(1) is alleged, the appropriate inquiry is an objective one rather than a subjective one. *In re Pickaway County Human Services Dept.*, SERB 93-001 (3-24-93), *aff’d sub nom. SERB v. Pickaway Human Services Dept.*, 1995 SERB 4-46 (4th Dist. Ct. App., Pickaway, 12-7-95). 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. *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), *aff'd* No. C-990040 (1st Dist Ct App, Hamilton, 8-27-99). For the reasons expressed above, the Complainant failed to establish by a preponderance of the evidence that a violation of O.R.C. § 4117.11(A)(1) occurred. Thus, the Employer did not violate O.R.C. §§ 4117.11(A)(1) and (A)(3).

III. CONCLUSION

For the reasons set forth above, we find that the Hamilton County Commissioners and Ralph Linne did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(3) when Jerry L. Graham was terminated, following a pre-disciplinary hearing, during his probationary period. Accordingly, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

Verich, Vice Chairperson, and Spada, Board Member, concur.