

ORIGINAL

IN THE SUPREME COURT OF OHIO

Mahoning Education Association
of Developmental Disabilities

Case No: 12-1378

Appellee

v.

State Employment Relations
Board, *et al*

On Appeal from the
Mahoning County Court
of Appeals, Seventh Appellate
District

Appellants,

Court of Appeals No.
11 MA 52

REPLY BRIEF OF APPELLANT, MAHONING COUNTY BOARD OF
DEVELOPMENTAL DISABILITIES

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II. REVIEW OF THE FACTS OF RECORD:

This case comes before this court through the vehicle of an administrative appeal under RC 4117. The agency below (SERB) lacked jurisdiction to address the constitutionality of RC 4117.11(B)(8); and , thus, no “record” was ever built on that issue. On appeal, the Mahoning Education Association of Developmental Disabilities (MEADD), Appellee herein; did not seek a “*de novo*” trial in the Common Pleas Court.

Here, on November 5, 2007 MEADD, through its agents and/or representatives, engaged in picketing, the subject matter of which was limited to their collective bargaining negotiations, and their member’s pecuniary interests. MEADD has never claimed that its “speech” ever addressed any matter of “public concern.”

MEADD was never prevented from picketing, nor did it have to seek “permission” in advance to do so. Rather, MEADD violated RC 4117.11(B)(8)’s 10-day notice requirement.

Here, SERB was not the “moving party”; rather that was the DD Board, a governmental body acting as “Employer,” who initiated the after-the-fact unfair labor practice (ULP) filing with SERB.

The result was a “subsequent punishment” in the form of a SERB “cease and desist” order, and an order to post a notice. (record)

III. RESPONSE TO APPELLEE’S PROPOSITION OF LAW:

A. Why this is not a “Prior Restraint” Fact Pattern:

Appellee’s extensive argument is based upon a faulty factual premise: this was **not** any form of “prior restraint.” We know this because it *occurred*, and:

-Nobody had to get a permit

-Nobody had to register by personal name

-Nobody had to cite a reason for the picketing

-Nobody had to ask permission or justify doing it

-There was no “regulation” of the economic message (“Settle now,”
“MEADD Deserves a Fair Contract,” etc.)

All that RC 4117.11(B)(8) required was a 10-day notice, which was not given.

SERB, for its part, did not “police” the event; it was the Employer, after-the-fact,
who sought a sanction. That sanction was a “ULP” against MEADD.

RC 4117.11(B)(8) does not “regulate” “content,” at all; rather it exists to regulate
the “process” of public sector collective bargaining.

As noted in Fitzpatrick v. City of Frankfort, 2008 U.S. App Lexis 26748 (6th Cir.
2008) a reaction by an Employer is “subsequent punishment” for First Amendment
purposes, if it is intended to suppress disruptive speech, and can be a mere reprimand.

B. The Standard for “Subsequent Punishment” analysis: “Public Concern”

Appellant Employer initiated the “after-the-fact” sanction. SERB did not.

The Employer Appellant views this as a critical determinate, because it alters the analytical mode.

In order to prevail in a “subsequent punishment” case, a plaintiff typically has to show that:

1. His expressions were protected under the First Amendment; and
2. He suffered some adverse actions; and
3. The adverse action was motivated at least in part as a response to his constitutional rights.

(See Savage v. Gee, 665 F.3d 732 (6th Cir. 2012), and Fox v.

Traverse City Area Public Schools Board of Education, 605 F.3d 345, 348

(6th Cir. 2010))

In proceeding through this analysis, in the first step, the court must determine if the speech was made “as a citizen” while addressing “a matter of public concern.” (See Connick v. Myers, 461 U.S. 138, 146-147 (1983); and Garcetti v. Ceballos, 547 U.S. 410, 421 (2006))

Where the “speech” arises out of the employment relationship, it is not “protected.” See Garcetti, *supra*; Savage, *supra*; and Weisbarth v. Geauga Park Dist., 499 F.3d 538, 543-544 (6th Cir. 2007) (applying Garcetti to *ad hoc* duties even though they may not be within the employee’s official responsibilities). A public employee’s speech does not address a matter of public concern merely because it is Union related. See Fitzpatrick, *supra*.

Here, “but for” their status as employees, the picketers would not have been in a “bargaining unit”; and would not have belonged to the MEADD Union.

We do not need to go beyond this to the “balancing test” of Pickering v. Board of Education, 391 U.S. 563, because the “message” conveyed by the picketers was exclusively related to their collective bargaining negotiations.

C. Why Appellee's "Examples" are Inappropriate:

Beginning on page one (1) of their Merit Brief, Appellee MEADD posits two hypothetical examples, ostensibly aimed at illustrating how RC 4117.11(B)(8) regulates the "message."

In reality, the logic of those examples was more "retroductive" than "syllogistic."

Appellee's examples lose sight of the fact that RC 4117 was engineered to regulate "the process" of collective bargaining, and to provide some modicum of safety to an inherently volatile "industry": labor management relations. As such, the picketers were not "disfavored speakers"; rather, they were simply participants in a regulated process that is "content neutral."

If we assume, *arguendo*, that Appellee's case theory is valid, where does it cut off?

Would an Employer/Supervisor have a First Amendment right to by-pass the Union and “speak” to employees, directly, about proposals (so called “direct dealing”)? Under Appellee’s case theory, any restriction on “direct dealing” would be a “content” restriction on the Employer/Supervisor as a “disfavored speaker.”

Similarly, under current law, public employers are prohibited from disturbing the “laboratory conditions” by making “captive audience” speeches on the eve of a Union representation election. Would that, also, now, be arguably an unconstitutional restriction on Employers, as “disfavored speakers?” For that matter, would the statutory requirement that a Union file a “Notice to Negotiate,” now, be yet another “notice/content/disfavored speaker” casualty of the First Amendment? It is, after all just another “notice” required by a different section of RC 4117.

The list could go on-and-on, because RC 4117, Ohio’s collective bargaining law is an extensive list of notice requirements and time lines *designed* to protect the public; and we cannot “pick the cherries from the pie” by negating one portion without extending the analysis to all parties, equally.

Indeed, speech in a “regulated industry” (such as labor/management relations...) is less protected and more akin to “commercial speech” because, here, it proposed or

“advertised” for a mundane “business deal,” called a “Collective Bargaining Agreement.” See generally; Metromedia v. City San Diego, 453 U.S. 490 (1981); and Carey v. Brown, 447 U.S. 455 (1980) (finding that Union picketing is “economic,” rather than “political” speech.) See also Florida Bar v. Went For It, Inc., 515 U.S. 618 (1998) noting that commercial speech in a regulated industry falls under a “subordinate scale” for First Amendment purposes. (attorney advertising)

Moreover, the regulatory climate in Ohio is replete with examples of situations in which “expression” is restricted, due to the “regulated” nature of the activity and not because the “speaker” is “disfavored.”

Judges may not lead partisan political parties. (Canon 7, Code of Judicial Conduct)

Attorneys may not make certain statements in a public forum that may prejudice a case (Rules of Professional Conduct, Rule 3.6)

Liquor establishments may not use a representation of Santa Claus in advertising (OAC 4301: 1-1-44(D)(4)).

The above, all represent “speech” or “expression” that is controlled, not for its “content,” and not because its author is a “disfavored speaker”; but because some “industries” are potentially volatile and must be “regulated.”

RC 4117.11(B)(8) is just another example...

D. Responding to Appellee’s “No Evidence” Argument:

At page 11 of Appellee’s Brief, Appellee asserts that “the government must present more than anecdote or supposition to meet its burden...” Appellee, then argues that the record includes no evidence of either a “compelling interest” (strict scrutiny) or even a “substantial governmental interest” (intermediate scrutiny).

First, Appellant’s do not need that “evidence,” because the Ohio Constitution and the General Assembly have, already, provided it. As this court has held, RC 4117 and, presumably RC 4117.11(B)(8), is based upon the Ohio Constitution, Article II, § 34. (See City of Lima v. State, 122 Ohio St 3d 155; Rocky River v. SERB, (1989) 43 Ohio St 3d1) Further, the history of RC 4117 is well known; and its salutary effects are noted by one of the *Amicus* parties.

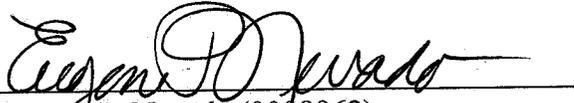
Further, it is inappropriate for Appellee to decry a lack of “evidence” of record, when *they* selected an administrative forum that was incapable of deciding an “as applied” constitutional claim; and where “facial” constitutional issues are little more than a proffer. See generally, City of Reading v. Public Utilities Commission of Ohio, (2006) 109 Ohio St.3d 193,(notice and an opportunity to develop the record necessary in “as applied” cases). Perhaps we need to rethink the role of administrative agencies in Constitutional litigation, and force this kind of issue into a Declaratory Judgment action, in the future.

III. CONCLUSION

A County Board of Development Disabilities is unique, in that its clients consist of a delicate population, having special needs; and needing special protections. In an era in which schools and DD Boards have had to hire armed “*Resource Officers*”; it is in society’s best interest that schools and DD Boards know, in advance, whether the mob walking across the parking lot screaming and carrying signs, is “friend” or “foe”. The 10 day notice is needed here, even if it is not needed elsewhere.

The Court of Appeals should be reversed.

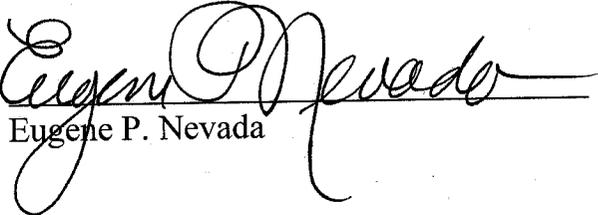
Respectfully submitted,

A handwritten signature in black ink, reading "Eugene P. Nevada", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief of Appellant was served on Michael DeWine, Esq., 30 East Broad Street, 14th Floor, Columbus OH 43215; Lori Weisman, Esq.; Michael D. Allen, Esq.; Alexandra T. Schimmer, Esq.; Stephen P. Carney, Esq., 30 East Broad Street, 17th Floor, Columbus OH 43215 and Ira Merkin, Esq.; Charles Oldfield, Esq.; Stanley Okusewsky III, Esq., PO Box 849, Youngstown OH 44501; all by regular U.S. mail this 10 day of April, 2013.


Eugene P. Nevada