

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 715,)
) Case No. SF-CE-82
)
) Charging Party,)
)
) v.) PERB Decision No. 65
)
) SANTA CLARA COUNTY SUPERINTENDENT)
) OF SCHOOLS,)
) August 16, 1978
)
) Respondent.)

Appearances; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 715; Richard J. Loftus, Jr. (Paterson and Taggart) for Santa Clara County Superintendent of Schools.

Before Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

DECISION

This case is before the Public Employment Relations Board on exceptions to the attached hearing officer's recommended decision. Service Employees International Union, Local 715 excepts to the conclusions of law that Santa Clara County Superintendent of Schools did not violate section 3343.5(a) of the Educational Employment Relations Act¹ by transferring Arthur Gonzales from his position as bus driver, and by failing to grant a bus driver's permit to Carole Cheshier and removing her from her position as bus driver. It also excepts to the recommended order that the unfair practice charge be dismissed.

1/Gov. Code sec. 3540 et seq.

We have considered the record and the proposed decision in light of the exceptions and briefs. We affirm the proposed findings of fact, discussion and conclusions of law, and adopt the recommended order insofar as it dismisses the unfair practice charge.

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The unfair practice charge filed by the Service Employees International Union, Local 715 against the Santa Clara County Superintendent of Schools is dismissed.

By Raymond J. Gonzales, Member Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member

STATE OF CALIFORNIA
EDUCATIONAL EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL)
)
UNION, LOCAL 715,)
)
Employee Organization,)
)
vs.) CASE NO. SF-CE-82
)
SANTA CLARA COUNTY SUPERINTENDENT)
OF SCHOOLS,)
)
Employer.)
_____)

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Service Employees International Union, Local 715; Richard J. Loftus, Jr. (Paterson and Taggart) for Santa Clara County Superintendent of Schools.

Before Michael J. Tonsing, Hearing Officer.

STATEMENT OF THE CASE AND ISSUES

On April 14, 1977, Service Employees International Union, Local 715 (SEIU) filed the above-captioned unfair practice charge, alleging in substance (1) that on March 30, 1977 Arthur Gonzales was transferred from his position as a school bus driver with the Office of the Santa Clara County Superintendent of Schools (Employer) because of his organizational activities, and (2) that on or about February 1, 1977, Carole Cheshier was suspended and terminated as a bus driver with the Employer, also on account of her organizational activities. The Employer filed an answer to the charge on May 2, 1977, denying that its actions were discriminatorily motivated and alleging (1) that Mr. Gonzales

was transferred because he was uninsurable as a bus driver, and (2) that Ms. Cheshier never had been suspended or terminated. An informal conference was held on May 19, 1977. The parties were unable to reach an agreement, and a formal hearing was held on July 27-29, 1977.¹ The following issues were addressed at the hearing:

1. Whether the Employer's transfer of Mr. Gonzales was an act of discrimination based on his organizational activities and therefore violative of Section 3543.5(a) of the EERA;

2. Whether the Employer's alleged action with respect to Ms. Cheshier was an act of discrimination based on her organizational activities and therefore violative of Section 3543.5(a) of the EERA.

FINDINGS OF FACT

Transfer of Arthur Gonzales

Arthur Gonzales was hired in November of 1974 as a transportation driver with the North County Regional Occupational Program (NCROP) of the Employer. He applied for and received a county bus driving permit before beginning his job as a driver. His responsibilities included transporting students to county vocational centers and county vehicles. He underwent a six month probationary period and thereafter received a favorable review of his work. He was reemployed for the 1975-76 school year - first as a transportation driver, then as a bus driver. He received another favorable evaluation during the course of that year. During the summer of 1976,

¹ It was stipulated that the Employer was an employer, and that SEIU was an employee organization, within the meaning of the Education Employment Relations Act (EERA).

Mr. Gonzales continued to work as a bus driver for the Employer.

Mr. Gonzales was employed again for the 1976-77 school year with NCROP. He was assigned the position of head bus driver by Ernie Hickson, his immediate supervisor. As head driver, Mr. Gonzales was in charge of NCROP's drivers and 15 school buses. He was responsible for maintaining and cleaning buses and keeping records. His rate of pay increased as a result of his new position. He received a third evaluation in November of 1976 from Mr. Hickson which rated his work as "exceptional."

In February of 1977, Mr. Gonzales became involved in the organizational drive of the Service Employees International Union within NCROP. He called a meeting attended by four other drivers and SEIU field representatives Peter Gautshi and Bob Muscat.^{2/} The meeting took place in the board room of the Fremont Union High School District, located just behind the NCROP offices. Another similar meeting was held in March of that year, for which Mr. Gonzales reserved NCROP meeting room space through Mr. Hickson. Mr. Gonzales told Mr. Hickson that he was having a meeting with Mr. Gautshi in the NCROP office, and Mr. Hickson walked by as the meeting was in progress. Mr. Gautshi was wearing several SEIU buttons at the time.

In March of 1977 SEIU published an election edition of

^{2/} During February there was no elected president of the SEIU local who normally would call organizational meetings.

its newsletter. Mr. Gonzales placed copies of the newsletters in the mail boxes of employees in the NCROP offices. The newsletters consisted of photographs of and statements by employees of the Employer who were supporters of SEIU. Mr. Gonzales¹ photograph was on page 2, accompanied by the statement,

SEIU represents the people ... CSEA hasn't even come to see us while Local 715 has made sincere effort to bring NCROP within the scope of collective bargaining.

Mr. Gonzales was the only NCROP driver whose photograph appeared in the SEIU newsletter.

Mr. Gonzales also talked to other NCROP drivers about SEIU. As he stated, "I was the one who initiated the action to get the (NCROP) drivers involved in the union." He also signed an SEIU authorization card on March 17 in the NCROP office.

On March 17, Mr. Hickson held three separate one-hour meetings with NCROP employees in the NCROP offices at which he distributed copies of a five-year plan which discussed long-term expansion of the Regional Occupational Program.⁴

On March 21, Mr. Gonzales hand-delivered a copy of the

³The election occurred on May 18, 1977. California School Employees Association won the election.

⁴

The evidence is in conflict as to whether Mr. Hickson stated that the contents of the plan were not to be discussed with persons outside of the office. Mr. Gonzales stated that he had not, while Mr. Hickson testified that he had. Although the alleged conduct of Mr. Gonzales could establish a motive for any demonstrated hostility of Mr. Hickson distinct from any alleged organizational bias, the hearing officer finds it unnecessary to resolve this conflict in testimony. As noted below (footnote 6), Mr. Hickson played no part in the decision to transfer Mr. Gonzales, and Mr. Gonzales' transfer was not based on his alleged disclosure of the five-year plan.

five-year plan to Peter Gautshi. Upon receiving the plan, Mr. Gautshi telephoned Ann Fruers, the Assistant Superintendent for Instructional Services. He told her that he wished to speak with whomever was responsible for developing the plan in the event that reclassification or realignment of employment positions was being considered. According to Mr. Gautshi, he told Ms. Fruers that Mr. Gonzales had given the plan to him.

On March 25, Mr. Hickson met with Mr. Gonzales to discuss Mr. Gonzales' disclosure of the five-year plan. Mr. Hickson told Mr. Gonzales that the five-year plan was to have been considered confidential and that it was intended specifically for the operations committee of the Employer. According to Mr. Gonzales, Mr. Hickson stated that if word of Mr. Gonzales¹ disclosure had gotten back to the operations committee, Mr. Hickson would have "blown (Mr. Gonzales) out of the water." According to Mr. Gonzales, Mr. Gonzales stated to Mr. Hickson that he (Mr. Gonzales) would take "full responsibility" for the disclosure, to which Mr. Hickson allegedly responded, "You bet you will." Mr. Hickson also allegedly said, "I don't give a shit about Local 715." Mr. Hickson testified that his talk with Mr. Gonzales consisted of "dressing him down," but he did not recall specifically stating that he would "blow (Mr. Gonzales) out of the water."

On March 31, pursuant to directions by Mr. Satterstrom, chief deputy of the Employer, Mr. Hickson told Mr. Gonzales that he was being placed on leave with pay pending investigation of his motor vehicle record (MVR) by the

Employer's insurer. The Employer had changed insurers effective March 28, and the new company, National Indemnity, was in the process of reviewing the MVRs of the Employer's bus drivers, particularly those (including Mr. Gonzales) who were under the age of 25.⁵ George Redington, the insurance manager for the Employer, decided about March 1, to terminate the Hartford policy because the premiums were "too high." Effective March 28, the Employer acquired vehicle liability insurance through National Indemnity.

⁵The Employer changed insurers for its vehicle liabilities three times during the preceding year. The Employer's insurer during 1976, St. Paul Insurance Co., did not renew its policy, and that policy lapsed on October 13, 1976. The Employer went uninsured from October 13 to January 14, 1977. On the latter date, an insurance contract with Hartford Insurance Company became effective. Hartford examined the MVRs of drivers of the Employer, but raised no objection to continuing the coverage of Mr. Gonzales. (See discussion infra at page 15. fn. 14.) George Redington, the insurance manager for the Employer, decided on about March 1, to terminate the Hartford policy because the premiums were "too high." Effective March 28, the Employer acquired vehicle liability insurance through National Indemnity. On March 29, Welch and Company (the managing general agents of National Indemnity) notified William Kummer, the agent who sold the National Indemnity policy to the Employer, that four drivers, including Mr. Gonzales, were "objectionable" because they were under the age of 25. On that same date, Mr. Kummer told Mr. Redington of Mr. Welch's notification. Mr. Redington in turn notified Mr. Satterstrom about National Indemnity's unwillingness to insure the four underage drivers. (Hereafter, the word "underage" describes drivers who were under the age of 25 during the time in question.) Between March 29 and 30, 1977, the insurance company decided after further investigation not to object to insuring the three underage drivers aside from Mr. Gonzales, because their driving records were "absolutely clear." Word of that decision filtered down to Mr. Satterstrom, who decided on March 30 that the problem with respect to insuring Mr. Gonzales was of sufficient seriousness to warrant placing him on leave pending a final determination as to what to do. In any event, no evidence indicates that the insurer's decision not to cover Mr. Gonzales was made because of influence asserted by the Employer.

Mr. Gonzales returned to work on April 1 to pick up his pay check and his clipboard, which usually was stored in the desk which he used while attending to his duties in the NCROP office. The desk had been moved from the office. The NCROP offices were being remodeled at the time, and it was not unusual for furniture to be moved to facilitate the remodeling crew. The clipboard, which had notes from the last organizational meeting on its face, had been placed on a high shelf in the office.

On that same day, Mr. Hickson telephoned Mr. Gonzales and informed him that he was to report the following Monday, April 4, to John Satterstrom. (Mr. Hickson did not inform Mr. Gonzales that he had a right to be represented at the meeting on April 4.)

On April 4, Mr. Gonzales met with Mr. Satterstrom, Philip Starke (the director of attendance and support services) and Ann Fruers. Mr. Satterstrom never before had taken part in a conference involving evaluation of a bus driver's MVR.⁶ At the meeting, Mr. Satterstrom questioned Mr. Gonzales about two MVRs which Mr. Satterstrom had obtained. There was a discrepancy between the two MVRs in that only one of them recorded an accident in San Bernardino. It was established that the San Bernardino accident involved another individual also named Arthur Gonzales. Mr. Gonzales

⁶Mr. Hickson did not attend this meeting, and he had no part in the Employer's subsequent decision to transfer Mr. Gonzales.

explained that the MVR containing the record of the San Bernardino accident was incorrect in that respect. The allegedly "correct" MVR contained the following entries:

1. Accident 8/11/74 (apparently no fault).
2. Moving violation 3/25/75.
3. "Fix-it" citation (lights) 8/6/76.

At the conclusion of the meeting, Mr. Satterstrom was convinced that Mr. Gonzales was being discriminated against by the insurer, and he resolved to talk with the Employer's insurance agent about the matter.⁷ The following day, he spoke with Mr. Kummer and stated his opinion that Mr. Gonzales¹ MVR was not serious enough to warrant the treatment to which the insurer was subjecting him. Mr. Kummer informed Mr. Satterstrom that his MVRs of Mr. Gonzales showed another accident on June 4, 1976 and another moving violation on March 31, 1974 which had involved Mr. Gonzales.⁸

On April 5, Mr. Gautshi had lunch with Mr. Gonzales in the cafeteria of the Employer to discuss his being placed on

⁷ According to the Employer, Mr. Satterstrom asked Mr. Gonzales at the conclusion of the meeting whether he was aware of any other driving violations or accidents in his record, to which he purportedly responded, "No." According to Mr. Gonzales, no such conversation took place. Since the Employer's subsequent transfer of Mr. Gonzales was not shown to have been based on this alleged misrepresentation, the hearing officer finds it unnecessary to resolve this conflict in testimony.

⁸ In the accident of June 4, Mr. Gonzales had been rear-ended. The insurance company of the driver of the other vehicle paid Mr. Gonzales for the damage done to his car. Mr. Gonzales had noted the occurrence of this accident on his county permit application in October 1976. The record does not indicate whether Mr. Satterstrom had before him a file containing Mr. Gonzales' application during the April 4 meeting.

leave. During that meeting, Mr. Starke walked by their table. Mr. Gautshi stated, "What have you guys done to declare war on us?" Mr. Starke responded, "If that's the way you see it, we'll get together after lunch and talk about it." During the post-lunch meeting, according to Mr. Gautshi, Mr. Starke stated, "Yes, you don't want to lose your steward Cor your only steward] over there." Mr. Starke then stated that he had little to do with the situation, and told Mr. Gautshi that he should direct his questions to Mr. Redington.

On April 5, Mr. Satterstrom received from Mr. Kummer a copy of a letter from Mr. Gonzales' personal insurance agent, Kennedy Insurance Agency. That letter indicated that Mr. Gonzales' personal automobile insurance would not be renewed upon its expiration on October 3, 1976. Mr. Satterstrom did not rely on that information, however, in evaluating Mr. Gonzales' employment status.

On April 6, Mr. Satterstrom again met with Mr. Gonzales. Mr. Gonzales confirmed that he in fact had been involved in the June 4, 1976 accident and had received another moving violation, but denied that he had withheld that information from Mr. Satterstrom. At that time, Mr. Gonzales also indicated that on April 8, 1976, while driving an unoccupied bus of the Employer, he backed into an unoccupied automobile. Information concerning that accident was not contained in any of Mr. Gonzales' MVRs.

In a letter of April 7, Mr. Satterstrom informed Mr. Gonzales that he was being removed from any responsibility

involving vehicles owned by the Employer because of the refusal of National Indemnity to insure him. The letter also stated that Mr. Satterstrom was directing the personnel office to make efforts to find suitable employment for Mr. Gonzales at a salary placement similar to that of an NCROP driver.

Mr. Satterstrom testified that he had no choice but to remove Mr. Gonzales from his position as driver. He stated:

I had no other option. The insurance company would not cover him and there was every indication that they would not in a matter that serious in terms of liability, and it couldn't be tolerated to keep him in that kind of a position. (T. 212:20)

On April 11, Mr. Satterstrom told Mr. Gonzales that he could be transferred to a temporary position of film inspector, or that he could quit his employment with the Employer. Mr. Gonzales chose to take the position of film inspector.

On May 3, Mr. Gonzales was transferred to a position of film packer. His salary as a packer was three ranges lower than his salary as a driver or film inspector. In addition, Mr. Gonzales was not able to log in this position the approximately 2 hours of overtime pay per week which he had registered as a driver. Mr. Gonzales did not work as a film packer during the summer of 1977, but he expected to be employed in that position for the 1977-78 school year.

Pursuant to negotiations conducted between Mr. Kummer and Welch and Company, National Indemnity agreed in April or May to insure drivers for the Employer who were between the

ages of 22 and 25 if they had "perfectly clean" MVRs. (A points system was implemented in which a driver was charged three points for being unmarried and under the age of 30, and one point for any moving violation or accident which was assessed to have been the fault of the applicants. If a driver accumulated more than four points, s/he would not be insured by National Indemnity. Moving violations which occurred more than approximately three years before the insurer's review of a driver's MVR would not be included in the count of points.) In the course of negotiations, Mr. Kummer asked National Indemnity whether it would agree to insure Mr. Gonzales if an additional premium were paid. The insurer answered that it would not. The employer has not adopted formally the point system as guidelines for hiring new drivers.

Neither Mr. Satterstrom, Mr. Redington nor Ms. Fruers knew of Mr. Gonzales¹ organizational activities at the time Welch and Company contacted Mr. Kummer with respect to the insurability of Mr. Gonzales. Mr. Satterstrom first learned of Mr. Gonzales¹ activities with SEIU "a day or two" after he made the decision to transfer Mr. Gonzales. Ms. Fruers learned of Mr. Gonzales' organizational activities after the second meeting with Mr. Gonzales and Mr. Satterstrom. Ms. Fruers testified that:

It was one of my conversations with Ernie Hickson and he said, "you know, Art is the union steward. You better be careful." And I said, "careful?" What's that have to do with it?" And so I was aware (of Mr. Gonzales' organizational activities) at that point, but it was a negligible fact as far as I was concerned. (Tr. 400:11)

Before making his decision to transfer Mr. Gonzales, Mr. Satterstrom did not check the Employer's records to determine whether there were other drivers under the age of 25 whose MVRs had not been examined by National Indemnity. At the time of Mr. Gonzales¹ transfer, the Employer in fact had other underage drivers in its employ in addition to the four whose MVRs were examined initially. Mr. Satterstrom did not know of that fact until a few days after April 4, but Mr. Redington was aware of it.⁹

Refusal to Grant Driver's Permit to Carole Cheshier

In late November or early December of 1976, Carole Cheshier applied for a position as bus driver with the Employer. At approximately the same time, she applied to the county for a bus driver's permit, which was a requirement for working as a bus driver with the Employer.¹⁰

⁹As discussed below at page 15, fn. 14, Hartford Insurance Company examined the records of drivers for the Respondent in February 1977 and notified the Employer that it was "concerned" about the records of some of the drivers. Hartford's notification, which found its way into the hands of Mr. Redington, indicated that there were eight drivers with relatively poor MVRs employed by the Employer. Four of those eight were under the age of 25, and the insurer's memorandum indicated on its face that one of the drivers was 19 years of age. None of those four underage drivers was subject to the scrutiny of National Indemnity in March or April. Mr. Redington knew that there were other underage drivers who were left unchallenged by National Indemnity, but he did not attempt to find out the reason for that.

¹⁰Ms. Cheshier included in her permit application a list of the moving traffic citations which she received over the preceding three years. Since her employment application did not require a listing of traffic citations, she did not supply such a list to the Employer.

Ms. Cheshier began work on January 5, 1977. She had not received her county permit as of that date. She initially was assigned to ride the bus routes with the Employer's drivers, and did so for six to eight hours per day, four to five days per week.

At the beginning of February, Ms. Cheshier still had not received a driving permit, and she submitted another application to the county.¹¹

Ms. Cheshier continued to ride the bus routes until February 3, when she was called to the office of Antone Zoletti, the director of transportation for special programs. Mr. Zoletti informed Ms. Cheshier that because of the high number of traffic violations in her MVR, she would not be allowed to drive "until the matter was cleared up."¹² Mr. Zoletti also told Ms. Cheshier that she could not continue her employment with the Employer after that day.

¹¹The record does not show clearly the reason for the delay in processing Ms. Cheshier's application. The County of Santa Clara was responsible until late 1976 for determining whether applicants for bus driver permits were qualified to receive them. In December the responsibility for processing permits was turned over to the Employer's Office of Administrative Support Services. Apparently Ms. Cheshier's original application was misplaced between the county offices and those of the Employer.

¹²

On December 6, a photocopy of Ms. Cheshier's initial permit had been sent to Philip Starke by G.D. Shellard, the county personnel employee who was responsible for issuing driving permits. That photocopy was accompanied by a memorandum stating "if this were a county employee we would not issue." Mr. Starke was not responsible for processing the application for the Employer.

The MVR of Ms. Cheshier, who was 18 years old during the time she was employed by the Office of the Superintendent, showed the following traffic violations:

1. Driving over 55 miles per hour 2/19/75
2. Violation of basic speed law 5/4/75
3. Running red light 11/21/75
4. Violation of basic speed law 11/21/75

Peter Gautshi, a field representative for SEIU, filed an appeal on behalf of Ms. Cheshier in March of 1977.

Mr. Starke provided verbally to Mr. Gautshi the criteria that the Accident Review Board would follow in evaluating Ms. Cheshier's case. The record does not show clearly what those criteria are. It appears that a conviction on three or four moving violations during the past three years would prohibit an applicant from obtaining a permit, although mitigating circumstances would be considered.

On March 24, Ms. Cheshier's appeal was heard by the Employer's Accident Review Board, which was responsible for reviewing the decision not to grant the permit to Ms. Cheshier.¹³ There was no written criteria for determining whether a driving permit should be granted. The Board did not compare Ms. Cheshier's MVR with those of other drivers of the Employer.

Mr. Gautshi presented evidence on behalf of

¹³ There were five persons on the Accident Review Board which convened to hear Ms. Cheshier's appeal: Marge Peters (Director of Business Services), Carl Miescke (Director of Environmental Education), Roy Brown (Audio-Visual Department member), Bob Michaels (Special Schools and Services Division), and Mr. Zoletti.

Ms. Cheshier at the hearing. He submitted, among other things, Ms. Cheshier's California School Bus Driver's Certificate, a certification that Ms. Cheshier had been authorized by the county to operate a mobile unit for the County Communications Department, a medical examiner's certificate, and a speedometer check. The speedometer check showed that on May 8, 1975, just after her second speeding citation, the speedometer of Ms. Cheshier's vehicle registered a speed approximately five miles per hour less than the actual speed at which the vehicle was traveling.

After hearing the evidence, the Accident Review Board deliberated for ten to fifteen minutes before deciding that, based on Ms. Cheshier's driving record and age, the decision not to issue a permit to her should stand.¹⁴

Ms. Cheshier's organizational activities consisted of her joining SEIU approximately two weeks after she began working for the Employer and her attending two SEIU meetings. She could not recall whether she had attended any SEIU meetings before February (she was removed from her job on February 3). When asked whether she believed that she had been terminated

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The Employer's insurer during the early part of 1977, Hartford Insurance Company, indicated to the Employer in a letter dated February 4, that it was "concerned" about the MVRs of eight drivers, and was particularly concerned about the MVRs of three, including Ms. Cheshier. Weeks later, on the basis of that letter, Mr. Starke prepared a list of the employees about whom the insurer was concerned and forwarded that list to Mr. Gautshi. The record does not show that either the county's failure to issue a permit or the Board's decision not to overturn the initial denial of Ms. Cheshier's permit application was based on the concerns of the insurer.

because of her organizational activities, Ms. Cheshier responded, "I don't know."¹⁵

Ms. Cheshier's mother, Lottie Cheshier, also was a driver for the Employer and was a supporter of the SEIU. Lottie Cheshier had distributed information for the SEIU and had been a spokesperson for it on occasion. Her name and photograph appeared in the SEIU's election newsletter of March 3, 1977.

The Accident Review Board did not discuss Ms. Cheshier's organizational affiliations during its review of her case. No evidence suggests that members of the Board discussed her affiliations before the Board met. Testimony of Carl Mieske, one of the members of the Review Board, showed that he was aware that Ms. Cheshier was being represented by a union field representative, but that the question of Ms. Cheshier's organizational activities did not enter into his consideration of whether to issue a permit to her. SEIU has not shown that Ms. Cheshier's organizational activities, even if known to the members of the Review Board, entered into their consideration of her appeal.

¹⁵Peter Gautshi's testimony appeared to indicate that Ms. Cheshier's organizational activities consisted of speaking in favor of the SEIU at her work location and of being involved in "minor representational matters" for other drivers. In view of Ms. Cheshier's own testimony, which did not indicate that she took part in such activities, the hearing officer finds Mr. Gautshi's testimony on this issue to be unpersuasive.

DISCUSSION

In order for a violation of Section 3543.5(a) to be found in this case, SEIU must prove by a preponderance of the evidence that the actions which the Employer took with respect to Mr. Gonzales and Ms. Cheshier were effected with the intent to discriminate or impose reprisals against them because of their exercise of rights guaranteed by the EERA, or that such was the natural and probable consequence of the Employer's actions. San Dieguito Faculty Association;¹⁶ California Administrative Code, tit. 8, Section 35207.

An employer's unlawful intent or motive may be proved by circumstantial evidence. NLRB v. Laney & Duke Co. 369 F.2d 859, 63 LRRM 2552 (5th Cir. 1966). Among those elements which circumstantially may indicate discriminatory intent are disparate treatment of union adherents as opposed to other employees within the same negotiating unit, Thermo Electric Co., Inc. 222 NLRB 358, 91 LRRM 1310 (1976); previous promotions of employees who later are discharged for allegedly unlawful reasons, Flavoripe, Inc. 222 NLRB 1052, 91 LRRM 1415 (1976); the timing of the allegedly discriminatory action of the employer, Big "E" Corp. 223 NLRB 1349, 92 LRRM 1127 (1976); and knowledge by the employer of an employee's organizational activities, Gould Inc. 216 NLRB 1031, 88 LRRM 1581 (1975). It has long been held that proof of an employer's knowledge of an employee's organizational activities may be established by

¹⁶EERB Decision No. 22, September 2, 1977.

circumstantial evidence, NLRB v. Tru-Line Metal Products Co«
324 F.2d 614, 54 LRRM 2655 (6 Cir 1963), cert. den. 377 U.S.
906, 55 LRRM 3023 (1964); Board Ford Inc. 222 NLRB 922, 91
LRRM 1294 (1976).

Transfer of Arthur Gonzales

There is some circumstantial evidence that Mr. Gonzales was transferred because of his organizational activities. He was active in the SEIU. His supervisor, Mr. Hickson, knew of his organizational activities and may have harbored some bias against Mr. Gonzales because of them.¹⁷ Another managerial employee, Philip Starke, also knew of Mr. Gonzales¹ organizational affiliation. The timing of Mr. Gonzales¹ transfer--two months after the advent of his organizational activities, and a few days after his disclosure of the five-year plan--is further evidence of a nexus between his activities and his transfer, as is the fact that Mr. Gonzales alone was singled out for removal from driving responsibilities in spite of the fact that he was not the only driver under the age of 25 who had a flawed driving record. Finally, Mr. Gonzales had been promoted to the position of head bus driver in the fall of 1976, and had received excellent evaluations from his supervisor since he began working for the Employer.

¹⁷ For example, Mr. Hickson stated to Mr. Gonzales that he "didn't give a shit" about Local 715, and that he would "blow (Mr. Gonzales) out of the water" in the event that the Employer's operations committee learned of Mr. Gonzales' disclosure of the five-year plan to the SEIU.

In spite of the above circumstantial evidence, however, credible direct testimony showed that Mr. Satterstrom, who was responsible for transferring Mr. Gonzales, had no knowledge of Mr. Gonzales¹ organizational activities until after the date of his transfer, and also showed that Mr. Gonzales¹ transfer was effected because of the insurer's unwillingness to insure him.¹⁸ (As indicated in the Findings of Fact, Mr. Hickson had no part in the decision to transfer Mr. Gonzales.) Since the record does not provide an adequate basis for inferring that Mr. Satterstrom knew of Mr. Gonzales' organizational activities at the time he decided to transfer Mr. Gonzales, it is found that the Employer's transfer of Mr. Gonzales was not "because of" his organizational activities, San Dieguito Faculty Association, supra.¹⁹

Apart from the fact that the SEIU has not established that the Employer's transfer of Mr. Gonzales was accompanied by a discriminatory motivation, the Employer has shown

¹⁸ As noted in the Findings of Fact (page 6, fn. 5), there is no evidence that the insurer's decision not to insure Mr. Gonzales was made because of influence asserted by the Employer.

¹⁹ Compare Board Ford, supra at page 18, where the NLRB found the Employer's dismissal of two union adherents to be violative of Sections 8(a) (1) and (3) of the NLRA. In that case, the NLRB imputed to the Employer knowledge of the Charging Party's organizational activities, based on the actual knowledge of one employee whose interests were "aligned" with management. The NLRB's finding was based on the record as a whole, which included evidence of anti-organizational remarks rendered by the Charging Party at the beginning of organizational activities within the shop, and dismissal of two union adherents on the basis that "business was slow," followed by employment of two replacements for the dismissed workers within one month.

affirmatively that its transfer of Mr. Gonzales was based on a legitimate business justification, i.e., that the transfer of Mr. Gonzales was effected because the insurer was unwilling to insure him.

The evidence does not substantiate SEIU's two-pronged assertion that the Employer's business "justification" for transferring Mr. Gonzales was a mere pretext utilized to discriminate against him. First, SEIU suggests that if securing insurance for Mr. Gonzales truly was the problem faced by the Employer, the Employer would have attempted to secure insurance for Mr. Gonzales elsewhere. But the record shows that the Employer in fact had inquired of the insurer whether it would be possible to obtain a rider to its policy for Mr. Gonzales, to which the insurer answered that it would not.²⁰ In addition, the fact that the Employer did not attempt to secure other insurance for Mr. Gonzales is susceptible of numerous inferences, including the obvious possibilities that execution of a policy solely for the benefit of Mr. Gonzales would entail additional cost and some administrative inconvenience. And since Mssrs. Satterstrom and Redington did not know of Mr. Gonzales¹ organizational activities, the fact that no attempt was made to secure other insurance is not logically susceptible of an inference of discrimination.

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It would be circumstantial evidence of discrimination if the Employer had secured riders, or other insurance, for other drivers aside from Mr. Gonzales, but no evidence was submitted on that point.

Second, SEIU contends that the Employer discriminatorily applied the insurer's criteria to Mr. Gonzales, since other drivers under the age of 25 had driving records similar to or worse than that of Mr. Gonzales. But the insurer initially scrutinized the records of three underage drivers aside from Mr. Gonzales, although the insurer determined to continue to insure them because of their unblemished driving records. In contrast to the MVRs of those drivers, Mr. Gonzales¹ driving record consisted of two moving violations, one "fix-it" violation,²¹ and three accidents (one of which was the fault of Mr. Gonzales).

It is somewhat probative that at least one other underage driver with a poor MVR was not subject to any degree of scrutiny by the insurer or the Employer. The Employer's insurance administrator, Mr. Redington, knew that other underage drivers were employed by the Employer²² but did not point out that fact to the insurer. However, there is no

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Although the record is not entirely clear with respect to this point, the evidence suggests that record of citations which are somewhat over three years old are not included in a driver's MVR except for serious violations. SEIU suggests that the record of Mr. Gonzales' March 31, 1974 citation should not have been considered by the insurer, since that citation was almost three years old at the time the insurer took its action. SEIU also argues that Mr. Gonzales¹ "fix-it" citation should not have been included in the "points count" since that citation was not a moving violation. Since no evidence was presented at the hearing showing either that it is customary procedure of the insurer not to consider citations over three years old or that "fix-it" citations generally are not included in the insurer's "points count," the hearing officer is unable to make any relevant findings on these points.

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See page 12 fn. 9.

evidence that the Employer was under an obligation to inform the insurer that other underage drivers were employed by the Employer, particularly since the insurer was conducting its own investigation of the Employer's drivers. Moreover, as stressed above, the record does not show that Mr. Redington had any knowledge of Mr. Gonzales¹ organizational activities, thus eliminating again the possibility of drawing the crucial inference of a discriminatory motive from these facts.

In sum, the evidence shows that the decision of the insurer not to insure Mr. Gonzales was based on his poor driving record. That decision was made independently by the insurer, and the managerial employee who was responsible for transferring Mr. Gonzales had no knowledge of his organizational activities. Under California Administrative Code, Title 8, Section 35027, the Charging Party must prove the charge by preponderance of the evidence in order to prevail in an unfair practice case. SEIU has failed to sustain that burden of proof here. On the basis of the record, it must be concluded that the Employer's transfer of Mr. Gonzales was not discriminatorily motivated, and therefore was not violative of Section 3343.5(a) of the EERA.

Refusal to Grant Permit to Carole Cheshier

SEIU contends that the Employer's refusal to grant a driver's permit to Carole Cheshier was based on her

organizational activities.²³ But the record shows this contention to be flawed in two fatal respects. First, Ms. Cheshier's organizational activities were not clearly proven, were apparently quite minor in scope and in any event were not shown to be known to the Employer.²⁴ Second, the denial of Ms. Cheshier's permit was fully justifiable in light of her age and poor driving record.²⁵ For those reasons, the Employer's actions were not proved to have been attributable to any organizational activity on the part of Ms. Cheshier.. The charge must be dismissed as a result.

CONCLUSIONS OF LAW

1. The Santa Clara County Superintendent of Schools did not violate Section 3343.5(a) of the EERA by transferring Arthur Gonzales from his position as bus driver.

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The SEIU also contends that she was denied a permit because of the organizational activities of her mother, Lottie Cheshier, who was a driver for the employer and was more active in the SEIU than was Carole Cheshier. However, SEIU has established no nexus between Lottie Cheshier's activities and the Employer's denial of a permit to the younger Ms. Cheshier.

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As noted in the Findings of Fact, supra, it was not established that Ms. Cheshier had engaged in any organizational activities, apart from joining the SEIU, as of the date of her removal from her job as bus driver.

²⁵The SEIU contends that the Employer used Mrs. Cheshier's poor driving record as a mere pretext for denying a permit to her. It attempts to substantiate this position by positing that the employer had no standards for determining whether an applicant should be granted a permit. (Presumably, SEIU feels that if no standards existed, the Employer's alleged discrimination against her would be made easier in that denial of her permit would not be based on objective, reviewable factors.) But the record shows that the county's established criteria were used during the Review Board hearing, although they were not in writing at that time. (Tr. 282:11, 304:21) See Findings of Fact, p. 15.

2. The Santa Clara County Superintendent of Schools did not violate Section 3343.5(a) of the EERA by failing to grant a bus driver's permit to Carole Cheshier and by removing her from her position as bus driver.

RECOMMENDED ORDER

The unfair practice charge filed by the Service Employees International Union, Local 715, against the Santa Clara County Superintendent of Schools is hereby DISMISSED.

Pursuant to California Administrative Code, Title 8, Section 35029, this Recommended Decision shall become final on December 20, 1977 _____ and an order will issue from the EERB unless a party files a timely statement of exceptions. See California Administrative Code, Title 8, Section 35030.

Dated; December 7, 1977



MICHAEL J. TONSLING

Hearing Officer