



STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA TEACHERS ASSOCIATION,)	
)	
Charging Party, <u>APPELLANT</u> ,)	Case No. LA-CE-205
)	
v.)	
)	
CERRITOS COMMUNITY COLLEGE)	PERB Decision No. 141
DISTRICT,)	
)	
Respondent.)	October 14, 1980
_____)	
JIM SHAW,)	
)	
Charging Party, <u>APPELLANT</u> ,)	Case No. LA-CE-206
)	
v.)	
)	
CERRITOS COMMUNITY COLLEGE)	
DISTRICT,)	
)	
Respondent.)	
_____)	

Appearances: Patrick D. Sisneros, Attorney (Wagner & Wagner) for Cerritos Community College District; Eugene Huguenin for California Teachers Association.

Before Gluck, Chairperson; Moore, Member.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by Jim Shaw and the California Teachers Association (hereafter Charging Parties) to the hearing officer's proposed decision dismissing the unfair practice charges filed by the Charging Parties

against Cerritos Community College District (hereafter District). The Charging Parties have excepted to the hearing officer's finding that the District's failure to rehire part-time instructor Jim Shaw did not violate section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA).¹

Having considered the record and proposed decision in light of the exceptions and briefs, the Board finds the hearing officer's findings of fact to be free from prejudicial error and affirms those findings.²

The hearing officer based his conclusion that the District's non-retention of Charging Party Jim Shaw did not violate section 3543.5(a) on the Board's decision in

¹The EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

Section 3543.5(a) provides:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

²The Charging Parties have excepted to certain credibility findings made by the hearing officer. Based on our consideration of the entire record, including the totality of testimony offered, we find no basis for reversing his findings. See Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

San Dieguito Union High School District (9/2/77) EERB Decision No. 22. Since the issuance of the hearing officer's decision, San Dieguito has been modified by Carlsbad Unified School District (1/30/79) PERB Decision No. 89. In that case, the Board determined that there must be a nexus between the employer's acts and the exercise of employee rights under the EERA in order to find a violation of section 3543.5(a). (See also Santa Monica Community College District (9/21/79) PERB Decision No. 103.) Here, the Charging Parties failed to establish the requisite nexus between Shaw's non-retention and his organizational activities. Therefore, we affirm the hearing officer's dismissal of the unfair practice charge in this case.

ORDER

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

The unfair practice charges filed by Jim Shaw and the California Teachers Association against the Cerritos Community College District are DISMISSED.

PER CURIAM

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA



CALIFORNIA TEACHERS ASSOCIATION,)	
)	
Charging Party,)	Unfair Practice
)	Case No. LA-CE-205
v.)	
)	
CERRITOS COMMUNITY COLLEGE)	
DISTRICT,)	
)	
Respondent.)	
<hr/>		
JIM SHAW,)	
)	
Charging Party,)	Case No. LA-CE-206
)	
v.)	<u>PROPOSED DECISION</u>
)	
CERRITOS COMMUNITY COLLEGE)	(9/28 /78)
DISTRICT,)	
)	
Respondent.)	
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Appearances: Patrick D. Sisneros, Attorney (Wagner & Wagner) for Cerritos Community College District; Eugene Huguenin for California Teachers Association.

Before Bruce Barsook, Hearing Officer.

PROCEDURAL HISTORY

On November 30, 1977, Charging Party, California Teachers Association (hereafter CTA), filed an unfair practice charge (LA-CE-205) against the Cerritos Community College District (hereafter District), alleging that the District had violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA).¹ Specifically, the charge states that the District, through its agents Wilford Michael, Sherill Moses

¹Gov. Code sec. 3540 et seq. All statutory references are to the California Government Code unless otherwise specified.

and others refused to rehire James Shaw, a part-time instructor, for the fall 1977 school term because of his exercise of rights guaranteed by the EERA. On December 2, 1977, Charging Party, James Shaw, filed an unfair practice charge (LA-CE-206) alleging the same violation.

On December 9, 1977, these two unfair practice charges were consolidated. The District filed its answer on December 22, 1977.

After an informal conference failed to resolve the dispute, a formal hearing was held on March 2, 3, and 20, 1978.

ISSUE

1. Was the District's determination not to rehire James Shaw for the fall 1977 school term because of his exercise of rights guaranteed by the EERA (section 3543.5(a))?

FINDINGS OF FACT

The essence of the charge is that in the spring of 1977, Sherill Moses, then acting division chairman, refused to recommend James Shaw for reemployment as a part-time instructor because of Shaw's organizational activity. The District disputes this argument and argues that Shaw was not reemployed because of his abrasive attitude and his inability to get along with others.

Many of the facts in this case are not in dispute. However, a few crucial events are disputed and the

interpretations that each side gives to them are in substantial conflict. Where appropriate, this opinion will state the differing versions of these events and make a determination as to the more credible interpretation of the facts.

James Shaw, a part-time psychology instructor, taught six consecutive semesters (Fall 1974-Spring 1977) at the Cerritos Community College.

In the spring of 1976, Shaw participated in organizing part-time faculty. Sometime in March 1976, he prepared a meeting announcement and placed it in the mailboxes of part-time faculty.

The part-timers held several subsequent meetings and out of this grew the Cerritos College Part-Time Faculty Association (hereafter CCPTFA). Shaw drafted the constitution for the organization and served on its executive committee.

In the fall of 1976, Shaw testified that his organizational activity was "largely confined to discussions with Mary Capdevielle," president of the CCPTFA. Sometime in October of 1976, Shaw attended a meeting between the CCPTFA Executive Committee and representatives of the Cerritos College Faculty Association (hereafter CCFA). As a consequence of this meeting, the executive committee decided to disband the CCPTFA and become part of the CCFA.

As part of an organizing effort in behalf of the CCFA, Shaw attempted to persuade part-time instructors to sign authorization cards. On November 13, Shaw was confronted by

the District switchboard operator, who refused to permit Shaw to place union literature in faculty mailboxes without prior permission from the District. Shaw incorrectly identified the operator as the wife of a District administrator. Claiming a statutory right to distribute union literature, Shaw disregarded these protests and stuffed the mailboxes anyway.

Around November 27, Shaw and Sherill Moses met for the first time. Mary Capdevielle introduced Shaw to Moses by stating, "here is the guy that put all the nice literature in the boxes. . . ."

After November 13, Shaw testified that he spent time in personal contact with other members of the faculty trying to persuade them to sign authorization cards.²

Throughout this period, Shaw indicated that he had general discussions with Keith Hinrichsen, division chairman of the social sciences division, and Dean Paige, director of the extended day program, regarding part-time employee rights. Shaw testified that his relationship with these two men was cordial.

No testimony was presented indicating what organizational activity, if any, Shaw engaged in during the spring of 1977.

At the commencement of the spring 1977 semester, Sherill Moses, then the political science department chairman, was selected as acting division chairman of the social sciences division, while Keith Hinrichsen, its permanent chairman, was away on sabbatical.

²Shaw was neither an officer nor a committee chairman of CCFA.

Sherill Moses had been employed at Cerritos since 1963. He was one of the founders of the American Association of University Professors (AAUP) Chapter at Cerritos College. He had served as its president. Moses was also a member of CCFA and had been on its executive board for the past ten years.

While Moses believed that the faculty-administration/board relationship was such that it was not a propitious time to begin collective bargaining, Moses philosophically favored the concept of collective bargaining. Tony Rodriguez, a witness called in behalf of James Shaw, testified that he had heard Moses speak out in favor of collective bargaining at a CCFA meeting.

As acting division chairman, Moses was responsible for scheduling classes in the division for the fall 1977 semester. In early March, Annette Taylor, division clerk of the social sciences division, contacted Shaw to determine his availability and his preferences for next fall's schedule.

By early April, Shaw had become concerned as to his next semester's assignment.³ He contacted Carol Driscoll, evening secretary for the social sciences division, who told him that he was tentatively scheduled for two classes for fall 1977.

As part of his duties as division chairman, Moses evaluated many of the part-time instructors in the division.

³Why this is so is a bit unclear. Shaw himself admitted during testimony that ordinarily he would not receive notification until mid-April.

Some of the departments, such as history and political science, had their own personnel to evaluate part-time instructors. However, as to the others, Moses was left to evaluate them unless he could obtain assistance from other full-time faculty.

Being somewhat unfamiliar with the psychology department, Moses contacted Dr. Charles Cabeen, the chairman of the department, to enlist his expertise in evaluating the part-time psychology instructors.⁴ Dr. Cabeen agreed to evaluate a couple of part-time instructors. Moses asked Cabeen about his impressions of the part-time instructors. Many of the instructors Cabeen knew well and assured Moses of their competency. Cabeen was not so sure about Shaw and a new teacher whose work Cabeen had not had an ample opportunity to observe. Cabeen didn't know Shaw well and therefore could not give any assurances regarding his competence.

On his part, Moses expressed some concern about Shaw. He had heard from two instructors as well as random "hearsay" comments that Shaw had a personality that some people found hard to get along with. To allay this concern, Cabeen testified, Moses felt that Shaw "should be given a fair evaluation and that somebody else should look at him too." Consequently, it was understood that both Moses and Cabeen would evaluate Shaw.

⁴Moses testified that he did the same thing in the sociology department.

On April 11, while on a break from his class, Shaw met with Moses who requested an opportunity to evaluate him. Moses also mentioned the possibility that because Dr. Cabeen would be on sabbatical in the fall, a greater number of classes would be available for Shaw to teach. After this brief discussion, the class commenced and Moses proceeded to evaluate Shaw's teaching.

One week later (April 18), Dr. Cabeen sought to evaluate Shaw. Shaw testified that because he had been evaluated by Moses one week earlier, he thought it was irregular for Cabeen to also evaluate him. Shaw indicated that he "didn't like the looks of it" and that "they were giving [him] a bad time over at someplace else."⁵ Shaw refused Cabeen permission to evaluate him until Shaw had an opportunity to talk to Moses. Shaw testified that when Cabeen told Shaw that Cabeen, as department chairman, had inherent authority to evaluate him, Shaw stated that he "didn't care if [Cabeen] was the department chairman, the department chairman has no authority in these matters." Cabeen denied telling Shaw that he had the unilateral authority to evaluate his class.

Cabeen thought Shaw reacted excessively defensive and seemed like a very threatened person.

⁵In his testimony, Cabeen indicated that although in this instance Shaw was being treated differently--it was not unusual for there to be an overlap; in prior semesters, both the psychology department coordinators and the division chairman would evaluate the same individual.

The next day, Cabeen told Moses of his unsuccessful attempt to evaluate Shaw.

Soon thereafter, Moses began his efforts to contact Shaw. For a long time, he was unsuccessful. Moses had become seriously concerned about Shaw's "suspicious and contentious" attitude and thought a meeting might help to clear things up. During the time period that Moses was trying to contact Shaw, Moses conversed with Cabeen regarding Shaw. Asked where Shaw would be ranked if Cabeen had to rank the part-time psychology instructors, Cabeen placed him at the bottom. Asked whether Cabeen would like Shaw as a (full-time) member of the psychology department, Cabeen answered "no," basing his opinion on Shaw's "personality problem."

When Moses finally did reach Shaw on the telephone, the two could not agree on a mutually agreeable time. Shaw, because he only worked on campus Monday and Thursday nights, sought a meeting on a Monday or Thursday evening. Moses who worked during the day, preferred a daytime meeting. While the two finally agreed upon a meeting before one of Shaw's classes, Moses was disturbed that Shaw should insist that the meeting be held at a time suitable to Shaw. Moses testified that it was not the insistence on the time that disturbed him but "the manner in which he talked, the tone of his voice."

The meeting between Shaw and Moses was held on May 12.⁶ Shaw's version of the meeting is as follows: The meeting began shortly after 6:00 p.m. Moses told Shaw that Moses' evaluation of him had disclosed that he was a good teacher. The two men discussed a part-time tenure bill which Moses was for and Shaw and CTA against. Moses told Shaw that his future employment was in question because certain administrators were displeased with Shaw's tactics in advocating part-timer issues. Shaw had a militant attitude and administrators were fearful that Shaw might receive tenure if he stayed longer. The "tactics" Shaw used was the apparent placing of notices in faculty mailboxes approximately one month earlier. Shaw denied this on the basis that he had not done that for approximately three months. Shaw was told that Dr. Cabeen had been asked to make a second evaluation to allay the criticisms of these certain administrators. Although Shaw's name was being deleted from the Schedule of Classes, he would still be considered for reemployment only after Moses "received certain data." Moses did not elaborate as to what that "certain data" was. Finally, according to Shaw, the two agreed to a second meeting the following Thursday at 6:00 p.m.

⁶The date of this initial meeting is disputed. Shaw testified that it was Monday, May 16, while Moses insisted that it was Thursday, May 12. Moses' version is the more credible. Shaw seemed unclear when testifying as to dates. He stated that approximately ten days after the April 18 incident with Cabeen, he received a call from Ms. Driscoll, calling on behalf of Mr. Moses to arrange a meeting between Moses and Shaw. Then Shaw testified that after receiving the call from Ms. Driscoll, he received a call from Moses on April 23 requesting a meeting. Finally, on rebuttal Shaw testified that Moses first called him on May 12. These inconsistencies lead me to believe that the meeting took place on May 12.

Moses' version of the May 12 meeting varies considerably at times from Shaw's version. According to Moses, the meeting began at 6:50 p.m., not 6:00 p.m. Moses testified that he told Shaw that he was an adequate teacher but that being hired back involved more than just teaching ability.

Moses alleges that he told Shaw that before he could recommend him for retention he wanted to be sure that Shaw "would be the kind of teacher that would be good for the institution." Moses was "concerned about [Shaw's] being contentious and suspicious and aggressive" in his dealings with people and gave specific examples of his concern.⁷

The scheduled May 19 meeting did not take place. Shaw showed up one-half hour late and by then Moses had left for another appointment.

On May 26, the next meeting between the two men was held. This time, Shaw asked Tony Rodriguez, a speech instructor as well as an officer in the CCFA, to join him.

The meeting scheduled for 6:00 p.m. began about 6:15 p.m., because Shaw was late again.

According to Shaw's testimony, he asked Moses whether Moses had taken Shaw's name off the Schedule of Classes because of pressure from the administration. Moses replied that he had done so alone, for the interests of the division. Moses then allegedly told Shaw that if Shaw stayed another semester, Shaw might acquire tenure and Moses was afraid of what Shaw might do.

⁷These examples include: Shaw's refusal to allow Cabeen to evaluate him; his attitude towards Moses when Moses was trying to set up a meeting; and at later meetings between the two men, Shaw's behavior at their earlier meetings.

Shaw further testified that Moses told him that on the very day Moses acquired tenure he formally created the American Association of University Professors (AAUP) Chapter at Cerritos and that "if he had known these facts, what would [Shaw] do!"

Moses purportedly reiterated that Shaw was a good teacher but that "being good in the classroom is not enough, that you had to be a team player." Moses continued by apparently using Mary Capdevielle as an example, stating that she was not hired as a full-time employee "because some administrators did not feel that she fit in."⁸

Moses' version is that he told Shaw about his activities with AAUP in order to "assure him that [Moses] was the last person on campus to hold [Shaw's] faculty or his professional activities against him." Moses attempted to assure Shaw that not only would his organizational activity not hurt but that if anything, it would be a plus factor.

The testimony of Mr. Rodriguez more closely supports the testimony of Mr. Moses rather than that of Mr. Shaw. According to Rodriguez, during Moses' opening remarks Shaw interrupted and stated "let's get right to the issue. . . are you or are you not going to recommend me for employment?" Moses responded by stating he hadn't made up his mind yet.

⁸No elaboration of what "fit in" meant was given according to Shaw's testimony, but he interpreted the phrase to refer to Ms. Capdevielle's organizational activities.

With regard to a discussion about Shaw's organizational activity, Rodriguez quotes Moses as stating "whatever you're doing and whatever kind of activities you're involved in are not necessarily part of me making up my mind." To further reassure Shaw, Moses mentioned his involvement in the fight for academic freedom and his efforts in behalf of the AAUP.

According to Rodriguez, Moses wasn't so concerned about Shaw's teaching ability but with his ability to get along with others and with his outspoken attitude.⁹

The next meeting between Shaw and Moses was held June 2. Again, Rodriguez was in attendance. The meeting was a short one--Moses told Shaw that he would not recommend him for reemployment.¹⁰

After meeting with Moses, Shaw went to Dean Paige's office to ask what Paige could do. Although nothing was official yet, Paige told Shaw that in 99 times out of 100 he sided with the division chairman and therefore Shaw should look elsewhere for assistance.

⁹Rodriguez testified that he considers Shaw to be outspoken. In characterizing someone who is abrasive, Rodriguez stated that he would characterize that person as outspoken.

¹⁰Both sides are in substantial agreement that if a division chairman refuses to recommend an instructor for reemployment, it is tantamount to a decision by the District not to rehire.

During the summer Shaw wrote to Dr. John Randall, vice-president of instruction, requesting that he be reinstated. After Randall left for another job, Shaw corresponded with Dr. Wilford Michael, district superintendent, who finally stated to Shaw on September 2, 1977, that he would not be reemployed for the fall 1977 semester.¹¹

Significantly, the letters from Shaw to the District administrators make no mention of Shaw's organizational activity but rather of his tenure rights. In fact, Shaw admitted during cross-examination that the letters (to and from Shaw) did not mention directly Shaw's organizational activity.¹²

It is now appropriate to assess the factual makeup of this case. Basically, there are two versions: Shaw argues that Moses refused to rehire him because of Shaw's organizational activity; Moses counters by arguing that Shaw's organizational activities were not in issue but rather his personality and attitude towards others.

¹¹While a division chairman's refusal to recommend a part-time instructor for continued employment is practically speaking a refusal to rehire, notification to a part-time employee that he has been employed for the ensuing school year can be made anytime up to the start of the semester.

¹²Indeed, Shaw's testimony that Dr. Randall wrote to him that Randall had "no knowledge. . . whether certain administrators were displeased with the tactics [Shaw] used in advocating for the rights of the part-time instructors at Cerritos College" is not substantiated by the letters themselves. The letters make no mention of Shaw's advocacy of part-timer rights.

Based upon an examination of the testimony given and the documents presented into evidence, it is concluded that the version of the facts given by Sherill Moses is the more credible one. Mr. Moses generally gave reliable and consistent testimony. His testimony was often supported by testimony given by witnesses, Cabeen and Rodriguez. Although Moses did not favor the immediate implementation of collective bargaining at Cerritos, there is no evidence that he was hostile to such efforts by Shaw or anyone else.

Shaw's testimony, on the other hand, was not as credible as that of Moses. At times, his testimony was vague, inconsistent or marked by editorializing. He admitted that his letters to Dr. Randall and Dr. Michael do not contain references to his organizational activity. But he also argued that Dr. Randall wrote to him discussing his tactics in advocating part-timer rights when in fact the letters make no mention of that subject. Shaw seemed confused as to the date of his first conversation with Moses following Cabeen's aborted attempt to evaluate him. In addition, he incorrectly identified the District switchboard operator as the wife of an administrator, when in fact no wife of an administrator worked in such a capacity.

For the above reasons, it is concluded that James Shaw was not retained as a part-time instructor because Sherill Moses thought that Shaw's suspicious, contentious and aggressive behavior prevented him from getting along with others.

CONCLUSIONS OF LAW

Having determined that Shaw was not retained because of his suspicious, contentious and aggressive behavior, it must next be determined whether non-retention for these reasons constitutes an unfair practice under section 3543.5(a).

Section 3543.5(a) provides that it shall be unlawful for a public school employer to:

Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
[Emphasis added.]

Significantly, the section provides that the interference, coercion, discrimination or other specified conduct must be done because of an employee's exercise of a right guaranteed by the EERA. San Dieguito Union High School District (9/2/77) EERB Decision No. 22.

Charging Parties have failed to show that Mr. Shaw's organizational activities were in any part responsible for his discharge. Shaw's organizational activity primarily ended

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Charging Parties' argument that the natural and probable consequence test applies is not persuasive where, as here, the issue is the isolated discharge of a single employee. "Otherwise, the discharge of any employee who participates in union affairs might violate (sec. 3543.5(a)) regardless of whether the employer's motives were entirely proper." Western Exterminator Co. v. NLRB (9th Cir. 1977) 565 F.2d 1114 [97 LRRM 2187, 2190 fn. 2]. In any event, the natural and probable consequence of an employee being discharged because of a personality conflict with his supervisor does not inherently chill other employees in engaging in organizational activities.

during the fall 1976 semester. Mr. Moses, who the Charging Parties allege is responsible for Shaw's non-retention, did not consider Shaw's organizational activity in making his determination. In fact, there is evidence that Shaw's organizational activity was a plus factor, if anything, when considering whether Shaw should be retained.

Rather, the evidence indicates that Shaw was not retained as a part-time instructor because of a personality conflict he had with Moses. Non-retention because of a personality conflict, however regrettable or seemingly unjustified, does not constitute a violation of the EERA. The charges filed by CTA and James Shaw against the District are therefore dismissed.

PROPOSED ORDER

The District has not violated section 3543.5(a).

The unfair practice charges filed by the California Teachers Association (Case No. LA-CE-205) and James Shaw (Case No. LA-CE-206) are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on October 18, 1978 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on October 18, 1978 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: September 28, 1978

Bruce Barsook
Hearing Officer