

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION and its DELTA COLLEGE
CHAPTER 359,

Charging Party,

v.

SAN JOAQUIN DELTA COMMUNITY
COLLEGE DISTRICT,

Respondent.

Case No. S-CE-360

PERB Decision No. 261

November 30, 1982

Appearances; Peter A. Janiak, Attorney for the California School Employees Association and its Delta College Chapter 359; and Mark F. Ornellas, Attorney for the San Joaquin Delta Community College District.

Before Gluck, Chairperson, Jaeger and Jensen, Members.

DECISION

JENSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision of the Administrative Law Judge (ALJ) filed by San Joaquin Delta Community College District (District). The ALJ found that the District violated subsections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or the Act) by discriminatorily transferring Burton Gray from his former position as a campus police officer to a position on the grounds crew. He dismissed the allegation that certain unilateral schedule changes by the District were undertaken in violation of subsection 3533.5(c), and that the District

violated subsection 3543.5(d) by encouraging or lending support to an attempt by members of the campus police force to withdraw from California School Employees Association and its Delta College Chapter 359 (CSEA). Further, he dismissed the allegation that the rescheduling of Shirley Gray from the graveyard shift to a rotating shift violated subsections 3543.5(a) and (b).¹

CSEA filed no exceptions. Thus, the only conclusion of the ALJ subject to review concerns the transfer of Burton Gray. For the reasons set forth, infra, we affirm that conclusion.

1 **EERA** is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code, unless otherwise noted. Subsections 3543.5(a) through (d) provide as follows:

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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

FACTS

We find the ALJ's statement of facts to be free of prejudicial error, and adopt that portion of his decision, which is incorporated by reference herein, as the decision of the Board.

DISCUSSION

The ALJ's decision in this case was issued prior to the Board's decision in Novato Unified School District (4/30/82) PERB Decision No. 210. Under the Novato test, a party alleging discrimination within the meaning of subsection 3543.5(a) has the burden of making a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to take adverse personnel action. In recognition of the fact that direct evidence of motivation is seldom available, we have held that it may be demonstrated circumstantially. In accord is Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party is able by direct or circumstantial evidence to raise the inference that the employer was in any way motivated to take adverse personnel action by its knowledge of the employee's protected activity, the burden shifts to the employer to demonstrate that it would have acted as it did regardless of the employee's participation in protected activity. Novato, supra; Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

To justify such an inference, charging party must demonstrate, initially, that the employer had knowledge of the employee's protected activities. NLRB v. South Shore Hospital (1st Cir. 1978) 571 F.2d 677 [97 LRRM 3004]. In the instant case, it is undisputed that Burton Gray was a CSEA activist, and that the employer had knowledge thereof. Prior to becoming a union officer, Gray was instrumental in urging CSEA to become active in urging the District to sanction the carrying of guns by campus officers. As noted by the ALJ, Gray became a job steward for CSEA in 1978, vice president of the local chapter in 1979 and campus chapter president at the outset of 1980. As a job steward and union officer, Gray filed approximately 29 grievances, nearly half of which involved formal procedures. This represented a 400 percent to 500 percent increase in grievance filing over that of Gray's predecessor.

During his service as CSEA officer, and in accordance with the wishes of unit employees, Gray actively agitated for a liberalized gun policy which would allow officers on foot patrol as well as those driving patrol vehicles to carry guns. In his role as CSEA president, Gray expressed his criticism of the campus student officer (CSO) program to District Vice President DeRicco in a meeting during February of 1980, stating that he felt that the money utilized for that program could be better spent on upgrading equipment and hiring regular officers.

It is undisputed that the District had knowledge of Gray's extensive participation in protected activities noted above. In fact, there is direct evidence that the District bore anti-union animus against Gray due to the heightened frequency and more aggressive character of grievance activity engaged in by him on behalf of CSEA. Thus, as noted by the ALJ, the District vice president complained to Gray in November of 1979 that the District was having more trouble with CSEA than with the exclusive representative of the certificated employees over grievances, and that if such activity continued CSEA might tarnish its image with the District's governing board.

Just prior to initiation of disciplinary activity against him, Burton Gray was instrumental in filing an affirmative action complaint and a contractual grievance on behalf of Shirley Gray. The record reflects that these grievances became a cause celebre both in the police department and on campus at large.

The Discipline of Burton Gray

The discipline to which Gray was subjected must be examined against the background of his extensive pattern of protected activity, the District's knowledge thereof, and the District's expression of anti-union animus. For the reasons described by the ALJ, we agree that the District's discipline of Gray was suspiciously severe in light of the transgressions of which he was found guilty.

It is noted that the District dismissed the most severe allegations of misconduct against Gray, those related to misuse of a firearm.

The District disciplined Gray severely for alleged insubordination on the grounds that he unjustifiedly criticized and monitored the CSO's, refused to follow orders, and inadequately responded to an unspecified crisis. The record of the disciplinary hearing upon which the District based its conclusions was not made a part of this record. However, the ALJ did have before him extensive testimony regarding the incidents which formed the basis for the District's finding that Gray was insubordinate. For the reasons set forth by the ALJ, we agree that the evidence presented at the PERB hearing reveals little basis for characterizing Gray's conduct as insubordination. Gray criticized the CSO program in his official capacity as a CSEA officer, clearly a protected activity. Further, all officers had the responsibility to generally observe and instruct the CSO's as part of the CSOs' training. Regarding the allegation that he refused to follow orders unless they were in writing, the evidence indicates that, while he may have stated that he would not follow such orders, he always did in fact follow them. As the ALJ noted, there was no evidence that Gray ever refused to follow a single order by a superior, either written or verbal. The incident relied upon by the District involved a request by a fellow

officer, and not an order by a supervisor. Further, we agree with the ALJ's findings regarding Gray's alleged refusal to correctly respond to a crisis. During the incident in question, Gray was not armed and refused personally to disarm a butcher-knife-wielding suspect, deferring instead to an armed officer who was also on the scene.

Thus, we find that the District's basis for concluding that Gray was guilty of any misconduct at all was suspect. It was based in part upon unsubstantiated allegations. Further, at least one aspect of Gray's conduct, his criticism of the CSO program, was itself protected activity.

In evaluating the reasonableness of the discipline of Gray, it is important to note that, prior to the action which is the subject of this charge, Gray had an unblemished record during his almost six-year tenure as a campus police officer.

Based upon the questionable finding of insubordination analyzed above, the District disciplined Gray in a manner which it seeks to characterize as benign but which, in context, was extremely severe. The record reflects that Gray was a career police officer, by virtue of inclination, training, and extensive experience. Transferring him to the grounds crew, while it may not have immediately deprived him of earnings, deprived him of the opportunity to practice his chosen profession.

The ALJ extensively described and analyzed the evidence regarding the District's reaction to misconduct by officers other than Burton Gray. We affirm his finding that the District's severe discipline of Burton Gray amounted to disparate treatment of a known union activist, when measured against the District's response to known misconduct by employees who were not union activists. We rely in this regard on the first two incidents cited by the ALJ involving misuse of a firearm by Chief Hale² and the firearms incidents and other alleged misconduct by Officer Oki.

In addition to those incidents relied upon by the ALJ, we find that the District's indifferent response to reported acts of harassment of Shirley Gray constitutes further indication of a generally lax disciplinary attitude on the part of the District. In sum, the record reflects that the District and its supervisory and managerial agents investigated accusations

²In this regard it should be noted that we do not rely upon the third incident involving Hale which occurred in June or July of 1979, in which he allegedly pointed his revolver at Officer Schiano and told him he was going to make him dance, because there is no evidence that the District had knowledge of this incident.

Further we do not affirm the ALJ's conclusion that Hale was "not disciplined" for the first firearms incident. We view the 30-day involuntary commitment to an alcohol treatment facility which followed that incident as a disciplinary as well as therapeutic measure. Although disciplinary, it was certainly a benign response to a serious transgression, and we continue to rely on it in part for our conclusion of disparate treatment.

of misconduct by employees without a known history of protected activity less vigorously, and punished such persons found to have engaged in misconduct far less severely than they did in the case of Burton Gray, a known union activist.

Thus, charging party has demonstrated that Burton Gray engaged in protected activity with the knowledge of the District, that the District harbored anti-union animus against Gray, and that its basis for disciplining him at all was extremely weak.

Further, we find that the District disciplined Gray more severely than it did others accused of misconduct. This is more than sufficient to raise the inference that the District was improperly motivated to discipline Gray as it did.

In light of our finding of disparate treatment, we conclude that the District has failed to demonstrate that it would have disciplined Gray as it did notwithstanding its knowledge of his protected activity. Thus, pursuant to the test for unlawful discrimination set forth in Novato, supra, we conclude that the discipline of Burton Gray herein was violative of subsection 3543.5(a). Wright Line, supra. As noted by the ALJ, unlawful discrimination against an employee organization officer and activist constitutes a concurrent violation of subsection 3543.5(b) as well. San Francisco Community College District (10/12/79) PERB Decision No. 105.

REMEDY

The remedy ordered by the ALJ is hereby adopted by the Board, with the additional provision that the District must remove from Burton Gray's personnel record any reference to the investigation or disciplinary action taken against Burton Gray by the District which formed the basis of the instant allegations.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, and pursuant to Government Code subsection 3541.5(c) of the Educational Employment Relations Act, it hereby is ORDERED that the San Joaquin Delta Community College District, board of trustees, superintendent and their respective agents shall:

A. CEASE AND DESIST FROM:

Imposing or threatening to impose reprisals on Burton Gray, discriminating or threatening to discriminate against Burton Gray or otherwise interfering with, restraining, or coercing Burton Gray because of his exercise of his rights to form, join, and participate in the activities of employee organizations of his own choosing for the purpose of representation in all matters of employer-employee relations, including the right to file grievances and otherwise serve as CSEA chapter president, by discriminatorily disciplining,

demoting, and transferring Burton Gray from his position as a campus police officer to the position of maintenance worker.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Immediately offer to fully reinstate Burton Gray to his former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

(2) Make Burton Gray whole for any loss of pay and other benefit(s) he may have suffered by tendering to him a back pay award equal to an amount that he would have been paid, absent his unlawful demotion and transfer on or about August 12, 1980, until the date of the offer of reinstatement; this total amount to be offset by Gray's earnings as a result of his other employment with the District during this period and augmented by payment of interest of 7 percent per annum of the net amount due;

(3) Remove from Burton Gray's personnel records any material relating to the disciplinary procedures which were the subject of the instant charge;

(4) Within seven (7) workdays following the date of service of this Decision, post at all work locations where notices to employees customarily are placed, copies of the

notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material or reduced in size;

(5) Within forty-five (45) workdays following service of this Decision, notify the regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on charging party herein.

Chairperson Gluck and Member Jaeger joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. S-CE-360, California School Employees Association and its Delta College Chapter 359 v. San Joaquin Delta Community College District, in which all parties had the right to participate, it has been found that the San Joaquin Delta Community College District violated the Educational Employment Relations Act, Government Code section 3543.5(a) and (b).

As a result of this conduct, we have been ordered to post this Notice and we will abide by the following:

A. CEASE AND DESIST FROM:

Imposing or threatening to impose reprisals on Burton Gray, discriminating or threatening to discriminate against Burton Gray or otherwise interfering with, restraining, or coercing Burton Gray because of his exercise of his rights to form, join, and participate in the activities of employee organizations of his own choosing for the purpose of representation in all matters of employer-employee relations, including the right to file grievances and otherwise serve as CSEA chapter president, by discriminatorily disciplining, demoting, and transferring Burton Gray from his position as a campus police officer to the position of maintenance worker.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Immediately offer to fully reinstate Burton Gray to his former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

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(3) Remove from Burton Gray's personnel records any material relating to the disciplinary procedures which were the subject of the instant charge;

SAN JOAQUIN DELTA COMMUNITY COLLEGE DISTRICT

Dated: _____ By _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, REDUCED IN SIZE, DEFACED OR COVERED WITH ANY OTHER MATERIAL.