

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES' )  
ASSOCIATION, )  
 )  
Charging Party, ) Case No. SF-CE-52-H  
 )  
v. ) PERB Decision No. 346-H  
 )  
REGENTS OF THE UNIVERSITY OF )  
CALIFORNIA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: Ernest Haberkern, Steward, for Charging Party;  
Martha M. Chase, Attorney for Respondent.

Before Jaeger, Morgenstern and Burt, Members.

DECISION AND ORDER

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the attached hearing officer proposed decision filed by the California State Employees' Association (CSEA) and a response to those exceptions filed by the Regents of the University of California (University). The hearing officer dismissed CSEA's charge alleging that the University discriminated against employee John Kasper in violation of subsection 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).<sup>1</sup>

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<sup>1</sup>HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise specified.

Subsection 3571(a) provides:

The Board has carefully reviewed the entire record in this case, including the record in Regents of the University of California (6/10/83) PERB Decision No. 319-H, of which official notice is taken, in light of the exceptions and the response thereto. We adopt the hearing officer's findings of fact<sup>2</sup> and conclusions of law and ORDER the complaint against the University DISMISSED.

Members Jaeger and Burt joined in this Decision.

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It shall be unlawful for the higher education 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.

<sup>2</sup>The University excepted to the hearing officer's finding that Kasper's supervisor, Virginia Griffin, demonstrated anti-union animus. We agree with the University that such finding is neither supported by the record nor properly inferred from Griffin's failure to testify at the hearing. However, as found by the hearing officer, Griffin was not significantly involved in the actions complained of here. Therefore, the finding of anti-union animus on her part, while erroneous, did not affect the result reached and was not prejudicial. (See Regents of the University of California (5/17/83) PERB Decision No. 267a-H).

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



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REGENTS OF THE UNIVERSITY OF )  
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\_\_\_\_\_ )

Unfair Practice  
Case No. SF-CE-52-H

PROPOSED DECISION  
(12/13/82)

Appearances: Ernest V. Haberkern, steward, for charging party;  
Martha Chase, attorney, for respondent.

Before: Gerald A. Becker, Administrative Law Judge.

PROCEDURAL HISTORY

This charge was filed by the California State Employees Association (hereafter Association) against the Regents of the University of California (hereafter University) on May 8, 1981. The Association alleges that impermissible anti-union animus motivated the University's decisions not to reclassify John Kasper and to deny him two promotional opportunities.

On June 30, 1981, the case was consolidated with Unfair Practice Case No. SF-CE-54-H, also concerning Kasper. However, at the start of the hearing in this matter, Case No. SF-CE-54-H was withdrawn.

On October 15, 1981, the Association requested to

consolidate this case with Case No. SF-CE-13-H, a third case concerning Kasper previously heard by the undersigned and in which a proposed decision was pending. At the start of the hearing this request for consolidation was denied, but official notice was taken of all the evidence from the previous case relating to the graduate division (in which Kasper works).

The hearing on this charge and subsequently issued complaint was held before the undersigned on June 22-24, 1982. On the last day of hearing, the Association requested the right to present further testimony on July 16, 1982. On July 13, 1982 this request was orally denied, and later formally denied in a September 14, 1982 Order.

After extensions requested by parties, briefing was completed on December 10, 1982 and the matter submitted for proposed decision.

ISSUES

In violation of Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA),<sup>1</sup> did the University retaliate against Kasper because of his

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<sup>1</sup>HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise specified.

Section 3571(a) provides:

It shall be unlawful for the higher education employer to:

- (a) Impose or threaten to impose reprisals

exercise of protected rights under HEERA by:

1. Denying his request for reclassification from senior to principal clerk;

2. Not selecting Kasper for an interview for the position of graduate assistant II; and

3. Not selecting Kasper for an interview for the position of data processing assistant II?

#### FINDINGS OF FACT

##### Kasper's Protected Activity.

As found in the Proposed Decision in Case No. SF-CE-13-H (issued April 13, 1982, and on appeal before the Public Employment Relations Board itself), Kasper has worked in the graduate division of the chancellor's office. He is classified as a senior clerk and is supervisor of the graduate student records "long files" unit. He supervises two or three part-time student employees. His performance has been rated, both orally and in writing, as satisfactory by Virginia Griffin, management services officer of the graduate division. He is at the fifth and final step of the senior clerk pay scale.

Also as detailed in the previous proposed decision, Kasper

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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.

has been active in AFSCME and later the Association, and has been highly visible in the graduate division in both union and safety-related activities.

In the prior decision a prima facie case of anti-union animus was found on the part of Griffin (pp. 17-18). In addition, with respect to an earlier reclassification attempt by Kasper in 1978, Kasper was told by Griffin that if he wanted her support, he should not bring in the union to assist him.

Griffin did not testify in either the previous or present hearing. The University's failure to produce Griffin's testimony further supports the finding of anti-union animus on her part since it raises the inference that her testimony would be unfavorable to the University. Evidence Code section 413. As stated in Bone vs. Hayes (1908) 154 C. 759, 765 [99 P. 172],

This principle applies with, perhaps, greater force where a party charged with conduct which is apparently suspicious or dishonorable has an opportunity to explain it, but fails to do so.

Kasper's Request for Reclassification from Senior to Principal Clerk.

Kasper's request for reclassification began with his December 19, 1979 letter to Robert Derus, personnel services advisor in the personnel department with responsibility for the graduate division. In 1977 and 1978, Kasper previously requested the same reclassification of his job. Both these prior requests were denied by the personnel department and are not at issue herein.

Kasper forwarded his job description card to Derus, which had been certified as accurate by Griffin, his supervisor, in late January 1980. Derus left University employment on February 1, 1980, and after a several week interval, Bettina Johnson took over as the personnel services advisor for the graduate division.

Johnson arranged for an audit of Kasper's job in March 1980. Because it was a nice day, Johnson asked Kasper if he would like to conduct the audit outside. Kasper agreed. Johnson began the audit by explaining the classification procedure to Kasper, along with a standard prefatory comment including the employees' appeal rights to the assistant vice-chancellor for employee affairs if the reclassification is denied. Johnson believed Kasper was a member of a union, but did not know which one.

Kasper went on to describe his job responsibilities. His chief responsibility was locating and supplying graduate student records. He supervised a few students who were casual, part-time file clerks. However, Kasper did no evaluations of the student clerks. He and the file clerks used a "UNIX" computer terminal to locate files. According to Johnson, Kasper's duties primarily were the same as they were when the previous reclassification request was denied.

After the interview with Kasper, according to normal procedure Johnson spoke with Griffin, Kasper's supervisor

regarding his duties. Johnson asked Griffin to verify Kasper's description of his responsibilities and Griffin did so. Griffin told Johnson that it seemed that even with some changes that had been made in Kasper's duties, it was still not sufficient to be classified as a principal clerk. However, Griffin did not put any pressure on Johnson or in any other way try to influence her decision. According to Johnson, Griffin "really wasn't that kind of a person."

It is University policy for the personnel services advisor to take sole responsibility for making an independent classification decision without influence from the department. Nevertheless, some supervisors, including some in the graduate division, have more actively supported reclassification of their subordinates than did Griffin in this instance.

Johnson felt Kasper clearly was properly qualified as a senior clerk. She finished her written decision denying Kasper's reclassification request but testified she could not remember whether she actually sent it out. Johnson left her position as personnel services analyst in July 1980.

At about the same time, the University's labor relations unit requested information from all representatives, including Johnson, concerning Kasper's employment. This was in relation to the previous unfair practice charge (SF-CE-13-H) filed on Kasper's behalf. Johnson told Debra Harrington, in the labor relations department, that she had a classification decision

pending on Kasper and that she was going to deny it. Harrington did not try to influence Johnson's decision except to say Johnson should make sure her decision was the right one because there was an unfair practice charge pending and she was sure when the reclassification denial was issued, it would be added to the charge.

Having heard nothing from Johnson concerning his reclassification request, in November 1980 Kasper questioned Griffin about it. Griffin contacted the personnel department which was unable to locate a copy of the written decision on the reclassification. By letter of November 12, 1980, Kasper was informed that Johnson's decision had been negative.

This long a delay in processing a reclassification request is unusual but is explained by the loss of the file when Johnson left. Apparently Johnson was experiencing some personal difficulties immediately before her departure and in fact failed to send out her reclassification decision respecting another employee.

After this charge was filed, the Association and the University agreed to do another audit of Kasper's position. This audit was done by Jim Treanor, who previously represented classified school employees as a representative of the California School Employees Association. At the time of his testimony in this hearing, Treanor was about to leave University employment.

Treanor interviewed Kasper in January 1982. Treanor also interviewed Griffin who confirmed Kasper's duties. Treanor found that Kasper hired, trained and counseled the student file clerks working for him, but he did not do written performance evaluations. Kasper told Treanor his clerks were level I clerks, he did not mention that he ever supervised senior clerks at his own level.

Treanor also compared Kasper's position with a principal clerk position in the file section of the letters and sciences department. The comparison position had full supervisory responsibility, including written performance evaluations, for two senior clerks. Each senior clerk supervised by the principal clerk was responsible, as was Kasper, for devising his or her own work methods under supervision of the principal clerk.

Treanor denied the reclassification request finding that Kasper's position was correctly classified as a senior clerk. Griffin then asked Treanor what it would take to increase the duties of Kasper's position so it could be reclassified to principal clerk. Treanor replied that it would require a restructuring of the department and in addition, added responsibilities for the position.

Kasper's Application for an Evaluator Position in the Graduate Admissions Office.

In the fall of 1981, Kasper applied for a position as a

student assistant II in the graduate admissions office. This was the same "evaluator" position, newly retitled, for which Kasper twice had applied and been rejected, and which rejections were at issue in Case No. SF-CE-13-H.

Forty-five applications were received which were once again screened by Karla Goodrich, the management services officer of the graduate admissions office, and Dona Bretherick, her assistant. They agreed 14 of the applicants should be interviewed. Once again, while not an absolute requirement, a bachelor's degree and some knowledge of a foreign language were considered desirable.

Kasper was not selected for an interview. This was because Goodrich believed all 14 people selected for an interview had considerably more than the minimum requirements, many with direct experience in the field of graduate admissions. Having previously interviewed Kasper, Goodrich did not feel him to be competitive with the other candidates. Furthermore, he did not possess a bachelor's degree.

The applicant chosen for the job had worked in the graduate division office of the University of Southern California for one year and for San Jose State University for two years. She had an excellent letter of recommendation from the University of Southern California. The remaining 13 applicants all had bachelor's degrees, familiarity with undergraduate or graduate students, and familiarity as well with the functioning of the

graduate admissions office. In addition, the top four runner-ups also had knowledge of a foreign language.

Kasper's Application for Data Processing Assistant II Position in the Electronic Data Processing Section of the Graduate Division.

In September 1981, Kasper applied for a position in the electronic data processing unit of the graduate division. The job was a newly-created position, combining some of the duties that previously had been performed by a senior coder and lead key entry operator, along with some new duties. The new job title was data processing assistant II. Forrest Peiper, a senior systems analyst, was responsible for hiring in the position.

At the beginning of the hiring process, Peiper mentioned to Griffin, Kasper's supervisor, that two members of the graduate division had applied for the job, one of whom was Kasper. There was no other discussion between Peiper and Griffin concerning Kasper's candidacy and Griffin did not in any way try to influence Peiper's decision. Griffin was not in Peiper's line of supervision as Peiper reported directly to the associate dean of the graduate division.

The duties of the data processing assistant II position required supervision of all key entry activities in the graduate division. Procedures would have to be written for key entry operators to follow so that data would be entered correctly to the system. Computer programs had to be run and

checked for accuracy as, for example, checking the reasonableness of the program's predictions. The person selected would be responsible for hiring, training and evaluating the performance of one senior coder and four part-time key entry operators. If something went wrong with the program, the data processing assistant would have to find out why and try to correct it. Therefore, familiarity with the graduate division programs and reports generated therefrom was necessary.

Given the responsibilities of the job, Peiper considered a background in data processing and supervisory experience in that field to be the two major criteria.

Seventeen applications were received for the position. Peiper and two others in the department independently screened the applications without consulting with each other. Four candidates were unanimously selected for interview by Peiper and the two others. All of the four selected for interview had substantial qualifications in both of the two above areas.

The person eventually selected for the position had several years experience in coordinating data processing activities. She was responsible for writing procedures for the collection and input of data which were followed in offices around the world. She had supervised 20 people. Her former supervisor gave her the highest recommendation. Among the runner-ups was a person who had worked as a senior coder in the electronic

data processing section of the graduate division for 10 years. She was thoroughly familiar with entry of data and had supervisory experience in data processing in the graduate division and in previous jobs. Another had worked as a data control assistant in the office of admissions and records in the University and had extensive data processing experience, including the responsibility of managing run schedules for the reports generated by that office.

The third runner-up had been an office manager at the University of California in San Francisco. In addition to coordinating office activities, she worked extensively with a word processing machine.

Peiper knew Kasper's qualifications both from his application and because Peiper had taught Kasper to use the UNIX computer terminals to retrieve data regarding graduate student admissions. Peiper felt Kasper's duties involving the use of the UNIX not to be data processing experience because it did not involve anything more than following a very simple procedure known by most of the clerks in the admissions office.

#### DISCUSSION AND CONCLUSIONS OF LAW

As detailed more fully in the Proposed Decision in Case No. SF-CE-13-H, at pp. 14-16 (issued April 13, 1982, and on appeal before the PERB itself), there is a two-prong test to determine violations of subsection 3571(a). Oceanside Carlsbad Federation of Teachers v. Carlsbad Unified School District

(1/30/79) PERB Decision No. 89; Laborers Local 1276, etc. v. Regents, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212.

In a case involving allegations of retaliatory conduct,

Unlawful motive is a specific nexus required in the establishment of a prima facie case [since] retaliatory conduct is inherently volitional in nature. . . . Novato Unified School District (4/30/82) PERB Decision No. 210, at p. 6.

For the reasons which follow, it is found the Association has failed to sustain its burden of proof under the Carlsbad test, and has not shown Kasper's failure to be reclassified and to be interviewed for the two positions resulted from the University's dissatisfaction with his union activities.

The Principal Clerk Reclassification Denial.

Although, as in the previous case, it has been shown that Griffin, Kasper's supervisor, possessed anti-union animus, once again no nexus has been demonstrated between her anti-union animus and the action taken to deny Kasper's reclassification request.

Although Griffin did tell Johnson that she did not think Kasper's duties were sufficient to make his position into a principal clerk, Johnson further credibly testified that Griffin did not try to influence the reclassification decision in any way, and that Griffin was not the type of person to do so.

In addition, despite Griffin's anti-union animus, she has

somewhat surprisingly, though consistently, supported Kasper's promotional aspirations. For example, in the present case, when Treanor denied Kasper's latest reclassification request, Griffin asked Treanor what it would take to get Kasper's job reclassified. See also p. 5 of the proposed decision in SF-CE-13-H.

Johnson's decision was her own and there is no evidence in the record that she harbored any hostile feelings towards Kasper's union involvement. The objectivity of Johnson's audit of Kasper's job is underscored by the fact the result was consistent with two previous audits, as well as with the latest one done by Treanor. Given that Treanor used to represent employees and that he would be soon leaving University employment, when coupled with the fact that the parties had agreed to have this audit performed, there is every indication of a high degree of objectivity on Treanor's part. Furthermore, Treanor impressed the administrative law judge as a particularly candid and forthright witness.

The Association argues that Griffin showed no real enthusiasm or support for Kasper's request for reclassification. While in an appropriate case such lack of support, in contrast to treatment of other employees, might be a factor indicating discriminatory motive, it is clear from the facts in the present case that even the most active support would have been insufficient to make a difference. Both

Johnson and Treanor felt that it was not a "close call," and that Kasper's job clearly was properly classified at the senior clerk level.

The Association also argues that the length of time it took to communicate the results of Johnson's job audit indicates the University was dragging its feet on Kasper's reclassification request, which would indicate discriminatory motivation on the University's part. This allegation is unsupported by the facts. The time delay was attributable to Johnson's mishandling of Kasper's file. There is no evidence this was intentional. Rather, the evidence supports the inference that Johnson was experiencing personal problems at the time. She in fact committed the same error with another employee.

Accordingly, no nexus having been demonstrated between Kasper's protected activities and the denial of his reclassification request, this portion of the charge will be dismissed.

Kasper's Failure to be Interviewed for the Two Graduate Division Positions.

Both these allegations of misconduct on the University's part lack merit. There is absolutely no evidence that Goodrich and Peiper, respectively the two principals in the two hiring situations, harbored any anti-union motivation.

With respect to the student assistant II position in the graduate admissions office, this was the same position for

which Kasper previously had been rejected, and which rejection was found not to be unlawfully motivated in Case No. SF-CE-13-H. This time around there were even more qualified applicants and Kasper's qualifications paled by comparison. The person chosen for the job certainly was better qualified than Kasper. Thus, it would have been futile to interview Kasper since the successful applicant, as well as many others, were better qualified for the position.

Turning to Kasper's application for the data processing assistant II position, again the evidence demonstrates that many applicants, in addition to the one eventually selected, had qualifications clearly superior to Kasper's. Kasper's limited experience with retrieving information from the UNIX system in no way approaches the kind of data processing experience, including responsibility for running computer programs and checking their accuracy, required by the position.

Therefore, both these allegations of discriminatory treatment by the University also will be dismissed.

#### PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the charge filed by California State Employees Association against the Regents of the University of California, and the complaint issued thereon, are hereby DISMISSED.

Pursuant to California Administrative Code, title 8,

part III, section 32305, this Proposed Decision and Order shall become final on January 3, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on January 3, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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: December 13, 1982

GERALD A. BECKER  
Administrative Law Judge