

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RICHARD C. MATTA,)	
)	
Charging Party,)	Case No. SF-CE-20-S
)	
v.)	PERB Decision No. 378-S
)	
STATE OF CALIFORNIA, (DEPARTMENT OF)	February 15, 1984
DEVELOPMENTAL SERVICES, NAPA STATE)	
HOSPITAL),)	
)	
Respondent.)	

Appearances; John D. Fouts, Attorney for Richard C. Matta.
Before Tovar, Jaeger and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the charging party, Richard C. Matta, to the attached proposed decision. The Administrative Law Judge (ALJ) dismissed Matta's charge that the Department of Developmental Services, Napa State Hospital, violated subsection 3519(a)¹ of the State

¹Section 3519 provides in relevant part:

It shall be unlawful for the state 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.

Employer-Employee Relations Act by discriminatorily terminating him for engaging in protected activities on behalf of the California State Employees' Association.

The Board has reviewed the entire record in light of the exceptions filed and, finding the ALJ's findings of fact²

²The Board set forth the appropriate standard of review in Santa Clara Unified School District (9/26/79) PERB Decision No. 104:

While the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented. (p. 12.)

This standard is particularly applicable in discrimination cases when the existence of a violation must often be "established by circumstantial evidence and inferred from the record as a whole." Novato Unified School District (4/30/82) PERB Decision No. 210; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]; Radio Officers Union v. NLRB (1954) 347 U.S. 17.

In the instant case, Matta testified that Charles Graham, Director of Program VI, told him, "I've been hearing your name around and you better cool it, you're getting too hot." Vol. I, p. 67: 15-16. Matta further testified,

He [Graham] indicated that I was becoming a hot issue and that he was wanting to cool my heels a bit and not - not put so much controversy on him in program 6. Vol. I, p. 70: 10-12.

We agree with the charging party in his factual exceptions that Matta's unrefuted testimony concerning Graham's statements was not so internally inconsistent as to find Matta incredible on this subject. However, we conclude that Graham's statements, seen in light of the record as a whole, are insufficient to ascribe animus to the director of the hospital, Dr. Dennis O'Connor. We therefore find that the incorrect credibility

and conclusions of law free from prejudicial error, we affirm the ALJ's dismissal of the charge.

ORDER

Upon the findings of fact and conclusions of law in the attached proposed decision, and the entire record in this case, it is hereby ORDERED that the unfair practice charge in Case No. SP-CE-20-S is DISMISSED.

Members Tovar and Burt joined in this Decision.

determination on the part of the ALJ was not prejudicial. With respect to the other credibility determinations, we do not find sufficient evidence in the record to justify overturning the ALJ's findings.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



RICHARD C. MATTA,)
)
Charging Party,) Unfair Practice
) Case No. SF-CE-20-S
)
v.)
)
STATE OF CALIFORNIA (DEPARTMENT) PROPOSED DECISION
OF DEVELOPMENTAL SERVICES, NAPA) (11/16/82)
STATE HOSPITAL),)
)
Respondent.)
_____)

Appearances; John D. Fouts, attorney for Richard C. Matta; and Francisco Gutierrez H., attorney for the State of California (Department of Developmental Services, Napa State Hospital).

Before; Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

Richard C. Matta (hereafter charging party) filed this unfair practice charge against the State of California (Department of Developmental Services, Napa State Hospital) (hereafter DDS or respondent) on January 23, 1981. The charge alleges the respondent violated section 3519(a) of the State Employer-Employee Relations Act (hereafter SEERA or Act)¹ by discharging Matta from his employment at Napa State Hospital because he engaged in protected activities on behalf of the

¹The SEERA is codified at Government Code section 3512 et seq. All statutory references are to the Government Code unless otherwise noted.

California State Employees Association (CSEA) and employees at the hospital.

An informal conference was set for March 2, 1981. However, on February 13, 1981 respondent filed its answer and moved to dismiss the charge as untimely because approximately 10 months had elapsed since the effective date of discharge. In the interim Matta had appealed his termination to the State Personnel Board (SPB) which rendered a decision on September 18, 1980.² On April 15, 1981 another administrative law judge denied respondent's motion to dismiss; however, on May 15, 1981 he certified an interlocutory appeal to the Public Employment Relations Board (hereafter PERB or Board) pursuant to PERB Regulation 32200. On December 29, 1981 the Board denied respondent's motion, holding that the statute of limitations was tolled during the State Personnel Board proceedings. (See PERB Order No. Ad-122-S.)

A complaint was issued on February 2, 1982. A pre-hearing

²After the SPB decision, which sustained the discharge, Matta filed a Petition for Writ of Mandate in the Superior Court for the County of Sacramento (Case No. 293782) pursuant to Code of Civil Procedure Section 1094.5. That case was pending in Superior Court as of the hearing in this case. Respondent has raised the argument that the SPB decision is res judicata as to the question of whether there was just cause to terminate Matta. It is unnecessary to address this argument, since this proposed decision recommends dismissal of the instant charge on the merits.

conference was held on April 1, 1982 in San Francisco, California, and the formal hearing was held on April 26, 27 and 28, 1982 at the Napa State Hospital in Imola, California. The final supplemental brief was filed on September 22, 1982, and the case was submitted.

FINDINGS OF FACT

Richard Matta's Protected Activities.

Richard Matta was a vocational instructor-industrial arts at the Napa State Hospital until he was terminated in February 1980. He had a good work record and had never been disciplined. During his employment at the hospital Matta became an active member of CSEA and of the California State Employed Teachers Association (CSETA), an affiliate of CSEA. He served as treasurer of CSETA and as a job steward for CSEA at the hospital.

As a job steward, Matta engaged in a variety of protected activities on behalf of employees at the hospital, beginning in 1979 and continuing through the end of his employment. He was aggressive and not very tactful in pursuing grievances, two of which are especially noteworthy. One involved opposing the appointment of a lead teacher at a time when the school in which Matta worked was going through a period of reorganization. This was a very important issue during the latter part of 1979 and it attracted a lot of attention from

employees and administrators alike.³ The second grievance involved a safety issue concerning the lack of equipment to enable teachers while in the classroom to communicate with others outside the classroom during an emergency. On this latter subject Matta participated in the filing of a Cal/OSHA complaint. An investigation was conducted and the hospital was cited.

During the year prior to his discharge, Matta requested vacation time to go to Sacramento as a CSEA representative to work on legislation covering the working conditions of employees at the various state hospitals. On a couple of occasions Dr. Charles Graham, Matta's immediate supervisor and the head of program six in which Matta was employed, granted the time as requested and Matta participated in the legislative process.

In addition to the foregoing, Matta was generally recognized by employees and administrators at the hospital as the leading spokesperson for teachers on employment-related matters. In this role he participated in several meetings with administrators about working conditions for employees he represented.

³At the time of the hearing in the instant case this grievance was on appeal in Sacramento at DDS headquarters. The last step in the grievance procedure at the hospital was the executive director level. From there grievances are appealable to a final level in Sacramento.

According to Matta, during the course of his union activities, hospital administrators made several comments which support an inference of unlawful motive. Matta testified about these statements as follows.

At a meeting on November 5, 1979 to discuss various grievances and employment-related matters, a heated discussion occurred around safety issues in the shop. Pat Parnell, an educational consultant in the office of program review, during the course of the discussion, threatened to shut down Matta's shop. Although Parnell was not Matta's supervisor, her authority extended to yearly review of Matta's program to determine effectiveness and efficiency and, if appropriate, to recommend changes. There was no evidence presented that any action was ever taken to close down Matta's shop. Parnell did not testify at the hearing.

On another occasion, Dr. Graham resisted Matta's request for vacation time to participate in the legislative process on behalf of CSEA. He told Matta that he didn't think it was reasonable to take classroom time for such activity, and he once asked Matta why he had to be the only one who went to Sacramento for this purpose. Another reason offered by Graham for refusing vacation time was short staffing. Matta responded that he used only vacation time, just as other employees, for example, used such time to take long weekends. Matta testified as follows as to Graham's response:

And he indicated that I was becoming a hot issue and that he was wanting to cool my heels a bit and not-not put so much controversy on him in program 6.

On other occasions, however, Graham granted Matta time off to go to Sacramento.

On yet another occasion Matta represented a probationer in a meeting with Dr. Graham. Matta said he "brought some light" to the situation. A few days later Graham told him that he was "stepping on toes." Matta recalled Graham's statement as follows:

I believe he said that to me, as though I was stepping out of bounds, influencing too many people or attempting to influence too many people.

In contrast to the inference arising from his testimony about Graham's statements, Matta testified that they had a good working relationship. When asked if he felt Dr. Graham was out to get him in any way, Matta testified:

No, I don't think so, I really don't. We had a good, fairly good rapport, I believe.

Graham did not testify at the hearing.

Lastly, Matta testified that Joan Finebloom, assistant chief of education, on two or three occasions covering a long period of time, made statements to Matta similar to the "your stepping on toes" comment. Matta conceded that these comments were not direct threats, but he described them as "somewhat subliminal" and designed to make it known that "they didn't like my activities."

The Billy Incident.

Billy was a very active emotionally disturbed child who had been diagnosed as schizophrenic and having an aggressive reaction to childhood. He had to be watched closely, and a psychiatric technician sometimes escorted him from class to class because of his tendency to run away from the hospital. Billy was about 13 years old at the time of the incident, weighed approximately 94 pounds and stood approximately 4 feet 9 inches tall.

On January 11, 1980 Billy arrived at Matta's classroom in an agitated condition, having received a zero for his grade in an earlier class. During the class, Matta told Billy that he would receive another zero if he didn't make an attempt to complete the assigned work. A zero on a report card means a student may be disciplined when he returns to his ward. Types of discipline which could be imposed include running laps, getting no snacks, going to bed early, or not being allowed to watch television.

When Matta told Billy that he might give him a zero for the day, Billy attempted to take his report card, which acts as a pass to the next class, from Matta's desk and leave the room. Matta apparently intercepted Billy at his desk and picked up the report card. According to Matta, Billy became excited, assumed a fighting stance, and began to flail away at him with his arms in an attempt to get the report card. This action was

described as a "temper tantrum," and it occurred in an area where there were many operative power tools. Matta testified that he then wrestled Billy to the floor, using a technique called management assaultive behavior (MAB). The philosophy of MAB, a technique which Matta had taught, is to contain the aggressive person so that he doesn't hurt himself, the instructor, or any other individual. The goal is to wrestle the individual to the floor, face down, and hold him in that position where he has no leverage until he calms down.

After a short time, Billy calmed down. Matta then let him up, gave him his report card and sent him off to his next class unescorted. Matta did not call for the assistance of Vince Mann, another instructor who was in the room, because he described the situation as one which he could handle easily.

Billy immediately complained to the hospital administration that he had been physically abused by Matta. Within a matter of hours after the incident Billy was examined by Dr. Sidney H. Silver, a physician at the hospital. The examination revealed that Billy had been injured. The inside of his left upper arm was black-and-blue where he had been gripped by Matta. In addition, the force of the grip had caused skin abrasions in the same location. The examining physician's report indicated that the contusions and abrasions were caused by squeezing and twisting.

In the past, Matta, as well as other instructors, have

found it necessary to wrestle Billy to the floor because of his behavior. Billy frequently complained that he was physically abused by instructors, and he constantly threatened instructors with such complaints. Matta testified that he had no knowledge of any other employee ever having been disciplined for using MAB technique on Billy. There was no evidence presented that any other staff member inflicted injuries on Billy.

The Frankie Incident.

Frankie was a very withdrawn child who had been a student of Matta's for approximately six to eight months. Matta had established a definite educational plan for Frankie, and he was making progress in accomplishing assigned tasks within this plan.

On January 14, 1980 Frankie was having difficulty performing tasks that he had previously accomplished without any problem. Matta attributed this to the influence of Paula Brown, a volunteer, and Ethel Yappert, a volunteer foster grandparent, who were working with Frankie during the class. According to Matta, they were actually performing tasks for Frankie rather than demonstrating and encouraging him to perform. This was not acceptable to Matta, and, at some point during the period, he explained to Yappert and Brown that Frankie should be doing the work. At the end of the period, Frankie was assigned to sweep the floor with a pushbroom, but Matta observed that Yappert had the broom. He took the broom

from Yappert and gave it to Frankie to start sweeping. Later, Matta said he noticed that Frankie was standing still in what he described as a catatonic state. He was not pushing the broom as he had been instructed and as he had done in the past. Matta testified that he walked over to Frankie and instructed him to sweep the floor. Frankie looked at the volunteers and began to giggle. Then, in an attempt to get Frankie to sweep, Matta said he placed his (Matta's) hands on the broom and began to model the proper movement, but there was no response. Matta testified it was in this context that he kicked Frankie in the buttocks with the side of his foot in an attempt to motivate him. Matta described his action as a kind of push, rather than a forceful kick.

Brown's version of the incident is different than Matta's version. She said that Matta was generally dissatisfied with Frankie's performance from the beginning of the period. At the end of the period Matta observed Frankie with a broom in his hands attempting to sweep the floor. The dissatisfaction continued. Rather than instruct Frankie on how to sweep the floor, Matta walked over to him and, without placing his hands on the broom to model the correct technique, Matta yelled at him and kicked him in the buttocks. According to Brown, the kick lifted Frankie off the floor; Frankie said "ugh" and continued his sweeping attempts. Yappert essentially confirmed Brown's version of the incident in her discussions with

O'Connor and the investigating officer, and in her testimony at the SPB hearing. Yappert did not testify at the hearing in this case.

The Frankie incident was also witnessed by Vince Mann, a staff member who was in the shop at the time. Mann told Phil Ryan, senior special investigator at the hospital, during the investigation that Matta walked up to Frankie and kicked him in the buttocks, but, contrary to Brown's testimony, he said he did not think the kick was done in anger or with malice. Mann did not testify at the hearing. He did testify at the SPB hearing, but his testimony there was so inconsistent and confusing that it can be given little weight toward corroborating either Matta's or Brown's version of the incident. Specifically, at the SPB hearing Mann testified at one point that the kick was not a hard kick. At another point he testified that "maybe" the kick was a hard kick. At yet another point he testified that he did not see the contact.

Brown was a credible witness whose testimony about this incident is consistent with her testimony at the SPB hearing, as well as with her statements to Ryan and Dorothy Owen, personnel director, during the course of the investigation. Watching her testify, one could see that she was still angry at Matta's conduct. In addition, her version of the Frankie incident is essentially corroborated by the statements made by Yappert to Ryan and O'Connor during the investigation, and with

the testimony Yappert gave at the SPB hearing. Even Mann's statements to Ryan early in the investigation serve to corroborate Brown's version of the incident to the effect that Matta kicked Frankie. Further, I find it highly unlikely that Brown and Yappert, both elderly women who performed volunteer work at the hospital, would fabricate a version of the kicking incident to harm Matta in some way.⁴ Therefore, it is found that Matta, while dissatisfied with Frankie's progress in sweeping the floor, kicked him with some degree of force, and he did so without first putting his hands on the broom in a modeling fashion.

Similarly, the facts fail to support Matta's description of his actions as an acceptable teaching method to motivate Frankie to sweep the floor. This assertion was convincingly contradicted by Charles Ball, a 20-year teacher at the hospital who was called as a witness by the charging party. Ball testified that while it may be appropriate for instructors to have some physical contact with patients, the school of thought which advocates forceful, sharp contact, such as kicking, has

⁴This conclusion is not altered by the fact that Brown had reported the incident to hospital administrators and, therefore, arguably had a stake in her own vindication in the subsequent proceedings. Such possible self-interest was outweighed by her truthful demeanor and the consistency of her testimony with that of other witnesses before the SPB as well as the PERB.

never been adopted at the Napa State Hospital. In fact, using physical force with patients has become a sensitive area at Napa. Ball further testified that, in his opinion, such contact should be conducted by a psychologist who was treating a patient, not by a teacher in the program. Ball has never used physical force on a patient. At the SPB hearing, Pat Parnell, an educational consultant at the hospital, essentially corroborated Ball's testimony on this subject.

The Investigation and the Decision.

After receiving reports on both incidents, Phil Ryan investigated the Billy and Frankie cases pursuant to established procedures at the hospital.⁵ He interviewed the appropriate individuals and submitted reports and recommendations on both incidents to Dr. Dennis O'Connor,

⁵After the Billy and Frankie incidents, Jack Euser, a teaching assistant in Matta's class, was approached by Bill Muirhead, a staff representative to O'Connor with duties as a patients' rights advocate, who asked him if Matta had taken any materials or equipment out of the wood shop. Euser replied that Matta had brought in materials and tools of his own and he removed them when he was put on leave. There was no indication, Euser told Muirhead, that Matta had taken anything from the shop. There was no evidence presented that Muirhead, who had no supervisory authority over either Euser or Matta, was acting at O'Connor's direction when he approached Euser, that Muirhead ever discussed his actions with O'Connor, or that Muirhead was a part of the investigation. Although O'Connor testified at length at the hearing, he was not asked about this incident by either party. Muirhead was not called to testify. Therefore, this evidence does not support an inference of unlawful motive.

executive director of the hospital. There is no evidence that Ryan harbored an unlawful motive or that his reports were inaccurate (other than to the extent Matta's version of the incidents differed on certain facts).

Ryan recommended that since Billy sustained an injury further review of the case would be appropriate. With respect to the Frankie incident, Ryan recommended further review because the complaint involved physical contact. Ryan suggested both cases be referred to Dorothy Owen and Dr. Graham for further review and disposition. On January 24 O'Connor accepted these recommendations and instructed Owen and Graham to review the cases and make recommendations to him no later than February 1, 1980. Ryan was not otherwise consulted by O'Connor about the incidents.

Meanwhile, Dr. Graham had set up a meeting with Matta for January 25, 1981 to discuss the incidents. This was expected, since the normal practice at the hospital was to begin disciplinary and patient abuse actions at the program director level after the initial investigation was undertaken. Depending on the decision of the program director, the case could end there, or it could be appealed. Jack Lair, a supervisor, testified that Graham, in a reference to Matta's situation, told him (Lair) prior to the January 25 meeting that he (Graham) intended to "write him up." This suggests that Graham, at this time, had no intention to discharge Matta.

However, it appears doubtful that Graham had had the opportunity to review Ryan's reports as of this time. On January 24 Graham sent Matta a memo saying that the meeting scheduled for the next day was cancelled and, as per instructions of Dr. O'Connor, Matta was to be placed on administrative leave. Graham told Matta that he was upset and surprised that the matter had been taken out of his hands and handled in this way.

Shortly after receiving Ryan's reports, O'Connor placed Matta on paid administrative leave pending the outcome of the investigation. In deciding whether to take such action O'Connor's practice is to consider whether an employee is dangerous to patients or residents. O'Connor testified that it is more likely an employee will be placed on administrative leave when the investigative reports reveal patient abuse. He viewed the complaints against Matta as serious cases of patient abuse, so he exercised his prerogative as he had on approximately 12 occasions since becoming executive director where similar administrative leaves had been directed. There was no evidence presented by either party with respect to details of other cases where employees were placed on administrative leave.

After Owen, Graham and O'Connor reviewed the special incident reports and the appropriate investigative reports, at least two meetings significant were held. At the first meeting

these three administrators discussed the case in great detail, using the written documentation as a basis for discussion. Because he was concerned about Billy's injuries, O'Connor, during the course of the meeting, called Dr. Silver, who had examined Billy hours after the incident. O'Connor was especially curious that the black-and-blue marks would appear so fast on Billy's arm. During the course of the conversation, Silver essentially confirmed the diagnosis written at the time of the exam:

Black and blue mark and abrasions on the underside of the left upper arm. Impression: contusion and abrasions from squeezing and twisting, mild to moderate. Treatment: none necessary.

In answer to O'Connor's question, Silver specifically said that the black-and-blue marks had been caused by the incident with Matta.⁶

⁶During his testimony at the State Personnel Board hearing, Silver changed his opinion and stated that, in retrospect, he didn't think the black-and-blue marks were caused by the incident with Matta. Nevertheless, at the time of the investigation, O'Connor, as a result of his discussion with Silver, was under the impression that the black-and-blue marks had been caused by the Matta incident. In addition, it is possible that the skin abrasions could have been caused elsewhere or even self-inflicted, but there is insufficient evidence in the record to contradict Dr. Silver's report, or to show that Billy's abrasions were incurred elsewhere. Thus, at the time he made the decision to terminate Matta, O'Connor had before him only evidence that Billy's injuries had been inflicted by Matta. Finally, it is noted that the evidence regarding Billy's injuries came from a reliable source, Dr. Silver, and there is no evidence that he harbored an unlawful motive.

Subsequently, Owen interviewed Brown about the Frankie incident and submitted a memorandum report to O'Connor, stating that the kick was hard enough to raise Frankie off the floor. During this interview Brown also told Owen that Matta had "browbeaten" Frankie. At the hearing, Brown reinforced this statement, testifying that Matta was too hard on Frankie and had called him a "goddamn little bastards." (sic) O'Connor personally interviewed Yappert, who confirmed that Matta had kicked Frankie.

During the course of the second meeting, O'Connor reviewed reports made by Noelle Melvin, a childcare practitioner with 18 years experience who is proficient in sign language. She had interviewed three deaf patients who witnessed the Billy incident and each patient confirmed that it occurred. More specifically, Melvin's report reflects that they told her Matta chased Billy around the room, caught him, picked him up and threw him to the floor. One patient who witnessed the incident told Melvin that Matta was angry and kept his foot on Billy after throwing him to the floor.

None of Matta's activities on behalf of CSEA were ever discussed or considered during the two meetings discussed above or at any time during the course of the disciplinary procedure, according to O'Connor and Owen. O'Connor testified that prior to receiving Ryan's reports he had never heard the name of Richard Matta, and he had no knowledge of the grievances filed

by Matta or of the Cal/OSHA complaint. He said there were approximately 2400 employees at Napa State Hospital, and he was unable to keep up with the names of all of them. Owen also credibly testified that she knew of Matta's CSEA affiliation, but disclaimed knowledge of his specific activities.

On February 19, 1980, O'Connor issued a letter of termination. The letter accused Matta of the following, all violations of subsections of Government Code section 19572.

- (b) Incompetency
- (c) Inefficiency
- (o) Willful disobedience
- (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment.

As a basis for the discharge the letter cited the Billy and Frankie incidents and concluded that these actions violated

Rule 41 of the rules and regulations, which state:

No employee shall strike, abuse, or inflict cruelty by physical means upon any patient. The use of physical strength to secure the cooperation of patients is to be avoided and is to be undertaken only to the extent necessary to ensure the safety and comfort of the patients. Sufficient assistance should be had from other employees so that injury to patients and employees can be avoided.

No employee shall abuse or inflict cruelty by psychological means upon any patient. No employees shall use language or take actions with (sic) are detrimental to the patient's welfare.

Any employee violating this rule shall be subject to disciplinary action.

O'Connor concluded in the letter that Matta's conduct was "without just cause or excuse" and it was "inappropriate and harmful to the patient's treatment program."

Shortly thereafter, a so-called Skelly hearing was held and Matta was given the opportunity to review the evidence against him and present additional facts and arguments.⁷ However, after hearing Matta's presentation, O'Connor chose not to modify his decision.

Other Incidents of Patient Abuse.

Ryan investigates all patient abuse complaints. Since he began his job in 1978 he has investigated approximately 450 cases of physical and verbal abuse.⁸ On seven other occasions, employees were discharged for physically or verbally abusing patients.⁹ The complaints were unfounded in the

⁷Skelly v. State Personnel Board, et al. (1975) 15 Cal.3d 181 [124 Cal.Rptr. 14] provides for notice of proposed disciplinary action and an opportunity for the employee to present evidence in his behalf.

⁸There was no breakdown of how many complaints were physical, as opposed to verbal.

⁹The cases of patient abuse where employees were discharged included the following: grabbing a patient by the hair, dunking his head in a toilet and flushing it; kicking two patients and choking two patients; fracturing a patient's arm while twisting it for the purpose of restraining him; dispensing medication without a physician's order; forcing medication down a patient while holding her on a bed; taking a patient home, giving him alcohol and allowing him to drive the employee's car; and having a co-worker ask a deaf patient to go home with him and have sex.

majority of the approximately 442 other cases. In the remaining cases, employees received various forms of discipline ranging from a letter of reprimand to a six-month suspension and/or 5 percent reduction in pay, depending on the seriousness of the infraction.

The charging party presented evidence of other patient abuse cases in an attempt to show disparate treatment. One complaint involved an incident in the boys' gymnasium in 1978.¹⁰ After a football game between staff and patients, staff members placed a laundry bag over the head of one patient, and picked up another patient and held him upside down over a toilet bowl while the toilet was flushed. After special incident reports were filed, these incidents were investigated by Ryan, who concluded that the activity was "horseplay" involving no punitive intent. Ryan did recommend further review by the personnel office and program director to determine if these acts were detrimental to the patients. Staff members who participated were counselled as a result of the investigation.

In 1978 O'Connor was the new executive director at the hospital. He had only a vague recollection of the gymnasium incidents, but distinguished them from the Billy and Frankie

¹⁰This incident is different from the toilet incident referred to in Footnote 9.

cases. He viewed the gymnasium incident as horseplay, as did Ryan, while he felt the Billy and Frankie incidents involved anger and a punitive intent on Matta's part. Additionally, he considered Billy's injuries as a distinguishing factor.

The charging party also introduced evidence to show that Cliff Atcosta, a psychiatric technician, physically abused patients and was not discharged. There were, in fact, several complaints lodged against Atcosta. However, most of these were determined by the investigator to be lacking in foundation or fabricated by patients. Only one complaint was pursued beyond the investigation stage and no patient abuse was found. It was finally determined that Atcosta had simply exercised poor judgment. Additionally, Atcosta had a serious medical problem which apparently affected his relationship with patients. Dr. Graham eventually recommended that he be given a complete physical and mental examination and be transferred to light duty. Although the record is unclear on this point, it appears that Atcosta refused to take the examination and either resigned or was dismissed.

DISCUSSION

The issue presented here is whether Matta's discharge was based on his protected activities. The charging party does not contend that the accusations against him as set forth in his letter of termination are entirely pretextual. He does contend that his protected activities played a part in the decision to

terminate, and but for his protected activities he would not have been terminated. Thus, charging party views this as a mixed motive case.

Respondent, on the other hand, argues that Matta's protected activities played no part in the termination decision. Rather, he was discharged solely because he physically abused two patients in violation of Rule 41 of the hospital's regulations.

Section 3519(a) expressly prohibits the state employer from imposing reprisals against employees because of their exercise of rights guaranteed to them by the Act. A party alleging a violation of this section has the burden of making a showing sufficient to support the inference that the protected conduct was a motivating factor in the employer's decision to engage in the action about which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. A shift in the burden of producing evidence operates consistently with the charging party's obligation to establish an unfair practice by a preponderance of the evidence. Novato Unified School District (4/30/82) PERB Decision No. 210; California State University, Sacramento (4/30/1982) PERB Decision No. 211-H.¹¹ The same principles

¹¹See also Wright Line, A Division of Wright Line Inc.

are applicable in discrimination cases under SEERA. State of California, Franchise Tax Board (7/29/82) PERB Decision No. 229-S.

Matta's protected activity.

Matta was a job steward for CSEA. In this capacity, he filed several grievances and served as chief-spokesperson for employees on employment related matters. He was also instrumental in filing health and safety related charges with CAL-OSHA, and he participated in the legislative process on behalf of CSEA. These activities, as a whole, clearly fall within the coverage of section 3515, which provides that,

. . . state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

Moreover, Matta was outspoken and not always as tactful as may have been desired under the circumstances. This characteristic made him a highly visible advocate to employees and to some hospital administrators. In sum, it is concluded that Matta's conduct constituted a course of protected representational activities within the meaning of the Act.

(1980) 251 NLRB No. 150, [105 IRRM 1169], aff'd, on other grounds NLRB v. Wright Line, A Division of Wright Line Inc. (1st Cir. 1981) 662 F.2d 899, [108 IRRM 2513]; Martori Bros. Distributors V. ALRB (1981) 29 Cal.3d 721 [175 Cal.Rpt. 626].

The inference of unlawful motive.

Direct proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. Carlsbad Unified School District (1/30/79) PERB Decision No. 89 at p. 11; Novato Unified School District, supra, at p. 6. To justify such an inference, however, the charging party must prove that the employer had actual or imputed knowledge of the employee's activity. In this case, the record evidence shows that the requisite knowledge existed in Dr. Graham and Dr. O'Connor.

Although O'Connor disclaimed knowledge of Matta's protected activities, and of who Matta was, this disclaimer is rejected. I find it unlikely that O'Connor, the chief administrative officer and the person who participated in the last step of the grievance procedure at the hospital, would have been unaware of Matta's activities as a union steward. Lack of knowledge is even more unlikely when one considers that Matta was an active steward with high visibility and a key participant in at least one popularly supported grievance (lead teacher) that passed through O'Connor's office before being appealed to the next level in Sacramento. In addition, Matta was openly involved in several crucial employment-related matters at the hospital, including the communications grievance and the health and safety

issues which ultimately resulted in the hospital being cited by Cal/OSHA. Therefore, knowledge of Matta's protected activity is imputed to O'Connor.

It is similarly concluded that Graham, as Matta's supervisor, had actual knowledge of Matta's protected conduct. He participated in several grievance and employment-related meetings where Matta was the chief spokesperson for employees, and he was clearly aware of Matta's activities on behalf of CSEA in the legislative process. Thus, the requisite knowledge of protected activities has been established for two of the three people who played key roles in the discharge.

The charging party has, however, fallen short of establishing a record from which an unlawful motive can be inferred, although some evidence of such motive exists. It might be argued, for example, that an unlawful motive should be attributed to Dr. Graham as a result of his statements to the effect that Matta was getting too hot to handle and was trying to influence too many people. Also, Graham's resistance to Matta's request for leave to participate in the CSEA legislative program might be interpreted to show at least some displeasure with this activity. And since Graham participated directly in the process to terminate Matta and contributed directly to the decision, any animus on his part might be attributed to O'Connor—who testified unbelievably to his knowledge of Matta's union activities—or found to have

otherwise unlawfully tainted the ultimate decision. Moreover, since Graham did not testify at the hearing, Matta's testimony about his allegedly unlawful statements was therefore uncontradicted, thus suggesting that an unlawful motive has been established.¹²

. . . when a party testifies to favorable facts, and any contradictory evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it. Martori Brothers Distributors v. ALRB, supra, 29 Cal.3d 721, 728.

However, in the present case, there is a rational basis for disbelieving Matta's testimony about Graham's allegedly unlawful statements, thereby negating the inference of unlawful motive.

Jack Lair, a witness for charging party, testified Graham told him that he (Graham) intended to issue a written reprimand to Matta for the Billy and Frankie incidents. Graham's intention to give Matta such a light penalty strongly suggests that he had no ax to grind with Matta and, more importantly, he

¹²Neither Finebloom nor Parnell testified at the hearing. Although testimony by Matta about their allegedly anti-union comments was also uncontradicted and might therefore support an inference of unlawful motive, it will not be considered here since there is no evidence that either of these two individuals played any role in the decision to terminate Matta. See Moreland Elementary School District (7/27/82) PERB Decision No. 227.

had no intention of firing him. Moreover, Matta testified that he was always on good terms with Graham and would have preferred that Graham make the decision on any possible disciplinary action. In fact, charging party strenuously argues that taking the disciplinary decision away from Graham evidences an unlawful motive. Matta also testified that he didn't think Graham was out to get him. Even in his brief, charging party states that Graham "throughout the process remained friendly." In the face of this evidence, it is entirely inconsistent for the charging party to then point to Graham's earlier statements and argue that he harbored an unlawful motive and acted on that motive during the meetings with Owen and O'Connor. To the contrary, it appears that Graham harbored no unlawful intent and, if anything, it was to Matta's advantage to have Graham participate in the meetings where his case was deliberated.

In sum, the charging party has produced evidence which, under some circumstances, might support an inference of unlawful motive from Graham's statements. However, facts and incidents must be considered compositely and reasonably justified inferences drawn therefrom. Santa Clara Unified School District (9/26/82) PERB Decision No. 104, pp. 14-15. In this case, the totality of the evidence on this point is so inherently inconsistent and contradictory that Matta's testimony about Graham's statements simply cannot be believed.

And even if it were accepted that Graham made these statements, it is more likely that they were uttered in passing during the daily give-and-take in a labor relations setting. Under the circumstances, it is simply not reasonable to interpret them as carrying an unlawful motive.

Contrary to the charging party's assertion, I find the nature of the investigation likewise does not give rise to the inference of an unlawful motive. O'Connor, through Ryan's reports, received Matta's initial version of the incidents. Several witnesses to each event were interviewed and O'Connor personally discussed Billy's injuries with Dr. Silver. O'Connor then met with Graham and Owen and discussed the incidents in great detail. Lastly, Matta was given an opportunity to present his arguments to O'Connor after the evidence was in and before the termination decision was actually finalized. While the investigation may have been conducted differently than others in the past, this does not overshadow the fact that it was otherwise done with dispatch and was thorough. Therefore, no unlawful motive can be inferred from the manner in which the investigation was conducted.

Charging party also contends that Matta's discipline was more severe than that given to other employees for much harsher treatment of patients. The record does not support this contention. The evidence shows that other employees who abused

patients had been discharged in the past. Of the approximately 450 complaints of patient abuse investigated since 1978, the majority were found to be without substance and others received discipline in various forms ranging from letters of reprimand to lengthy suspensions. Seven other employees since 1978 had been discharged for abusing patients.

While it might be argued that the Billy and Frankie incidents were not as serious as certain infractions for which other employees were terminated, it can be argued with equal force that they were at least as serious as other incidents of patient abuse which resulted in discharge. For example, the Billy and Frankie incidents might not be considered as serious as breaking a patient's arm, dunking a patient's head in a toilet and flushing it, or kicking and choking patients with criminal intent. However, one might argue that Matta's conduct is at least as serious as, for example, dispensing medication without a physician's order, forcing medication down a patient while holding him on a bed, giving a patient alcohol and allowing him to drive an employee's car, or having a co-worker ask a deaf patient to go home with him and have sex. All of the latter cases resulted in discharge.

It is unnecessary to determine which of these offenses were more serious or less serious than the conduct which formed the basis for Matta's discharge. Suffice it to say that Matta's conduct was at least within the range of dischargeable offenses

at the hospital. Even if one disagrees that Matta's conduct was a dischargeable offense, this alone does not establish anti-union animus. Moreland Elementary School District, supra, p. 15.

Inherent in charging party's disparate treatment argument is the contention that Matta's conduct was more like past incidents where lesser penalties, such as suspension, were imposed. This argument, too, must fail. The Billy and Frankie incidents, as O'Connor credibly testified, are easily distinguished from the 1978 gymnasium incidents which, while obviously inappropriate, can reasonably be characterized as horseplay, as opposed to physical abuse of patients.

Atcosta's alleged physical abuse of patients can be similarly distinguished. Of the several complaints filed against Atcosta and introduced into evidence, all were found by the investigators to be either lacking in foundation or completely fabricated by patients. Thus, except for one complaint, the investigators recommended no further action and the cases were closed. As to the remaining complaint, the case was closed after investigation and Atcosta's conduct written off as poor judgment. Additionally, at about the time the complaints were filed against Atcosta, he was suffering from a serious medical problem and his overall condition was such that Dr. Graham recommended he be given a complete physical and mental examination with the objective of placing him on light

duty not involving nursing care in the program. As a result, Atcosta either resigned or was dismissed. In comparison, the complaints against Matta were found to have merit and the investigator recommended further action. Also, Matta had no mitigating circumstances based on his health.

Finally, regarding disparate punishment claims, Ryan testified that in several hundred cases of patient abuse since 1978 employees received a form of discipline less than discharge. A comparison of these cases with Matta's conduct may have supported charging party's disparate treatment argument. However, since evidence about these cases was not presented, such an undertaking is impossible, as it would necessarily involve speculation and conjecture.¹³

Even assuming that Matta should have received a lighter penalty, this alone does not violate the Act in the absence of other evidence from which an unlawful motive can be inferred. Disciplinary action may be without just cause where it is based on improper or unlawful considerations which bear no relation to matters contemplated by the Act and which the Board is

¹³It might be argued that DDS, not charging party, had the burden of production regarding details of these lesser penalty situations. However, since DDS produced evidence of other discharge cases, of which Matta's was within the class, thereby establishing the business justification defense, further rebuttal that a lesser penalty was appropriate was properly the burden of the charging party.

therefore without power to remedy. Moreland Elementary School District, supra, at p. 15.

Charging party next argues unequal enforcement of work rules in that respondent did not use progressive discipline in Matta's case. According to charging party, application of this concept along with Matta's good work record and clean disciplinary slate would have resulted in a lesser form of punishment. In support of this argument, charging party cites Ryan's testimony for the proposition that progressive discipline was routinely used at the hospital. The charging party has misread the record. That part of Ryan's testimony referred to by charging party does not indicate that progressive discipline was the standard practice at the hospital.¹⁴ Ryan simply said that, when considering the forms of discipline given out in the past, the number of penalties got progressively less as one approached the more severe penalties. In other words, there were fewer discharges than there were letters of reprimand. Ryan's testimony shows only the expected fact that less serious infractions met with lighter penalties, while more serious infractions met with stiffer penalties. The record simply does not show that progressive discipline was the rule at the hospital. Owen's

¹⁴Transcript, Vol. II, p. 87.

unrebutted testimony establishes the opposite. She said that progressive discipline is not a practice at the hospital and in fact each case is judged on its own circumstances. Thus, there is no support in the record for charging party's assertion that the hospital demonstrated an unequal enforcement of any progressive discipline rule with respect to Matta's discharge.

Based on the foregoing, it is concluded that the record contains insufficient evidence from which an unlawful motive can be inferred and then attributed to those who played a role in the decision to terminate Matta. The charging party has not met its burden of making a sufficient showing to support the inference that protected activity was a motivating factor in respondent's decision to take adverse personnel action. The requisite nexus between the protected conduct and the adverse action has therefore not been established. Novato Unified School District, supra, p. 6; State of California, Department of Developmental Services (7/28/82) PERB Decision No. 228-S, at p. 22. Thus, the charge must be dismissed.

Respondent has met its burden of producing evidence.

Assuming charging party had made a prima facie showing sufficient to support the inference that the exercise of an employee rights guaranteed by the Act was a motivating factor, thus creating a "mixed motive," the burden would shift to the employer to prove that its actions "would have occurred in any event." Martori Bros. Distributors v. ALRB, supra, 29 Cal.3d

at 730; See also Novato Unified School District, supra, at p. 14. If the employer is able to show that it would have taken the action in the absence of protected activity the charge must fail. Once employee misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. Martori Bros. Distributors v. ALRB, supra, 29 Cal. 3d at 730.

In this case respondent has presented just such a defense.

There was no evidence presented by charging party that Matta's protected activity was discussed as part of the decision to discharge him. See, e.g., Coast Community College District (10/15/82) PERB Decision No. 251, at pp. 23-24. In fact, the credible testimony of Owen and O'Connor establishes that Matta's protected activity was not a factor in the decision to terminate. And the totality of the evidence supports this testimony. The charges from the outset of the investigation were viewed as serious by O'Connor. A complete investigation was quickly undertaken and Matta was given an opportunity to respond in full after all the facts were gathered. After weighing all the evidence, including input from Owen and Graham, O'Connor decided that there were sufficient grounds to discharge Matta based on the violation of Rule 41.

Rule 41 provides that no employee shall "strike, abuse, or inflict cruelty by physical means" on a patient. The kicking of Frankie and the twisting of Billy's arm clearly violate this part of the rule, as these acts constitute physical abuse of patients. The rule also states that physical strength to secure the cooperation of patients is to be avoided and used "only to the extent necessary to ensure the safety and comfort of the patients." As more fully explained below, an analysis of the relevant facts shows that Matta similarly violated this part of the rule.

In reaching the decision to terminate Matta, O'Connor relied on evidence that indicated Matta, while in an angry state wrestled Billy to the floor, inflicting abrasions and black-and-blue marks on his body.¹⁵ Granted, since Billy was an active and aggressive child, Matta may have had ample justification for wrestling him to the floor. However, even assuming Matta was initially acting to ensure Billy's safety and comfort, and assuming further that Billy struggled in the

¹⁵The fact that Dr. Silver later formed the opinion that the black-and-blue marks may not have been caused by Matta is immaterial. The crucial point here is that, as of the time O'Connor decided to terminate Matta, he was justified in relying on Silver's medical opinion that the marks had been caused by Matta. Additionally, while the abrasions may have been incurred elsewhere, the evidence produced by the investigation pointed to the fact that Matta had inflicted them on Billy during the incident, and it was this evidence that was presented to O'Connor for his consideration.

process, the evidence suggests that the amount of force used was excessive. Since Billy was only 4'9" tall and weighed only 94 pounds, it seems that Matta, an expert in MAB technique, should have been able to control him without excessive force. This did not occur. Rather, Matta gripped Billy's arm in such a way that the skin was broken, thus strongly suggesting that the force was far in excess of what was needed under the circumstances. The fact that Matta did not call upon Vince Mann for assistance, either at that time or at the end of the class as a possible escort, also suggests that the incident with Billy was routine, presented no real danger, and should have been handled by Matta with ease. And in the end Matta released Billy from the class without an escort, thus indicating that he could have done so at the outset, avoided the entire incident, and taken up the report card incident at a later date. Moreover, although Billy was an aggressive child and frequently needed to be restrained, there was no evidence that any other instructor ever inflicted physical injury in doing so. All of this supports O'Connor's conclusion that Matta was acting in anger, as opposed to merely attempting to subdue Billy or protect himself, Billy or others. The evidence thus provides ample support for O'Connor's conclusion that Matta violated Rule 41.

With respect to the second incident, witnesses stated that Matta kicked Frankie with a considerable amount of force. Even

the charging party concedes in its brief that Matta may have gone too far "and used a foot where a push with the hand would have avoided all appearances of impropriety." Once again, the fact that Matta used a foot, with some considerable amount of force, when a push would have been sufficient, suggests that he was acting in anger, as opposed to merely trying to motivate Frankie. It cannot reasonably be argued that this act was for the purpose of providing "safety and comfort" to Frankie.

Based on the foregoing, and the fact that physical force is frowned on by the hospital, O'Connor was justified in his conclusion that Matta's conduct during the Billy and Frankie incidents violated Rule 41. While it is true that Matta's good work record and clean disciplinary slate are factors in his favor, they do not outweigh the fact that he violated a hospital rule and O'Connor had just cause to discharge him. See Dade Tire Co. (1979) 244 NRB 244 [102 IRRM 1029].

It has been concluded that respondent did not discriminate against Matta because of his protected activities. However, there is a fine line between "discrimination" and "interference" cases and this case may thus lend itself to a Carlsbad as well as a Novato analysis. See Coast Community College District, supra, at pp. 19-20; Moreland Elementary School District, supra, at p. 16. Under Carlsbad, while proof of unlawful motive is generally not required in interference cases, the charging party must demonstrate some nexus between

the employer's conduct and the protected activity with resultant harm to employee rights under the Act. In such event, the Board will balance the operational justification claimed by the employer against the harm done.

Here, assuming the nexus and resultant harm were established,¹⁶ the justification was the need to protect against patient abuse and the right to take disciplinary action against offenders. After balancing the competing interests here, it is found that the employer's interest in maintaining an educational environment free of patient abuse outweighs any harm to employee rights. As O'Connor wrote in the discharge letter, Matta's actions were "inappropriate and harmful to the patient's treatment program." Any other conclusion would preclude employers from ever disciplining union activists irrespective of just cause. See Moreland Elementary School District, supra, p. 16.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record of this matter, the unfair practice charge filed by Richard C. Matta against the Napa State Hospital and the related PERB complaint are hereby DISMISSED.

¹⁶ This assumption is made only for purposes of analysis. As noted earlier, charging party has proved neither a nexus nor resultant harm to employee rights, and under the facts presented here it cannot be concluded that resultant harm is inherent in respondent's action.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on December 6, 1982, 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 December 6, 1982, 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: November 16, 1982

FRED DORAZIO
Administrative Law Judge