STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID H. GOGGIN, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF THE YOUTH AUTHORITY), Respondent.	)	Case No. S-CE-118-S PERB Decision No. 432-S November 15, 1984

Appearances; McMaster & Lobel, by Loren E. McMaster, Attorney for David H. Goggin; Jeffrey L. Gunther and Juan Perez for State of California (Department of the Youth Authority) .

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: David H. Goggin appeals the attached dismissal of his charge that he was terminated by the State of California (Department of the Youth Authority) (CYA) because of his activities on behalf of Teamsters Local 960 and the California Youth Counselors Association (CYCA). After a hearing, the administrative law judge (ALJ) concluded that Goggin had failed to establish a prima facie case.

Goggin has filed a considerable number of exceptions to the findings and conclusions of the administrative law judge. Except as modified herein, the Board adopts the ALJ's findings

of fact. Goggin's exceptions may be summarized: He complains that the ALJ's finding that his absence after August 4 was not authorized is incorrect. He points out that his form 634 showed him on leave from August 3 to August 13 and on paid vacation from August 14 to August 19. He claims that CYA witness Jane Nye testified that the "L" on the form for the period August 20 to August 31 represents informal leave. He further argues that his doctor informed his supervisor, Pete Rios, on August 3 that he would recommend leave for Goggin because he could not function in his present state of mind.

Goggin disputes the finding that CYA made a diligent effort to find him while he was on leave. He asserts that Andrew Jackson, his team leader, and Rios made no effort to find him after August 1, and that Rios did not tell him that he had been looking for him or order him to report back at any particular time. Rios' notes used at the State Personnel Board hearing do not indicate that he contacted the doctor and informed him of the attempt to find Goggin. According to Goggin, Rios met with him on August 1 and had no need to try to find him only two days later.

Goggin objects to the ALJ's adverse credibility findings concerning his own witnesses. The testimony of neither was impeached and support of Goggin is not a proper basis for making such findings.

He challenges the credibility of Institutions Chief Ron Lopez[1] assertion that because of Goggin's union activities, he was only concerned with "covering all the bases" in dealing with his absence. When Lopez was asked if he decided on the absence-without-leave transaction before he called the doctor, he answered, "No." But, Goggin points out, the termination notice was issued the day before Lopez called the doctor, and Mary Calhoun, assistant superintendent at Nelles, had already received Lopez' approval for this action.

Goggin claims he was subject to disparate treatment and refers to Nye's testimony that after 18 years of service in the CYA, she recalled no other employee terminated for being AWOL, and that it was CYA practice to place employees on extended leave if there was medical substantiation of their illness.

To support the claim that CYA departed from established procedures, Goggin refers to a provision in the Department manual for leaves of absence in cases of compensable illness.

He also argues that CYA has offered inconsistent explanations for its action. He cites Lopez[1] testimony that the termination was for an abnormally long AWOL, but points out that his termination took place as soon as possible after the alleged 5-day period of unreported absence. He contends that Lopez' explanation that his concern was with filling the vacancy if Goggin did not return contradicted his testimony before the Personnel Board that he was contemplating taking disciplinary action against Goggin.

Goggin argues that CYA's claim that he was given ample opportunity to request an extension of his sick leave is irrelevant. He claims that CYA's practice is to place employees on leave automatically when it is aware of the illness. He asserts that the Personnel Board does not require that such requests be made, that it discourages the use of AWOL action, and encourages granting of sick leave where the illness is known to the employer.

Goggin raises broad objections to the ALJ's findings concerning CYA's knowledge of his protected activities, pointing to the nature of his accusations at Paso Robles School when Lopez was its superintendent, the testimony of Nelles' Superintendent Kason and the circulation of Teamster newsletters featuring Goggin's activities and photograph.

Finally, Goggin argues that CYA's use of the "automatic resignation," a method of termination struck down by the courts, demonstrates the Department's desire to get rid of him.

DISCUSSION

Goggin requested oral argument contending that the voluminous record and great number of exceptions made such argument necessary in order for the Board to "ferret [ing] out the critical pieces of evidence . . . ." The Board, concluding that oral argument is unnecessary, denies the request.

The preliminary issue to be decided is whether Goggin has furnished sufficient evidence to establish that but for his

participation in activities protected by the State Employer Employee Relations Act (SEERA),[1] he would not have been terminated as an employee of the Department of the Youth Authority. Monsoor v. State of California (7/28/82) PERB Decision No. 228-S established that the party charging unlawful reprisal has the burden of proving that he or she was engaged in activities protected by SEERA, that the employer had knowledge of those activities and, in taking the action it did, was motivated by that participation.[2]

At the outset, the Board finds that Goggin has met the first of these obligations by his recitation of his activities as union organizer and grievance representative from 1977 to 1979, on behalf of CYCA until January 1979, and for the Teamster's local from January 1, 1979. That he may have acted at certain times in the name of the CYCA after it had retired from labor relations activities is immaterial. At the least, Goggin was attempting to organize the CYCA members to support the Teamsters' certification effort. Further, Goggin acted in the employment-relations interests of all the employees of the school at a time when there was no exclusive representative.[3]

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[1]Codified at Government Code section 3512 et. seq.

[2]See also Novato Unified School District (4/30/82) PERB Decision No. 210, rev. den. (1/10/83) 1 Civ. 7, No. AO17764.

[3]Monsoor v. State of California, supra; also see

As to the matter of employer knowledge, we are not completely in accord with the administrative ALJ's evaluation of the facts. The ALJ finds no evidence that Rios knew of Goggin's activities "since 1979." In light of the nature of Goggin's activities both at Paso Robles, where Rios was a supervisor and in close communication with Lopez, and at Nelles, where he was Goggin's supervisor, and the circulation of Teamster material, it is more than difficult to believe that Rios was not aware of Goggin's activities during 1978 and 1979.

Lopez concedes that he knew of Goggin's actions both at Paso Robles and Nelles. Mary Calhoun, assistant superintendent at Nelles School, testified that she was unaware of Goggin's activities. Goggin files no exception to the ALJ's finding to this effect.

The question raised by Goggin is whether the ALJ has ignored the implication of animus present in these alleged discrepancies in the testimony. Although the false denial of knowledge of a union activist's conduct may certainly raise the inference that the employer is attempting to conceal the true reason for its conduct, we do not find the testimony here to be of that character. It is not unreasonable to conclude that the witnesses tended to play down their knowledge of Goggin's

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Morris, The Developing Labor Law, 2nd Edition, Ch. 6, pp. 142-143.

activities. But, we do not find this in itself a sufficient basis for drawing an inference of unlawful motivation.

Goggin points to other purported discrepancies in the Department's case which, he argues, permit an inference of unlawful motivation to be drawn. He asserts that CYA's claim that it made diligent effort to locate him is false, demonstrating a lack of good faith in justifying his termination as a voluntary resignation. It is true that the pertinent evidence is mixed. Jackson did try to reach Goggin by phone to find out when he expected to return to work. Being informed that the phone was disconnected, he visited Goggin's residence. Finding no response to his knock, he inquired of the landlady and was told Goggin had moved. But, he did not ask if Goggin had left a forwarding address or phone number and made no further effort to locate Goggin at that time or later.

Rios limited himself to asking another worker to talk to Goggin and tell him to call the office. Lopez called Goggin's doctor to determine when Goggin would return to work. Upon being told that the doctor was also trying to find Goggin, he made no further effort to locate him.

However, we conclude that the degree of diligence exercised by CYA is irrelevant. The Board finds in the facts before it no obligation on CYA's part to make any special effort to locate Goggin. Nor do we read into CYA's testimony any belief on its part that proof of "diligent effort" to locate Goggin was a necessary part of its defense. To the contrary, CYA

consistently maintained that Goggin had the burden of contacting his employer. It is the administrative ALJ who characterized the Department's effort in the manner Goggin finds objectionable. Thus, sustaining Goggin's exception to his finding would have no impact on the result we reach.

In support of his claim that he was treated differently than others in similar circumstances, Goggin misreads Nye's total testimony. Although she did say that she was aware of no instance in her eighteen years with CYA of an ill employee being terminated as absent without leave, she did not say that any AWOL employee had been automatically placed on approved leave, as Goggin would have us interpret her statement. She did testify that the departmental policy was to require the employee to submit a written request for leave together with medical substantiation. There is nothing inconsistent in these two aspects of her testimony. Her explanation of the symbol "L" as merely denoting "out of time" stands uncontroverted as does her explanation of the reason the form 634 was filed in October.

No persuasive evidence of inconsistencies in CYA's conduct, or explanations for its actions, appear in the record. Throughout the course of these events, it was Goggin's own conduct - his failure to report, his continued unexplained absence, his unreported move to northern California - that was the subject of management discussion and the precipitating cause of his termination. That he was terminated for absence

without leave rather than as a disciplinary matter may have been a matter of expediency. At any rate, it was an option available to the Department and in no way inconsistent with Lopez' dual interest in disciplinary action against Goggin and his concern for filling the vacancy caused by Goggin's absence.[4]

The Goggin letter to Jackson, which was sent before the Department's actions took place and, of course, before the charge was filed, but which the ALJ characterized as self-serving, does not support the conclusion that Jackson's alleged animus caused Goggin's termination.

Accordingly, the Board concludes that charging party has failed to prove that his termination was motivated by his participation in activities protected by SEERA.

ORDER

Based on the entire record, the Board ORDERS that the unfair practice charge filed by David H. Goggin against the State of California, (Department of the Youth Authority) is DISMISSED.

Chairperson Hesse and Member Morgenstern joined in this Decision.

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[4]Accepting, arguendo, that the ALJ's credibility findings regarding Goggin's witnesses is unjustified, the Board finds in their testimony no substantiation of unlawful motive by the Department. Similarly, the fact that "automatic resignations" subsequently met with court disapproval does not prove that CYA's use of that procedure was motivated by reasons condemned by the Act.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID H. GOGGIN, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF THE YOUTH AUTHORITY), Respondent.	)	Unfair Practice Charge Case No. S-CE-118-S PROPOSED DECISION (10/20/83)

Appearances; Loren E. McMaster, Attorney (McMaster & Lobel) for David H. Goggin; Jeffrey L. Gunther and Juan Perez (Department of Personnel Administration) for State of California (Department of the Youth Authority).

Before William P. Smith, Administrative Law Judge.

PROCEDURAL HISTORY

On March 22, 1982, David H. Goggin (hereafter Goggin or Charging Party) filed unfair practice charge No. S-CE-118-S against the State of California (Department of the Youth Authority), (hereafter Youth Authority, DYA or Respondent). The charge alleges that the Charging Party was wrongfully terminated because of his union activity in violation of section 3519(a) of the State Employer-Employee Relations Act (hereafter SEERA or Act)-1

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[1]Government Code section 3512 et seq. All references herein are to the Government Code unless otherwise noted.

Government Code section 3519(a) provides that it shall be unlawful for the state to:

PERB issued a complaint on May 5, 1982. The matter was set for informal conference on June 17, 1982. The Respondent also filed its answer on June 17, 1982. The Respondent admitted Goggin was terminated but denied it was for union activity. It alleged that the termination was for absence without leave for in excess of five consecutive days. His termination was deemed a voluntary resignation. On June 28, 1982, Charging Party filed a Motion to Amend and an Amendment to the unfair labor practice charge. By stipulation of the parties at the formal hearing, the proposed amendment was accepted and was incorporated in the complaint. The answer was deemed amended to deny each and every allegation contained in the amended charge. A request to set the hearing was received July 15, 1982. The matter was scheduled to be heard on September 1, 1982. The case was taken off calendar at the request of Respondent with concurrence of Charging Party because of settlement possibilities. A pre-hearing conference was held January 19, 1983. The formal hearing was conducted on January 24-26, 1983.

At the commencement of the hearing Respondent made various motions to dismiss the complaint. These were overruled and the

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> 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.

Charging Party was allowed to proceed with his case in chief. At the conclusion thereof, the Respondent moved to dismiss for failure of the evidence to present a prima facie case. The administrative law judge allowed the parties to file briefs on the motion after receipt of the transcript. Briefs were due and filed on March 16, 1983. Oral argument on the motion was heard on March 21, 1983. The motion was denied. The hearing was resumed on March 28, 1983, to allow the parties to present any additional related evidence to the substantive case. Briefs and reply briefs were submitted between April 22, 1983, and June 6, 1983. The case was submitted on June 6, 1983.

STATEMENT OF FACTS

The Respondent is a state employer as defined in Government Code section 3513(i). David Goggin was a state employee as defined in section 3513(c). The Teamsters Local 960 is an employee organization as defined by section 3513(a). The status of the California Youth Counselors Association as an employee organization is described herein.

A. Termination of Goggin

Goggin was employed by the DYA as a youth counselor at the Fred C. Nelles School in Whittier, California. Samuel Kason was the superintendent at Nelles School. Mary Ruth Calhoun was the assistant superintendent. Pete Rios and Andrew Jackson were Goggin's direct supervisors.

Goggin worked at Nelles School until June 20, 1979. On June 23, 1979, Goggin requested and was granted sick leave. Goggin was entitled to full pay.

On approximately July 17, Goggin furnished a note from his physician stating that he was unable to continue working as a youth counselor because of a psychiatric condition. On August 1 he presented a request from his doctor that he be given extended sick leave until August 4, 1979. Pursuant to the request, the authorized sick leave was extended to August 4. Goggin continued to remain absent after August 4. His absence was without authorization following that date. Soon thereafter Goggin's supervisors, Jackson and Rios, made a diligent but unsuccessful effort to contact him. Goggin had failed to notify the employer's personnel office of his current mailing address or, telephone number. Management attempted to reach Goggin through his physician. Rios reached the physician who indicated that the leave should be extended to August 17. No written request was made regarding this extension.

On August 17, Goggin exhausted his last day of paid vacation and/or authorized sick leave

On August 27, 1979, Rios mailed a notice of termination for absence without leave to Goggin at his last known address. The letter was returned unopened to the school. Subsequently, school administrators learned that Goggin had moved to a new address in Norwalk. Jane Nye, personnel officer, then sent the

notice of termination to the Norwalk address on September 6. Due to a technical error, a revised notice was mailed on September 7. Both notices were issued under the signature of Mary Ruth Calhoun. Both letters were forwarded to Goggin at a Susanville address. He received the notices about September 13, 1979. The notices indicated that Goggin's employment was terminated pursuant to the authority of Government Code section 19503. That section creates a presumption that an employee who is absent without leave for five consecutive workdays has resigned. The presumption may be overcome by the employee giving a satisfactory explanation of his absence.

Goggin filed a written request for a further extension of his leave on October 1, 1979. The DYA considered him to have been terminated by that time.

B. Review of the Termination by the State Personnel Board

Goggin appealed his termination (deemed an "automatic resignation" by section 19503) to the State Personnel Board (hereafter SPB). Pursuant to SPB rules of procedure, a hearing was held on his appeal on April 28 and 29, 1980. The hearing officer's proposed decision was adopted by the SPB as its decision (Case No. 11311) on August 7, 1980.

Goggin sought a review of this decision by a petition for peremptory writ in the Superior Court of Los Angeles County (Case No. C-359690). Judgment denying the writ was entered on

January 29, 1982. An appeal from this judgment has been taken to the Second District Court of Appeal. The appeal is currently pending.

The SPB found that the automatic resignation, effective August 19, 1979, and Goggin's appeal therefore complied with the procedural requirements of the State Civil Service Act. Based on the record it concluded that the termination under section 19503 was appropriate because the DYA was reasonable in assuming that appellant had abandoned his position. It also found that the DYA complied with the provisions of Personnel Transactions Manual section 530.2 as to notice to the employee of the consequences of failure to provide substantiation of illness.

In the proceeding before the SPB, Goggin claimed that the action was taken as a reprisal because of his prior union activities- The SPB found that this contention was not established by the evidence presented. It specifically found that there was no evidence that Goggin would have been denied a medical leave if he had requested one. It found that the DYA "was lenient" in authorizing appellant's leave after the fact and during periods when his supervisors did not know where he was.

Goggin also argued that he should have received a warning notice prior to his termination under section 19503. The SPB found that a prior notice is not required under section 19503

because terminations are appropriate when an employee abandons his position. It found that he did so in this case. Under such circumstances, DYA was not required to remain in contact with him. SPB further found that Goggin failed to present a satisfactory explanation for his absence, failed to obtain leave and failed to show he was ready and willing to resume his duties. Based thereon, that board denied his appeal for reinstatement after the automatic resignation.

The Charging Party presented much evidence at the hearing in an attempt to show that the proper grounds to support an AWOL termination were not present in his original termination He also attempted to show that the law and SPB regulations were not followed. This evidence is not examined herein since the SPB had that matter fully before it in its review of the action and made its findings in support of the action taken. The only issue before the PERB is whether the DYA acted with an unlawful retaliatory motivation.[2]

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[2]The DYA has asked that collateral estoppel effect be given to the decision of the SPB. That request was denied. The issue before PERB, while similar, is nonetheless different from that which was before the SPB. It was the SPB's duty to determine whether the state had good cause to terminate Goggin as AWOL. The issue before PERB is whether the DYA acted with unlawful, retaliatory motivation. The two questions are not synonymous. See Moreland Elementary School District (7/27/82) PERB Decision No. 227.

The Respondent also urged that the decision of the SPB constituted a res judicata bar to the issues herein. Goggin's appeal from the SPB decision is still pending in the courts. A judgment is not res judicata until it is final. See Witkin, sec. 164, Judgments, p. 3307.

C. Goggin's Protected Activities

Goggin was active as the president of the California Youth Counselors Association until September 1979. The Association, among other activities, represented its members in grievances and other employment concerns before the DYA and the California Legislature. From the implementation of SEERA on July 1, 1978, until January 3, 1979, the Association is found to have been an employee organization as defined in section 3513(a). On January 3, 1979, the Association registered with the State as a "bonafide association" and disclaimed any role as an "employee organization" as defined by SEERA.[3]

In January 1979 Goggin also became a shop steward on behalf of Teamsters Union Local 960. The union was one of several employee organizations competing for the right to become the exclusive representative of a statewide unit including youth counselors employed by the DYA. Goggin represented the union at Nelles School as well as in statewide matters. He was a member of a steering committee participating in meetings on behalf of the Teamsters with officials of the DYA.

3prior to January 3, 1979, the stated purposes and activities of the Association involved representing youth counselor employees in grievances with the employer- On that date Goggin, as president of the organization, filed a statement with the Governor's Office of Employee Relations requesting to disclaim any role as an employee organization. The organization registered as an association.

In sum, Goggin was active in employee organization activities between July 1978 and the date of his termination.[4]

D. Supervisors' Role in Goggin's Termination

1. Samuel Kason

Kason was well aware of Goggin's employee organization activities while serving as superintendent at Nelles School. Yet he played no role in the decision to terminate Goggin because he was absent from the site during the period when the termination of events occurred. Kason displayed no animus toward Goggin as a result of his knowledge about Goggin's union activities. On the contrary, he viewed Goggin's performance of a particular work assignment as "a good job." He seemed genuinely concerned about staff efforts to locate Goggin during Goggin's absence. Although Kason referred to Goggin as "unreliable" in a post-termination report, the report must be considered valid criticism of Goggin's failure to keep the employer informed of his whereabouts or apply for leave. The decision to terminate Goggin was made by the assistant superintendent, Mary Ruth Calhoun. Kason had no conversations with Calhoun prior to the issuance of the termination notices.

4The activities of Goggin on behalf of the California Youth Counselors Association between July 1, 1978, and January 3, 1979, were received into evidence over the objection of DYA. The evidence was received to allow the Charging Party to establish that such activities were contributing factors in the employer's termination. Goggin's activities on behalf of the Teamsters subsequent to January 3, 1979, do not lose protection because that organization was not selected as the exclusive representative.

2. Mary Beth Calhoun

Calhoun assumed the position of assistant superintendent at Nelles School the second week of July 1979. At that time Goggin had been absent on sick leave since June 23. Calhoun had previously held the position of treatment team supervisor at El Paso Del Robles in Paso Robles. The record is devoid of any evidence indicating that she had any significant knowledge or concern as to Goggin's protected activities prior to making the termination decision. No other basis for animus by Calhoun against Goggin was shown. Calhoun made the termination decision in the absence of the superintendent based upon information given to her by staff member Rios. Prior to making the decision, she sought approval of the proposed action from Ron Lopez, chief of Institution and Camps-South.

3. Pete Rios

Pete Rios was a team supervisor at Nelles School. He served at the school between late June 1979 and November 1982. Goggin was absent on sick leave when Rios began employment at the school.

Rios was responsible for the staffing of the "cottage" for the housing unit to which Goggin was assigned for his duties as youth counselor. He was Goggin's immediate supervisor. Rios exercised final approval of the work schedules and staffing needs for housing units under his responsibility.

Rios relied upon information and recommendations received from the senior youth counselors for each cottage. Senior

youth counselors are routinely called "seniors." They are essentially the working foremen for youth counselors. The senior for Goggin's cottage was Andrew Jackson.

Rios had worked at the school as a youth counselor and an assistant aid some years earlier. While he had been aware of Goggin's activities on behalf of the Youth Counselors Association, Rios had no knowledge of Goggin's employee organization activities since 1979. His prior knowledge had been based upon hearsay comments from line staff. In August 1979 Rios recommended to Calhoun that Goggin be logged AWOL since management was unable to reach him. Rios made the request in order to be able to hire a replacement for Goggin.

Rios contacted Goggin's physician, Dr. Heninger, during Goggin's absence. He inquired about Goggin's health and the likely date of his return. He also mentioned the employer's attempt to locate him.

There is no evidence that Rios had any basis for animus toward Goggin because of his employee organization activities. Nor is there evidence that such activities played a role in Rios' AWOL recommendation. He had no conversations with Kason prior to making the recommendation. Rios had no conversations or direction from higher management in the DYA other than Calhoun, his immediate supervisor. He specifically had no conversations with or direction from Ron Lopez, the division chief over Nelles School.

4. Andrew Jackson

Jackson as the senior youth counselor was responsible for preparing the proposed work schedules for counselors assigned to his cottage. The department required that all shifts be properly covered for reasons of security and safety. Therefore, youth counselors were assigned and present 24 hours a day. Scheduling assignments routinely involved rotating shifts worked by youth counselors. Consideration in assignments is given to the level of experience, individual preference, and personal circumstances of each youth counselor as well as the needs of the institution. When staff are unable to fill the shift to which they are assigned they normally contact the senior. The senior makes immediate arrangements to see that the shift is properly covered. The change is made either by assigning other staff to work overtime or seeking the authority to hire limited term employees. The proposed schedule is presented to the treatment team supervisor for his approval. Rios and Jackson saw each other or communicated concerning staffing and other personnel problems on a daily basis.

Goggin had been assigned to the a.m./p.m. relief shift. The shift was not a desirable one and was hard to fill with experienced personnel. Goggin's request for sick leave was initially referred to Jackson. Jackson made his recommendation to Rios. Jackson and Rios had frequent conversations regarding Goggin's unavailability to fill his regular shift assignment

during the period between his original sick leave request and his termination. The record confirms that Jackson's sole purpose in calling the problem to Rios' attention was his need to staff the vacant position.

Goggin reported to Jackson by telephone when he first called in sick. Jackson made repeated attempts to communicate with Goggin by telephone for scheduling purposes to ascertain when Goggin might be expected to return. Jackson, at Rios' suggestion, went in person to what had been Goggin's residence in an unsuccessful attempt to contact him as to his return to work.

Jackson had known Goggin well since 1972. As his immediate supervisor he had daily work contact with Goggin. Jackson routinely had between six to ten occasions a year to contact Goggin by telephone at home. While it is clear that Jackson was aware of some of Goggin's employee organization activities, no evidence was presented to show that he was biased toward Goggin or harbored any anti-union animus.

Goggin testified that on or about the early part of April 1979 he received a letter from Jackson indicating he would be docked pay for absence from his assigned work without following proper procedures for approval. Goggin testified it was on union business and identified a lengthy letter he had written to Jackson in response. The letter itself is essentially self-serving in nature and tone.

Goggin also received a memo of reprimand from Jackson on April 25, 1979, as to alleged tolerance of misuse of state property (a towel) made into a kite tail by wards under his supervision. Goggin sent Jackson a memo of denial in answer shortly thereafter. There are no union activity concerns apparent from the content of either document. Goggin wrote a long rambling letter to Jackson on May 11, 1979. It is largely self-serving in nature, setting forth his many efforts to reform the programs of the DYA. He refers in one of the paragraphs to his role in holding offices in employee organizations. The letter is mostly a complaint about the personal relations between Jackson and Goggin from Goggin's point of view. Apparently Jackson did not bother to respond to it. Jackson's receipt of this letter and his failure to respond does not support an inference that Jackson harbored anti-union animus which led to actions by him in furtherance of Goggin's termination.

On the contrary, it is clear that both Rios and Jackson made significant efforts to contact Goggin and ascertain his plans to return. There is no evidence to indicate that had Goggin returned a timely verified request for additional sick leave, it would have been authorized.

5. Jane Nye

The only persons other than Jackson and Calhoun who Rios communicated with concerning Goggin's absence was Jane Nye.

Nye, a personnel assistant II, was in charge of the Nelles School personnel office. Nye's only involvement as the efficient personnel officer she clearly appears to be, was to help all the parties, whether Calhoun, Rios or Goggin to follow the proper procedures to effectuate the personnel transactions desired. She saw that the "paperwork" was in order. In both the sick leave and the termination cases, she was equally concerned that Goggin be timely paid all monies he was entitled to. She gave Goggin the information and the forms necessary to achieve this as well as to request authorized leave.

6. Ron Lopez

Ron Lopez was Chief of Institutions and Camps-South for the DYA at the time of Goggin's termination. He had held that position since August 1978. He had known Goggin for four or five years. Lopez was aware that in 1977 Goggin had made complaints on behalf of the CYCA some of which went to alleged misconduct and mismanagement in the operation of Paso Robles School. Since Lopez was the superintendent of the school, he obviously would have been interested and concerned. The auditor general issued a report in 1978 that essentially found only minor discrepancies in the financial records of the institution. It found that the profits from the Paso Robles Canteen operation were unaccounted for in the ward benefit fund. Beyond that, Lopez concedes he was aware of various charges filed by Goggin to the management of the DYA including

a so-called "blacklisting" charge in 1978. He was not directly charged therein but did understand it to be critical of the management of the DYA and he considered himself concerned thereby as a member of management.

At the time of Goggin's termination, Lopez was a division chief of the DYA. Actions of AWOL termination instituted by a school superintendent would have to pass over Lopez' desk for approval. A disciplinary action was distinguished from an AWOL termination in that a disciplinary action also required the approval of the Director of the DYA.

Goggin's termination papers from Calhoun did reach Lopez' desk for his approval or disapproval. He was immediately concerned that the proper steps had been completed. He was the more concerned because he was aware of Goggin's role in union activities. He stated that it was the sensitivity to this fact that,

> I wanted to make sure all bases were covered in respect to the communications to Mr. Goggin, the effort, the good faith effort of trying to communicate with Goggin . . . (in respect to coming to work).

He, like Rios, called Goggin's physician. He was concerned Goggin's disability income protection claim form somewhat ambiguously listed two sets of dates (6/20/79 through 8/17/79 and 8/17/79 through 9/12/79) as periods of disability. The document carried a date time stamp on the front of August 30, a.m. 11:20. It was acted upon by Jane Nye on

September 6, 1979. Lopez was concerned as to whether the physician was authorizing Goggin to be absent from his job on leave through September 12, 1979. Lopez was unable to reach the doctor. He did reach the nurse. Lopez learned from her that the doctor was trying to locate Goggin as well. At this time, Calhoun had already sent out the first notice of termination dated August 27, 1979. Lopez testified that Calhoun would have talked to him seeking his approval before issuing the first of the termination letters. Rios did not discuss the matter with him.

Lopez' testimony is that he too was concerned that if Goggin wasn't going to return, or otherwise be on authorized absence on sick leave, that the position be open to fill. Sick leave absences can be filled with limited term employees from the budget item earmarked for that purpose. A position held by an employee who is not verified to be on approved leave cannot be filled until the issue is resolved. Lopez' testimony is credited for the purpose of establishing that his actions in review of the termination were taken for legitimate business reasons.

7. Other Administrators at DYA

Several witnesses testified on behalf of Goggin attempting to show that certain higher levels of management in the DYA, including Pearl West, the Director, were aware of Goggin's union activities and had reason to harbor resentment toward him

because his activities were in some degree critical of the management of the agency. The testimony of these witnesses, particularly Roy Henderson and Ted Whitehouse, is found to exhibit such anti-employer bias and support of Goggin that their statements are found to lack credibility. More importantly, of the members of management who played any role in reviewing the termination, only Ron Lopez was involved directly enough to be considered. Lopez has been discussed above.

E. Goggin's Activities While Absent

Both parties introduced a great deal of evidence as to Goggin's activities while on approved leave or otherwise absent from his position at Nelles School. Goggin, Roy Henderson, Ted Holmes, Jack Whitehouse and Jerry Wilkerson all testified to one or more aspects thereof. Goggin's contention is that he was more or less occupied, depending on the dates, as a paid consultant to Wright Way Homes in Susanville and Janesville. He received $2,000 a month for consulting services. Also during his absence he had an arrangement with W.W., a corporation comprised of the same principals as Wright Way Homes. W.W. acquired property which it then leased to Wright Way Homes for its school and home care facilities. Wright Way Homes was a non-profit corporation operating homes for youthful delinquents. They were under contract with the state to provide alternative supervision and care facilities such as the DYA operates at the Nelles School and elsewhere.

Goggin also invested $25,000 in W.W. For his promise to pay $25,000, Goggin supposedly acquired a 25 percent interest in W.W. This interest, together with that of the other principals is in litigation elsewhere, the several parties in interest having had a falling out-

The records of the school indicate he was paid as an employee and not as a consultant. Appropriate employee taxes and other deductions were made. Ted Wright, one of the partners in Wright Way Homes and W.W. testified that Goggin was employed on a full-time basis as an employee and not as a consultant. Further, there is conflicting testimony as to Goggin's intent to establish his residence in Susanville. Goggin testified that it was not his intention to do that. His actions in moving all of his furniture from his apartment in Norwalk to Susanville and terminating the rental of his apartment in Norwalk would indicate otherwise.

The evidence offered about Goggin's employment status with another employer and his change in residences do not justify his absence from the DYA. His intent to return to his duties, if not manifest or known to his employer, is of little or no relevance to these proceedings.

LEGAL ISSUES

1. Was the charge timely filed?

2. Did the DYA terminate David Goggin in retaliation for participation in protected activities and thereby violate section 3519(a)?

CONCLUSIONS OF LAW

A. Statute of Limitations

Since the Respondent raises the defense that this unfair practice charge was not timely filed, that will be examined first. If the Respondent is correct, further examination of the facts would be unnecessary. Section 3514.5(a) of SEERA essentially imposes a six-month statute of limitations on the filing of a charge.[5]

Goggin's termination occurred on August 19, 1979. This charge was filed March 22, 1982. Thus, more than two years and seven months had elapsed. However, after his termination,

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[5]In relevant part, section 3514.5 says: (a) Any employee, employee organi
employer shall have the right to file an unfair practice charge, except that the Board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the

> purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

Goggin timely pursued an appeal of the action to the SPB. The SPB issued its decision on August 7, 1980. Goggin timely sought a review of this decision to the Superior Court of Los Angeles County. His petition for a peremptory writ was denied. From that decision, he timely filed an appeal to the District Court of Appeal which is still pending.

Government Code section 3514.5(a)(2) provides in part as follows:

> . . . (the PERB) shall consider the six-month limitation . . . to have been tolled during the time it took the charging party to exhaust the grievance machinery.

The PERB has ruled that it is permissible and appropriate for it to apply the doctrine of equitable tolling in cases where the issues raised by the charge have been pursued by appeal to the SPB.[6]

The PERB has pointed out that the key issue is whether the application of the equitable tolling doctrine would create a

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[6]SETC v. State of California (Department of Water Resources) (12/29/81) PERB Order No. Ad-122-S.

situation of prejudice or surprise to the Respondent.[7]

Here there is no surprise or prejudice since the evidentiary issues are quite similar- Since the Respondent was placed on notice by the SPB appeal and court proceedings and had sufficient time to review its obligations and had access to relevant information concerning the charge, there could be no prejudice. In this case, the one-year period in which to file appropriate proceedings in the superior court must be taken into account because the SPB decision is not final upon entry.[8]

In Meyers v. County of Orange (1970) 6 Cal.App.3d 971, the court specifically held that the applicable limitation period was tolled by the pendancy of both the administrative proceedings and the subsequent judicial (mandate) proceedings. The court indicated the statute of limitations on one of the plaintiff's two remedies was tolled while he was pursuing the other, and that "the period during which the statute is tolled includes the time consumed on appeal." (Emphasis added.)[9]

7See Victor Valley Joint Union High School District (12/29/82) PERB Decision No. 273.

8See the Proposed Decision by the hearing officer in SETC v. State of California (Department of Transportation) (11/16/82) PERB Decision No. 257-S for rationale supporting this theory — although that decision is not precedent.

9Meyers v. County of Orange (1970) 6 Cal.App.3d at 635-635. See also Elkins v. Darby (1974) 12 Cal.3d 410.

Since the judicial appeal from the SPB decision of August 7, 1980, is still pending to this date, the six-month statute of limitations has not yet begun to run according to PERB precedent. Thus, the foregoing legal precedents lead me, however reluctantly, to find that the charge was timely filed as of March 22, 1982.

B. Alleged Violation of Section 3519(a)

1. Legal Principles

Employees of the DYA have the protected "right to form, join and participate in the activities of employee organizations on all matters of employer-employee relations."[10] Under section 3519(a), it is unlawful for the state employer to.

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

[10]Section 3515 provides in pertinent part as follows:

> Except as otherwise provided by the Legislature, 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. State employees also shall have the right to refuse to join or participate in the activities of employee organizations . . . .

Goggin contends here that he was terminated because of his employee organization activity. He asserts that the filing of the grievances, charges and complaints with the DYA were protected concerted conduct, that management knew of his activities and that the DYA's explanations for the termination are pretextual.

The DYA argues that Goggin has failed utterly to demonstrate any relationship between the termination and Goggin's employee organization activity.

As noted by both parties, the analytical method for resolving charges of discrimination and retaliation was set out by the Board in Novato Unified School District (4/30/82) PERB Decision No. 210, adopted for SEERA in William Thomas Monsoor v. State of California (7/28/82) PERB Decision No. 228-S and for HEERA in California State University, Sacramento (4/30/82) PERB Decision No. 211-H. Under Novato and California State University, a party alleging discrimination within the meaning of section 3571 must make a prima facie showing that the employer's action against the employee was motivated by the employee's participation in protected conduct. Because direct proof of motivation is rarely possible, the Board concluded that unlawful motive could be established by circumstantial evidence and inferred from the record as a whole, citing Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].

Proof that the employer had actual or imputed knowledge of an employee's participation in protected activity is a key element in establishing unlawful motivation by circumstantial evidence. Novato, supra, PERB Decision No. 210; Moreland Elementary School District (7/27/82) PERB Decision No. 227. An employer cannot retaliate against an employee for engaging in protected conduct if the employer does not even know of the existence of that conduct.

Once it is shown that the employer knew of the protected conduct, the charging party then must produce evidence linking that knowledge to the harm which befell the employee. Among the factors which have provided that link are, "the timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards, . . . the employer's inconsistent or contradictory justification for its actions," Novato, supra, or the cursory nature of the investigation which preceded the discipline of the employee. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221. Respondent's knowledge of protected conduct together with some indicia of unlawful intent will establish a prima facie case.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to prove that its action would

have been the same despite the protected activity. If the employer then fails to show that it was motivated by "a legitimate operational purpose" and the charging party has met its overall burden of proof, a violation of subsection 3571 will be found. Baldwin Park, supra, PERB Decision No. 221.

2. Effect of Ruling on Summary Judgment

Charging Party urges that the administrative law judge determined that it established a prima facie case when the Respondent's Motion for Summary Judgment was overruled at the conclusion of Charging Party's case in chief during the hearing. Charging Party neglects to recognize that the basis for the ruling was carefully explained. At the time the motion was ruled upon, the majority of Charging Party's evidence consisted of testimony from witnesses, who as management or agents of the employer, participated in the steps resulting in Goggin's termination. As such, they were understood to be, and essentially were examined as adverse witnesses.

The ruling was the result of applying a different standard to weigh the evidence at that point than would apply after the Respondent had rested its case. For example, the testimony adverse to Goggin that was adduced the result of his having called and examined adverse witnesses from the DYA would not be considered at that time.[11] Nor would the credibility of the

[11]California Judges' Benchbook, Civil Trials, p. 313 states:

witnesses favorable to Goggin be judged at that time.[12] 11 evidence would be liberally construed and all inferences possible drawn in favor of Goggin's case.

The fact that a different test would be applied at the conclusion of the case with the possibility of a different result was understood by counsel.[13] (See Tr. p. 22, lines 1-1)

3. Failure of Proof

Goggin has failed to show a nexus between his termination and his union activity. The facts giving rise to his

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> In ruling on a motion for nonsuit, the trial court may not consider evidence unfavorable to the plaintiff that the defendant introduced as a result of the plaintiff having called and examined the defendant as an adverse party under Evid. C. section 776. See Miller v. Dussault (1972) 26 CA3d 311, 316, 103 CR 147. 150. (Emphasis added.)

[12]California Judges' Benchbook, Civil Trials, sec. 978, p. 314 states:

> Nor may the court weigh the evidence or judge the credibility of witnesses as it may do on a motion for new trial. It must give the evidence, whether erroneously admitted or not, the benefit of its full probative strength, as long as that evidence is relevant to the issues. Estate of Callahan (1967) 67 C2d 609, 613, 617, 63 CR 277, 279, 282.

[13]See also California Judges' Benchbook, Civil Trials, supra p. 315:

> The fact that a motion for nonsuit was previously denied does not prevent the court from directing a verdict for the defendant. Fuchs v. Southern Pac. Co. (1935) 5 CA2d 409, 412, 42 P2d 704, 706).

termination was his own neglect to follow instructions from Rios on completing the forms for an authorized leave, or otherwise communicate with Nelles School while he was engaged in paid employment elsewhere.

Goggin has failed to establish another vital element in his case, i.e., that his employee activity was a motivating factor in the decision to terminate him.

Goggin has not even made a prima facie showing that the DYA's termination of him was motivated by retaliatory intent. The best he has done is to show that the termination occurred after he had in fact engaged in such activities. However, the timing of the termination is not suggestive of retaliation. Goggin was not dismissed until August 1979. The union activity Goggin relied upon to infer discriminatory motive by Lopez occurred in 1977. In any event, Lopez only acted on a termination action originated by Calhoun.

Indeed, Goggin has shown none of the ordinary indicia of unlawful motivation. There is no significant indication of disparate treatment, no significant evidence that the DYA departed from its established procedures, no indication of inconsistent explanations for the dismissal, no significant evidence that the pre-disciplinary investigation was cursory. The record establishes instead that the DYA gave him ample opportunity to request an authorized leave and then terminated him only after he failed to do so. The effort the DYA made to

contact him and ascertain his intent was thorough and even-handed.

Procedurally, the burden of establishing an unlawful motivation by a preponderance of the evidence was that of Goggin. The evidence introduced by Goggin falls far short of meeting that burden. It is concluded that Goggin has failed to establish a prima facie case that his termination was unlawfully motivated[14] and the charge therefore should be dismissed.

For these reasons, the allegation that the DYA violated section 3519(a) by the termination of Goggin is hereby dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, unfair practice charge SF-CE-118-S filed by David H. Goggin against the State of California, Department of Youth Authority and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 9, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the

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[14]See Novato Unified School District, supra, PERB Decision No. 210; Monsoor v. State of California, supra, PERB Decision No. 228-S; California State University, Sacramento, supra, PERB Decision No. 211-H.

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 itself at the headquarters office in Sacramento before the close of. business (5:00 p.m.) on November 9, 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. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: October 20, 1983

WILLIAM P. SMITH
Administrative Law Judge'