

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ANTHONY J. CALCOTE,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
THE YOUTH AUTHORITY),

Respondent.

Case No. LA-CE-144-S

PERB Decision No. 535-S

November 4, 1985

Appearances; California Correctional Peace Officers Association
by Lawrence J. Friedman, Attorney, for Anthony J. Calcote;
Lester L. Jones, Graduate Legal Assistant, for State of
California (Department of the Youth Authority).

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public
Employment Relations Board (PERB or Board) on exceptions filed
by Anthony J. Calcote to the proposed decision, attached
hereto, of a PERB administrative law judge dismissing his
charges that the State of California (Department of the Youth
Authority) violated the State Employer-Employee Relations
Act.¹

The Board has considered the proposed decision in light of
the exceptions and the entire record in this matter, and

¹SEERA is codified at Government Code section 3512 et seq.

affirms the rulings, findings, and conclusions of the administrative law judge and adopts his proposed Order. Accordingly, the unfair practice charge in Case No. LA-CE-144-S is DISMISSED in its entirety.

Members Jaeger and Morgenstern joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



ANTHONY J. CALCOTE,)
)
 Charging Party,) Unfair Practice
) Case No. LA-CE-144-S
 v.)
) PROPOSED DECISION
 STATE OF CALIFORNIA (DEPARTMENT OF) (6/7/85)
 YOUTH AUTHORITY),)
)
 Respondent.)
 _____)

Appearances; Lawrence J. Friedman, Attorney, California Correctional Peace Officers Association, for Charging Party; Lester L. Jones, Department of Personnel Administration, Legal Division, for Respondent.

Before Gary M. Gallery, Administrative Law Judge.

STATEMENT OF CASE

In this case, after election as officer of a union, an employee's request for a shift change was denied, he was then transferred from one unit to another, and his later request for retransfer was denied.

PROCEDURAL HISTORY

On June 1, 1984, Anthony Calcote filed the instant unfair practice charge against the State of California, Department of Youth Authority. In essence, Mr. Calcote charged that he requested a shift change on February 26, 1984, he was informed that it would be granted. On March 13, 1984, he was elected vice president of the local CCPOA chapter, and was thereafter denied the shift change. On March 28, 1984, he was transferred

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

to another more stressful unit within the facility. He alleged that his activities with CCPOA are being held against him and alleged a violation of Government Code section 3519(a).¹ In response to a PERB agent's investigation the charge was amended on August 29, 1984. The amendment, filed by the California Correctional Peace Officers Association (CCPOA), on behalf of Mr. Calcote, alleges that the employer wrongfully transferred Calcote to the high stress Marshall Unit of the Southern California Reception Center and Clinic just two days after gaining knowledge that Calcote had been elected vice president of the local CCPOA chapter, and that the employer has wrongfully refused to transfer Calcote off the Marshall Unit pursuant to his request. The amendment alleges that the initial transfer and refusal to transfer him back are reprisals for protected activities under Government Code section 3519(a). A complaint, incorporating the charge and amendment was issued on September 20, 1984. On October 9,

¹Section 3519 provides that it is 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.

The State Employer-Employee Relations Act (SEERA or Act) is codified at Government Code section 3515 et seq. All references are to the Government Code unless otherwise noted.

1984, a motion for partial dismissal and an answer were filed by respondent.² The answer denied violation of the SEERA, admitted and denied facts and raised affirmative defenses that will be considered elsewhere in this proposed decision. An informal settlement conference was held on November 1, 1984, without success. The formal hearing was held on January 24 and 25, 1985. Posthearing briefs were filed and the matter submitted on April 29, 1985.

FINDINGS OF FACT

The State of California, Department of Youth Authority is the employer within the meaning of Government Code section 3513(i). Anthony Calcote is a youth counselor and an employee within the meaning of section 3573(c).

The Southern Reception Center and Clinic (SRCC) is a facility within the Department of Youth Authority and is located at Norwalk, California. As the name implies, it serves as a reception facility for youths who have been made wards of the Youth Authority. The facility provides diagnostic services for youths committed by a superior or juvenile court and also operates an intensive treatment program (ITP) called the Marshall program.

²The partial dismissal addressed allegations in the charge pertaining to Mr. Calcote's medical condition arising in 1983. At hearing, the motion was granted insofar as any finding of unlawful conduct on the part of respondent regarding such event.

On the diagnostic side, wards are initially given an orientation and pre-screening. After a week or two, they are then assigned to one of six live-in units. These units, designed to house 50 wards, are often over crowded, reaching as high as 67 wards. After a complete diagnostic study, taking three to six weeks, the wards are then presented to the Youthful Offenders Board for referral to other institutions, including, possibly, the Marshall program.

The Marshall program, in existence for about 8 years, is designed for 40 wards, and provides intensive treatment in a long-term residential setting for psychotic and suicidal youths.

Enrique Aguilar is the superintendent of the facility. The assistant superintendent is Ken Pack. Aside from the clinical staff, reporting to the assistant superintendent from the diagnostic side are the managers, more specifically called treatment team supervisors. Each treatment team supervisor is responsible for two units, called sister units.

James Richardson was at all times pertinent hereto, the treatment team supervisor for the Sutter and Drake Units. A senior youth counselor is in charge of each unit. Reporting to Richardson in February and March 1984 were two senior youth counselors, Gwen Jackson (Sutter Unit) and Thomas Aycock (Drake Unit). The senior youth counselors provide direction to youth counselors who are the on-line staff working with the wards.

There are two youth counselors on the morning shift, two on the evening shift and one youth counselor on the night shift.

The Marshall program also employs youth counselors, whose job description is the same as those for the diagnostic side.³ Because of the intensive nature of the program, there

³The job description describes typical tasks as:

Trains, counsels and supervises wards in their daily living and activity programs; develops and implements constructive programs for periods of time when wards are not in a school or vocational work program; provides a planned, scheduled, casework program of individual counseling for a case load of approximately ten (10) wards; assists in the diagnostic classifying of assigned wards and developing appropriate treatment strategies; conducts small group counseling and activity programs with assigned intensive case load; participates in large group counseling session conducted during work shift; communicates and coordinates with other institutional staff about observations, impressions and work with assigned wards: prepares written progress evaluations, treatment summaries and other reports required by the institution and the Youth Authority Board; implements part of treatment plans developed by the treatment team to which assigned; presents diagnostic and treatment information about assigned cases at scheduled case staffings; may present assigned cases to the Youth Authority Board; assists in planning and carrying out programs of recreation, intramural sports, and other activities; trains wards in cleanliness, personal hygiene grooming; participates in in-service training sessions; orders materials and supplies necessary for the operation of the unit; maintains custody and necessary discipline; and prepares reports.

are five staff members on each of the morning and evening shifts and one at night. The higher ratio of staff to wards at Marshall is because they provide more treatment, conduct large and small group counseling, family counseling, bio-feedback and other treatment for the wards.

Anthony Calcote is a youth counselor at the SRCC. He has been with the Youth Authority for over seven years. Prior to his transfer to SRCC, as a youth counselor in 1980, Calcote was a group supervisor at the Nellis Center. Even after his transfer to SRCC, Calcote volunteered coaching at Nellis during his off-work time. Calcote was on industrial disability leave in July, August and September 1983.⁴

In February 1984 Calcote was working the relief shift between the Sutter and Drake Units. This position covers the days off of other counselors. Calcote worked three days a week at the Sutter Unit and two days a week at the Drake Unit. Calcote's scheduled days off were Thursday and Friday.

Calcote's relief position was one of six regular full-time positions at the Sutter Unit. Another position was held by a Mr. Radillo, who worked the 5:45 a.m. to 1:45 p.m. shift. Radillo's days off were Wednesday and Thursday.

A memorandum of understanding with the CCPOA requires the

⁴In May 1984 Calcote obtained a Worker's Compensation Appeals Board Award for cardiovascular asttointestinal and "psyche" injuries leading to high blood pressure.

facility to give employees 14 days notice of any assignment change. To meet this requirement, and to publicize the shift staffing for a month in advance at Sutter and Drake, the senior youth counselors in the sister units work up a schedule and with Richardson's concurrence, post the schedule by the fifteenth of each month. Unforeseen circumstances will require a revision to the schedule that is finalized by the end of the month. For February 1984 Radillo and Calcote were shown on the shift assignments set forth above.⁵

Radillo was sick and off work on February 18 and 19, he returned to work on February 20 and 21, and then was off on his scheduled off days February 22 and 23. Sometime during this period Radillo notified Richardson that he would be off on extended illness. He was scheduled to be off on vacation for the balance of the month. It was not known when he would return.

Calcote first approached Gwen Jackson about moving into the position held by Radillo. He mentioned he wanted to spend evenings with his son. She told him she had no problem with the change. Jackson testified that Richardson also indicated that there was no problem. As treatment team supervisor, Richardson had the final say on shift assignments. Aguilar was not involved in any shift assignments.

⁵All date references are to calendar year 1984 unless otherwise noted.

On February 26 Calcote submitted a written request to Richardson for placement into Radillo's vacant position at Sutter. He wrote that he felt his presence would bring more stability, harmony, and security to the Sutter team. He indicated his ability to change immediately, and requested a response in writing.

Richardson responded in writing on February 27. He stated:

Due to the sudden departure of Mr. Radillo, we have on a temporary basis moved youth counselor Mendoza into his shift for the month of March. Your interest in the shift will be considered as we evaluate both unit needs in preparation for filling Mr. Radillo's position on a more permanent basis.

Mendoza was put into the position, said Jackson, because he had days off the same as the vacancy and there would be less impact on other personnel. If Calcote were placed into the position, it would have affected another person in either unit as the Calcote position was the relief position between the sister units. Also, if Calcote had been put into the position, then a majority of the remaining positions at Sutter would have been black.⁶ There would then be only one white male at the Sutter Unit. Mendoza did not need a 14-day notice as he was already on the morning shift. Thus, his placement affected no other employees and gave them an additional Hispanic.

⁶The ethnic population is about 35 percent black and 33 percent Hispanic.

Aycock testified that Mendoza's classification was that of a limited term employee. He did not have permanent full-time status and was more flexible. Because Mendoza's work schedule coincided with Radillo's it was easier to place Mendoza into that slot.⁷ Also, they were attempting to meet an ethnic standard by adding a Chicano to the unit. The schedule was made up the last week of February.

Richardson also testified that Mendoza was placed into the Radillo position in March because his work schedule was the same. While evidencing uncertainty about where Mendoza had been in February, Richardson testified that Mendoza, who had previously been an intermittent employee, was not at the institution for several months prior to February, but returned that month as a limited term employee.⁸ Richardson said Mendoza had worked for him before and as a limited term employee would provide more stability to the position and was therefore a good choice to fill in for the Radillo vacancy.

Aycock testified that Mendoza had originally been scheduled (prepared in mid-February) for the limited term slot on the

⁷Mendoza's classification is within the unit covered by the memorandum of understanding and would be entitled to 14 days notice of schedule change.

⁸Around this time the facility commenced a classification of limited term employees. Whereas intermittent employees and part-time employees are limited to under 40 hours without a regular work schedule and on an as needed basis, the limited term employee may be hired on a regular schedule for up to six months.

March schedule. Documentation submitted by the department for that month shows Potts in the S31 (temporary) slot having the same shift and days off as the Radillo slot.

The Election

Calcote testified that on March 13 he was elected vice president of the local chapter of the CCPOA. There is no evidence of any prior employee organizational activity by Calcote.

Hector Rodriguez, a youth counselor at Marshall, had served for some time as both president of the local chapter and as chief job steward. In March 1984, Rodriguez secured approval of a transfer to the Washington Ridge facility in Northern California. Rodriguez testified that the election for officers was more a confirmation by the chapter board of directors on nominations put forth by the president. As to the timing, and thus notice to management at the facility of the new officers, his testimony differs from that of Calcote, Robert Collier and Ruben Gilbert. Rodriguez testified that the election was held on March 8, and that the next day he went to Aguilar's office and told him the results of that election. He told Aguilar that Calcote was going to be vice president, Gilbert was to be president and that Collier was to be job steward. March 9 was his last day at the facility, he said, and on that day all his duties passed on to others.

Calcote and Gilbert testified that the election was held on March 13. Collier testified that it was on March 14.

Aguilar said that Rodriquez did tell him that Collier would be taking Rodriquez¹ place as job steward when he came in to say goodbye around March 9, but denied that Calcote's name was mentioned in that conversation. The first time he knew of Calcote's position with CCPOA was at the March 26 meeting which is described later.

Further confusion on the issue is presented by CCPOA's notice regarding the election. By memo on the chapter letterhead, dated March 16, 1984, Gilbert notified CCPOA members that he had taken over as president, Calcote had been confirmed as vice president and Collier would handle employee grievances. Despite the date typed, Gilbert testified that the memo had been typed on March 14 and that he delivered it to the superintendent's office on March 14. The March 16 date was an error, he said. The superintendent's secretary placed the document in her in-coming mail when he delivered it to her, he said.

Emma Moretz, secretary to the superintendent, testified that the March 16 letter from Gilbert was date stamped on April 4, 1984, in the lower right hand corner, and that her practice was to date stamp any document coming into the superintendent's office on the day she received it. Thus, her records indicate that the superintendent's office received the document on April 4, 1984, (indeed the copy provided by charging party's counsel had the date stamp in that place.)

Finally, by memo dated March 15, 1984, Arthur Nettles, the Department of Youth Authority's Equal Employment Opportunities Division Manager, wrote to Collier regarding Collier's status as EEO Counselor. Nettles' office is in Sacramento. Because Nettles had learned on March 14, 1984, that Collier had become job steward for CCPOA, Nettles advised Collier that he could not hold both positions. The document indicated a copy was to go to Aguilar.

The inconsistency of charging party's evidence on the precise date of the election undermines the credibility of both Rodriquez and Calcote. Rodriquez on the one hand testified that that election took place on March 8. On March 9, he said he told Aguilar of Calcote's election. Calcote, however, said that he was elected on March 13. On March 14 Calcote said he told Jackson of his election because he thought she would be proud of him. He thought she would be surprised as he "wasn't running for anything." Had Calcote been in the running on the 8th, and elected then, why would he wait until March 14, five days later, to relate his election to Jackson?

Rodriquez, who was brought in from his assignment in Northern California, appeared later at the hearing and thus did not hear the testimony of his fellow employees. He knew the issue in this case, however, and related on the stand, that first he told Aguilar of Calcote's election. This is questionable since Calcote was only to serve as vice president

while others, Gilbert and Collier, were to serve in more direct functioning roles as president and job steward. Thus, I do not credit Rodriquez over Aguilar regarding what was said on March 9. Therefore it is found that Rodriquez did tell Aguilar that Collier was going to be job steward, but made no mention of Calcote's position.

As to the March 16 letter, I credit Moretz over Gilbert. In the face of a typed letter dated March 16 and date stamped as received April 4 in a manner consistent with business practice and contemporaneous with the event as to when received, charging party would have a finding drawn that the letter was delivered on March 14. This contention is more in keeping with a contrived design to place knowledge on the part of management of an event that coincides with the March 14 scheduling regarding the April schedule. Because of this inherent inconsistency in the testimonial and documentary evidence, I find that charging party has failed to establish knowledge by a preponderance of the evidence as it was obligated to do. PERB Regulation section 32178.

Insofar as the Nettles' letter is concerned, the acknowledgement on March 15 by a Sacramento based employee of the department that Collier was elected to serve as job steward is consistent with Aguilar's acknowledgement of receiving that information on March 9 from Rodriquez. It serves no basis for

finding that Calcote's election was likewise known to Aguilar, Richardson or Aycock.

Calcote testified that on the morning of March 14 Jackson told him he had gotten the position. Later he testified that those were not her exact words but he did have that impression. He told her about being elected to the vice presidency of the CCPOA. Calcote thought that she would be surprised as "he really wasn't running for anything". They are friends, he said, and he thought she would be "proud of him". At 11:00, he said, Jackson said she was meeting with Richardson and Aycock. That afternoon Aycock told him that he did not get the position he had requested, but gave no reason for the denial.

Calcote further testified that Mr. Martinez, another youth counselor, told him that same day that Richardson stopped him on the way in and told him that he, in fact, was going to get the shift. Martinez had told Calcote previously that he was going to get the position. (Martinez was working the 2 p.m. - 10 p.m. shift at Drake in March.)

Jackson testified that she thought she learned of Calcote's election as vice president sometime in February. First, Collier told her he was going to take over as job steward and later Calcote told her that he was going to be vice president. However, she said, the fact of his election was not known while she was involved in scheduling. Nor was the fact that the

CCPOA elections had taken place discussed at the meetings with Aycock and Richardson when scheduling was being done. She was not cross-examined on the scheduling meetings.

While Jackson was wrong about learning of Calcote's election as early as February, I found her to be credible in her testimony generally. Obviously a friend of Calcote's, and supportive of his role as a youth counselor, her denial of any discussions of Calcote's election at the scheduling meeting appeared truthful. It is found that Jackson did not carry the fact of Calcote's election into the meeting on March 14 regarding scheduling. Both Richardson and Aycock testified that the meeting did not involve a discussion of CCPOA elections.

Calcote was left on the same relief schedule for April that he had occupied for February and March. This time, however, Mendoza was returned to the S31 (temporary) slot and Martinez, who had been at the Drake Unit, was moved into the Radillo slot. Thus the Sutter Unit had two Hispanic employees, working the same shift and with the same days off.

The next day, (after the election) Calcote testified, Jackson told him she did not know why he did not get the position.⁹ He spoke to Richardson and was told that Richardson wanted a Chicano in the position.

⁹The March schedule shows that Calcote was off on that day.

On March 21 Calcote wrote to Richardson asking for an answer in writing as to why he did not get the position. This followed a meeting with Assistant Superintendent Pack at Calcote's request. Calcote thought the reasons were other than having Chicanos on the unit. Pack called Richardson in and asked why the request was not granted. Richardson told them both that he wanted a Chicano in the position and Pack said that was the way it was going to be.

By way of showing disparate treatment, Calcote testified that John Grijalva was given a shift change because his wife was having a baby. Calcote told Jackson that he wanted the shift change to spend evenings with his son as he was a single parent, but he did not convey that fact to Richardson in his written February 26 request for shift change. Calcote did not know any other employees who were single parents.

Aycock testified that at a March 14 meeting it was decided to place Martinez in the Radillo slot because he was a full-time budgeted employee. Mendoza was placed back into the S31 slot. The reason, said Aycock, was Mendoza was a limited term employee and as such did not lend the desired permanency. As a limited term employee, he could be terminated if the head count of wards dropped. By placing Mendoza in the S31 slot they maintained the flexibility of his classification and Martinez then gave them the desired permanency.

Aycock was not aware of the election outcome and there was no discussion of CCPOA. The final decision was made to cause the least amount of impact on employees. In fact, Martinez did have a shift change as he had worked the 2:00 - 10:00 p.m. shift at Drake the month of March (and February).

As a result of the new schedule, the permanent staff at Sutter consisted of three black males, a black female, a Chicano, and a white male. They also had Mendoza at the Sutter Unit in the limited term position. At the Drake unit they had four blacks, a white male and a white female. Also at Drake a Spanish case worker, who served as translator, worked from an office at the unit. She was visibly present and met with the wards, said Aycock, and did contribute to the ethnic needs.

In May Mendoza was assigned to the Drake Unit.

The schedule for May was prepared within the first two weeks of April and was posted by the middle of that month. Martinez was scheduled for the S2 (Radillo) slot. Aycock said they found out in the last week of March that Martinez was to be promoted and was to go to the YTS effective May 1. Jackson was promoted to treatment team supervisor and Grijalva had requested a change in classification from regular to intermittent employee. Richardson said he approached the administration because of the large number of personnel changes that occurred. King, a black limited term employee, was placed

in the Radillo slot. Calcote was not considered because effective April 16 he was transferred to the Marshall Unit. King filled the S2 slot for one month.

In June Fernando Juarez came to the Sutter Unit and filled the slot held by King. Stiggers, a black female, came from the Pico Unit and helped fill the ethnic needs. Juarez had been selected in early April or May but it took some time before they could get him to the Sutter Unit. Juarez was desired because of his good history in working with gang problems as he had experience as the institutional game coordinator and had extensive knowledge of the ward population.

The Cole Transfer

Tim Cole is a youth counselor who for the last five years worked at the Marshall program. For two years prior to that he was at the Ventura facility, where for six months he worked in the receiving side and the remainder in the intensive treatment program. Cole, who is white, was transferred to the Sutter Unit in April 1984. Cole said that about a month before he was transferred, his caseload was reduced and he suspected something was happening. Aguilar told him that he was to be transferred to the diagnostic side. Cole filed a grievance on the transfer as he disagreed with the explanation. The reasons given were that it would enhance his education at the facility, and that it was consistent with Aguilar's goal to move staff members from the Marshall side to the diagnostic side. Cole

believed that his six months experience in the receiving unit at Ventura was sufficient education. There were other counselors at the Marshall site with more seniority, said Cole, including Delbert Jackson, Larry Floris and Bill Lewis. Cole also testified that two other people were transferred from the Marshall Unit to the diagnostic side, and he was under the impression that the same number of people transferred to the Marshall Unit from the diagnostic unit. Cole said he was the only white counselor at Marshall when he was transferred and there were other white counselors at Sutter, the unit to which he transferred.

Aguilar said the decision to transfer Cole to the diagnostic side was made in the first week of March before he had any knowledge of Calcote's election. Cole had been at the Marshall program for over three years and it was in keeping with Aguilar's goal that the transfer was made. Jackson and Floris "will be transferred," said Aguilar, and "seniority has no input on the policy." All of the counselors will be rotated out of the Marshall program. Cole coming to Sutter, said Aguilar, would lend ethnic balance to that program, although he did not know the ethnic balance at Sutter at the time of the transfer. Richardson did not know that Cole was coming to the Sutter Unit until the middle of March. Ed Fox, senior youth counselor at Marshall, said that the three individuals who were at the top

of the program, recommended Cole's transfer. Those three were Owens, Atesalp and Fox.

Calcote Transfer

Calcote said he learned from Tim Cole that he was going to be transferred to Marshall. The next day Jackson called him up to Richardson's office and they gave him a memo indicating his transfer to Marshall. The memo, dated March 28, stated his transfer to Marshall effective April 16. Richardson noted in the memo that the assignment would provide Calcote with an opportunity to use his treatment and recreational skills in a long-term setting.

Calcote was unhappy with the reassignment. He was concerned that it would be more stressful as he was unsure of his ability to work in an unfamiliar setting. He felt that he was being set up by the administration to fail because of the type of wards and the duties the job entails.

Aguilar testified that the decision to assign Calcote to Marshall was made in the week before March 26. (His basis of recall was that he was able to tell Collier that Collier would not be transferred to Marshall.) Aguilar testified that the decision to transfer Calcote to Marshall was that, of the names presented to him, the only one that he could recall, Rudy Hernandez had already been at Marshall and did not fill the needs of the program. The Marshall program had been looking for someone who could program and organize wards; so when Calcote's name

appeared, Aguilar knew he was a person who was involved in programming and handling athletic activities. Calcote was an athlete and knew about officiating at games. These were some of the main factors in the decision. The date set for his transfer was April 16 because management had to give two weeks notice of the transfer and could not do that by the end of March.

Calcote's blood pressure was not taken into account in the decision to transfer Calcote, said Aguilar, because he did not know of the fact.

Calcote's transfer was consistent with the administration's policy of transfer, said Aguilar. That policy is set forth in a superintendent's memo dated October 12, 1982. Criteria for assignment or reassignment considerations involve program needs for staff experiments and skill; comparable employee skills and experimental levels; ethnic and gender balance; staff development/exposure and training; rotation to maximize staff growth; to prevent "burn-out"; budgetary fluctuations; and staff wishes for assignments. Factors relative to Calcote's transfer, said Aguilar, were program needs, comparable employees skills, ethnic gender balance (because Calcote came from a unit where there was a high number of black employees) and staff development. Calcote was qualified to take the assignment and fill in behind Cole.

Aguilar testified that since Cole was transferred to

Sutter, the treatment team supervisor there was involved in discussions and that is how Calcote's name came up.

Richardson, however, testified that he did not know that Cole was coming to the diagnostic side, let alone the Sutter Unit. He was not involved in the discussion to transfer Cole to the diagnostic side. He had been requested by Aguilar to provide names of youth counselors on the diagnostic side who had expressed interest or had skills that might be useful to the Marshall side.

Richardson said he gave the superintendent the names of Calcote, Green and Sikes. He had been told that Marshall was contemplating some kind of expansion of recreation and Calcote would be good for that. At the time he did not have knowledge of Calcote's involvement in CCPOA. Richardson said he was later informed that he was to write to Calcote regarding the transfer.

Robert Collier

The memorandum of understanding provides that where possible, the chief job steward may have the 6:00 to 2:00 shift, with Saturdays and Sundays off. This is to allow him/her to be available to constituents and the administration. Rodriguez was given this shift at Marshall. At the time of his election, Collier was working the 6:00 to 2:00 shift with Mondays and Tuesdays off.

Collier testified that the day after his election as job

steward, Ed Fox, the senior youth counselor at Marshall, stated "I hear you're coming to Marshall?"

Fox admitted making the inquiry to Collier but said he had no knowledge of an actual transfer. Rather, he understood Collier was going to carry on Rodriguez' responsibilities and it was just idle talk.

Apparently, Collier had requested the 6:00 to 2:00 shift with Saturdays and Sundays off. But he made it clear that if having that shift meant going to Marshall he would then decline the shift.

At a meeting of March 26 regarding intermittent employees, the matter of Collier's transfer came up. Aguilar assured Collier that he would not be transferred to Marshall as the decision had already been made to transfer Calcote to the Marshall program. The meeting was to discuss intermittent employees and, among others, Calcote was present. Collier testified that he introduced Calcote as the vice-president.

Collier wrote to Aguilar the next day (March 27) confirming that he would not be transferred to the Marshall program. He also stated that Aguilar had stipulated that Collier's request for the 6:00 to 2:00 shift with weekends off would be accepted and not be used as a reason for reassignment.

Aguilar responded on March 30 confirming that he had told Collier that he would not be transferred to Marshall. Aguilar stated that they had already made the decision to transfer

Calcote and thus he was in a position to tell Collier that he would not be transferred. Aguilar took exception, however, to any suggestion that he had said Collier could have the 6:00 to 2:00 shift with weekends off. He suggested that Collier submit a written request to Richardson.

In April 1984 Collier was given the 6:00 to 2:00 shift with Saturday and Sunday off. While Collier denied that the accommodation affected other regular employees, he did admit that it affected intermittent staff. Richardson testified that he was able to create the exception to the schedule that otherwise favored evening shift employees having either Saturday or Sunday nights off. There had been no schedule previously where the a.m. shift had both Saturday and Sunday off.

Calcote's Request for Return to Sutter

On April 26, on CCPOA letterhead, Calcote requested assignment to a then vacant position at the Sutter Unit because of Martinez¹ promotion to senior youth counselor effective May 2. Two reasons prompted his request; it had been established that his high blood pressure was job related and that he had been advised by doctors to avoid excess stress. It was a known fact, he stated, that the ITP was more stressful than the diagnostic side. Secondly, Calcote noted that the Sutter position would alleviate problems he had as a single parent.

On May 3 Aguilar denied the request for retransfer. There was no vacancy at Sutter, stated Aguilar, because Martinez' position was filled by Fernando Juarez. He discounted Calcote's contention that Marshall was more stressful on the ground that Calcote had not been there long enough to make the generalization. He hoped Calcote would give the Marshall job a chance and that he approach the duties there with a positive attitude. Aguilar further wrote, "You may be surprised that your attitude has more to do with your personal problems than the unit in which you are presently working."

The denial, said Aguilar, was based upon the ethnic balance they were seeking to maintain at the Sutter Unit. Martinez, he said, was the only Chicano at the Drake Unit. Martinez' position was filled by Juarez and his former position had been filled by Magill, who had just returned from maternity leave. Calcote's reference to high blood pressure was not part of the decision, said Aguilar, and the fact that he was a single parent was not unusual, although personal preferences are considered for shift changes. Aguilar was unaware that, at the time of Calcote's request for return to Sutter, he had already requested to get the 6:00 to 2:00 shift at Marshall.¹⁰

¹⁰Around March 28 Calcote had written to Owens and Fox requesting the 6:00 to 2:00 shift at Marshall. After a conversation on April 13, where he explained the rotational system at Marshall, Fox advised Calcote on April 16 that effective May 2, Calcote would be assigned to the relief youth counselor position at Marshall. This resulted in Calcote's hours being 6:00 to 2:00 p.m.

Charging party stipulated that with the exception of the refusal to return Calcote to Sutter after his request there were no complaints about his treatment at Marshall.

In November Fox surveyed the entire Marshall team for possible transfer to the diagnostic side. Calcote responded that he did not want to transfer to the diagnostic side.

Paperwork at Marshall Versus Sutter

There are a variety of opinions on the amount of paperwork required of youth counselors at the two sides. Calcote testified that Marshall requires more in the form of board reports, recommendations to the board for referral to parole, contracts on the wards for their treatment needs and documentation on their daily activities for evaluation.

The number of wards assigned to counselors is less on the Marshall side, and there are fewer wards on the Marshall side. Aguilar conceded that youth counselors write more reports at the Marshall program than on the diagnostic side and the reports are more detailed. Aguilar said that staff on both sides find it stressful to write reports.

Stress at Marshall

It is also apparent that the Marshall program is stressful. In addition to the inner staff conflict that has occurred between the clinical and custodial staff at Marshall, there is the unpredictable and in some cases suicidal nature of some of the wards. Both Calcote and Cole said it was stressful

and Collier did not want to transfer to Marshall because of the stressful situation, he said, "the wards being more violent prone". Yet some of these same wards come to the Marshall Unit from the diagnostic side.

The facility as a whole seeks to obtain funding for training, including counselors¹ training to deal with stress. In the past, the Marshall Unit has had additional funding for training because of its status as a treatment program. Stress reduction is one component of the comprehensive training program. The element of danger is present on either side, said Aguilar. Aguilar did take issue, however, with Calcote's memo in April, stating that it was a known fact that the Marshall program was more stressful than the diagnostic side. Fox acknowledged conflict because there were more people (meaning the clinical as well as custodial staff) making more decisions (because of the treatment provided) on fewer wards.

In August 1984 the Marshall program administrator issued an assignment document to the Marshall program staff that outlined strategies for the 1984-85 fiscal year. Stress reduction permeates the sundry assignments given to staff. Working in teams with timelines, staff were to make recommendations and proposals for training programs on topics such as; staff understanding and skill in dealing with wards with psychotic, suicidal, criminal, and compulsive sex offender inclinations; crisis intervention for staff, control of overtime, preventing

"greed and burn-out", and stress reduction program to reduce stress related IDL's (industrial disability leave) by 50 percent.

Union Representation

In October of 1982, after discussions with his managers on the issue, Aguilar, as superintendent, issued a memo on the treatment of union representatives. The memo admonished managers that there would be no discrimination against SRCC employees who participated in union activities. Participation in union activities was to have no bearing on shift assignments, overtime, lead person designation, assigned days off, etc. The memo provided that there should also be no preferential treatment for union representatives.

ISSUES

The issues in this case are whether the employer discriminated against Anthony Calcote for being elected vice president of the local CCPOA chapter by: (1) denying his request for the Radillo position, (2) transferring Calcote to the Marshall Unit, and/or (3) denying him his request for return to the Sutter Unit.

CONCLUSIONS OF LAW

Section 3519(a) prohibits discriminatory action against an employee for engaging in conduct protected by the SEERA, including,

. . . 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. (Section 3515.)

The standard for determining if discrimination has occurred is that set forth in Novato Unified School District (1982) PERB Decision No. 210. See State of California (1982) PERB Decision No. 228-S. In the absence of direct evidence of proscribed motivation, a charging party who alleges a violation of section 3519(a) has the burden of making a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to take adverse personal action. Such a nexus between protected activity and the personal action taken may be demonstrated by circumstantially-raised implication. Novato, supra, State of California, supra. Once this nexus is demonstrated, the employer then has the burden of demonstrating that it would have taken the same action regardless of the employee's participation in protected activity.

This test is consistent with precedent in California and under the National Labor Relation Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 20 Cal.3d 721, 729-730; Wright Line, Inc. (1980) 251 NLRB 150 (105 LRRM 1169) enf., in

part, (1st Cir. 1981) 662 F.2d 899 (108 LRRM 2513).¹¹

As a threshold to any inference of discriminatory motivation, the charging party must prove that the employer had actual or imputed knowledge of the employees' protected activity. Novato Unified School District, supra; Moreland Elementary School District (1982) PERB Decision No. 227.

Knowledge by the employer of protected activities, plus other factors, may support the inference of unlawful motive. Said PERB, in Novato.

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 when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive.

In this case, charging party was elected vice president of the local representative of employees. Holding office in an employee organization that represents the employees within the meaning of the Act clearly is a protected activity.

¹¹The construction of similar or identical provisions of the NLRB, as amended, 29 USC 151 et seq., may be used to guide interpretation of the SEERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, pp. 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3519(a) with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

The Shift Denial

On February 28 and around March 14, the treatment team supervisor, after consultation with both Jackson and Aycock, determined to place others on the shift Calcote first sought on February 24. By his own testimony, Calcote was not involved in any protected activities prior to his election as vice president. He testified that he told Jackson on March 14 that he had been elected, and that he thought she would be surprised, as he had not been running for anything. Clearly, the decision to place Mendoza into the position held by Radillo was done at a time antedating Calcote's election as an officer of CCPOA. As of February 28, again at least two weeks before the election, Richardson had determined, for ease of facilitating a reassignment, and for ethnic balance, to place Mendoza into the Radillo position. Under these circumstances, the placement of Mendoza into Radillo's position could not have been related to Calcote's later election as officer. Accordingly, the charge, to the extent it suggests the denial of this shift assignment to Calcote, must be dismissed.

As to the March 14 decision to deny Calcote the slot held by Radillo, it is likewise concluded that Calcote has failed to establish that Richardson, the decision maker, had knowledge of Calcote's election as an officer of CCPOA. Richardson and Aycock both denied that CCPOA was discussed at the meeting during which the April schedule was ascertained. Jackson's

testimony was most favorable to Calcote and yet she was uncertain as to when she learned of Calcote's election as an officer. Jackson too, however, denied that CCPOA was discussed at the scheduling meetings.

Charging party's post-hearing brief attempts to establish knowledge on the part of management by incidents involving Aguilar, only one of which antedated the March 14 scheduling meeting of Richardson, Jackson and Aycok. As the evidence clearly establishes, Aguilar was not involved in shift change assignments, rather Richardson had the final say on such matters. Even if one was to assume that Aguilar learned of Calcote's election on March 9 (contrary to the discussions below) there is nothing in the record to suggest that such knowledge was imparted from Aguilar to Richardson between March 9 and 14.

The only evidence linking knowledge of Calcote's election to the vice president position is Calcote's own testimony that he told Jackson on March 14 of that fact. Given the inherent inconsistency of Calcote's testimony with that of his co-officers, Collier and with Rodriguez, and the inherent improbability of Jackson's confirmation that he had the Radillo slot at a time before she went to the monthly scheduling meeting (she was not cross examined on the scheduling meetings), I conclude that Calcote has failed to meet his burden of proving knowledge by a preponderance of the

evidence. CCPOA asserts that knowledge can be gleaned from the same facts upon which unlawful motivation is established. Yet, the record is barren of any acts by the employer that suggest unlawful motive other than those complained of by Calcote. Mendoza was not placed into Radillo's slot because of anti-union animus, Cole was not transferred to Sutter based upon union animus. Rodriguez, and subsequently Collier, were both given unique work schedules to accommodate their union status. At a time long before this charge arose, the superintendent issued a memo squarely placing union activities beyond the pale of consideration in employee relations. The record is simply barren of any union animus by the employer. It is concluded that the March 14 denial and placement of Martinez into the Radillo slot had no bearing on Calcote's election to the vice presidency of CCPOA. At this point, the conclusion is based upon the failure to establish knowledge on the part of Richardson of Calcote's election. The charge, insofar as it complains of the denial of Calcote's request for a transfer to the Radillo slot, must be dismissed.

Even if one was to assume that Jackson had knowledge of Calcote's election as vice president, and thus, by inference Richardson knew of the fact, application of the balance of the Novato test fails to raise an inference of unlawful motivation. As to timing, it is clear that the decision to give the Radillo slot to Martinez and not to Calcote was done

the same day as the announcement of the purported election results. Yet the timing in this case was not beyond coincidence. The fact of the matter is that the next month's scheduling was always done near the middle of the month. Moreover, timing only is not sufficient to infer unlawful motive.

Charging party cites that the department allowed John Grijalva a shift change to accommodate his desire to be with his wife and newborn child. Aside from the difference of being a single parent versus one's spouse having a baby, it is certain from this record that while Calcote told Jackson about wanting to be with his son in the evenings, he did not convey that fact (or that he was a single parent) to Richardson. Calcote's official request for the shift change, written on February 26, made no mention of his personal needs, but rather stressed benefit to the unit by his presence. In addition, Calcote knew of no other single parents, and could site no instance where another single parent was given a shift change on the basis of such personal circumstances. There is no showing of disparate treatment by this scant testimony.

Departure from established procedures and standards.

Charging party argues that Richardson looked at the first criteria of the department's policy on transfers and yet failed to establish that Martinez possessed skills and experience more attune to the program needs than those possessed by Calcote.

Yet Richardson, corroborated by Aycock and Jackson, testified that the selection of Martinez was primarily on the basis of ethnic balance. There was no contention that Martinez had inferior or superior experience. In addition to failing to grasp the obvious, that is that ethnic balance was the primary factor, the charging party would shift the burden, at this initial point, and require the employer to demonstrate superior experience over Calcote. That requirement is premature at this juncture. If anything, Calcote should have shown that he had superior qualifications than Martinez. Neither Calcote nor CCPOA made any showing of the relative abilities of Martinez and Calcote.

Finally, CCPOA finds inconsistent justification for Calcote's shift denial by relating Aycock's failure to respond to Calcote about why he did not get the shift request and Richardson's position of desired ethnic balance. CCPOA did not cross examine Aycock on this point. In any event, silence on the one hand (by Aycock) and expressed desire for ethnic balance (by Richardson) does not constitute inconsistency. For whatever reason Aycock declined to give an explanation of why Calcote did not get the position, that lack of response is not inconsistent with Richardson's position, asserted by Calcote's own testimony both to him directly and then again later in the presence of Assistant Superintendent Pack. Richardson was consistent on the only response that was given

by the department.

Thus, an inference of unlawful motive is not substantiated by the facts in this case. Assuming, for purposes of argument, that the timing of the decision and any other factor would suggest an inference of unlawful motive, the burden shifts to the employer to show that it would have acted the way it did in an event.

The employer's case is that Mendoza aided the ethnic balance of the unit. While a limited term employee, he did bring to the unit a Chicano presence that was conspicuously absent. Placing Calcote in the position held by Radillo would not only have perpetuated a predominance of blacks but as credibly testified by Richardson, Aycock and Jackson, would have involved shifting others in either or both units because of the relief position filled by Calcote. Mendoza had been slated for a slot in the temporary category that exactly coincided with Radillo's. Mendoza, a limited term employee, unlike either Martinez or Calcote, was subject to employment on population in the unit and subject to reduction if the population fell. Martinez, another Chicano with regular status, whose employment was not subject to the population head count gave more permanency to the unit in the slot held by Radillo. While Richardson was left with two Chicanos on the same shift and with the same days off, it is clear that at least the unit had a better ethnic balance than without either being placed into the unit. As the record reflects, Martinez

was slated to stay in the slot and Mendoza was assigned to the Drake Unit for May in the S31 slot.

Accordingly, I find that even if an inference of an unlawful motive was established, Calcote's denial of the shift change for the month of April would have been made, despite his election as vice president of CCPOA. Thus, the facts of this case require dismissal of this allegation.

CCPOA attacks the department's policies on transfer considerations and applies these considerations to both the request for shift change denial and the transfer to Marshall. There is no evidence, however, to justify analysis of the policy of shift changes. Thus, as to Calcote's shift change request and the denial, CCPOA's arguments are not relevant. Thus, the relative skills of Calcote and Martinez are not in issue and need not be resolved.

As to the application of the policy as to Calcote's transfer to Marshall, CCPOA's arguments go beyond the scope of the evidence. Aside from the fact that elsewhere in its brief CCPOA eliminates the transfer to Marshall as an issue in this case, the testimony of Aguilar was limited to the needs of the Marshall program, and that he was aware of the desire to enhance the recreational aspects at Marshall. Calcote's prior outside activities suited him ideally for the assignment. Other candidates were not selected because at least one had been at Marshall before. The duties of the youth counselor

clearly embraced recreational activities. Calcote admitted that his recreational duties were a part of his responsibilities and consistent with the job duties at Sutter. For some reason, not explained on the record, he did not agree that the same job description applied to the Marshall side.

The Transfer to Marshall

The decision to transfer Cole to the diagnostic side was made in early March. There is nothing in the record to suggest that his transfer was related in any way to activities of CCPOA. Cole was not a union participant, and the transfer was in keeping with the department's rotational plan involving employees having been at Marshall for more than three years. That others on the Marshall program may have had more time in service on that program than Cole raises no inferences as there is no connection between Cole and CCPOA.

The decision to transfer Calcote to Marshall was, according to Aguilar, made a week before March 28. That the decision was made before March 28 is corroborated by testimony and documentary evidence. Calcote himself testified that Cole told him the day before Richardson called him into the office that he, Calcote, would be transferred to Marshall. According to the documentary evidence, notice to Calcote was given on March 28. Aguilar testified, with corroboration by a letter he wrote on March 30 to Collier, that they had made the determination to transfer Calcote to Marshall prior to the

meeting on March 26, and for that reason Aguilar was able to inform Collier that he would not be transferred to Marshall.

Aguilar testified that he drew an assumption from the meeting of March 26 that Calcote was an officer with CCPOA. He denied that before that date he had knowledge of Calcote's election.

The CCPOA argues the employer's knowledge is predicated upon Rodriguez telling Aguilar of Calcote's election on March 9, that Gilbert delivered the letter announcing the election of officers on March 14, and of the inference that must be drawn from the Nettles letter of March 16.

CCPOA urges credibility in favor of Rodriguez over Aguilar because of his "superior" recollection over Aguilar. Because Rodriguez stated that he told Aguilar on March 9 that Calcote was elected vice president, and that Aguilar expressed surprise that Calcote was elected, against Aguilar's lack of recall of any discussion, it urges that Rodriguez' testimony should be credited.

As the findings conclude, however, Rodriguez did not tell Aguilar of Calcote's election on March 9. As Calcote himself testified, the election took place on March 13 and he told Jackson the next day, March 14, thinking that she would be surprised, as he was not running for anything.

Gilbert's testimony should be favored over Moretz' testimony, urges CCPOA, because of Gilbert's recollection is

that he delivered the letter personally and she evidenced inconsistency as a long-time secretary (and, of course, her loyalty) in her testimony regarding the amount of mail that comes in.¹² It is not unusual for mail to get mislaid on the desk of a busy secretary, urges CCPOA, and Gilbert had nothing to gain by waiting until April 4 to deliver the letter. It was in his best interest to have the department recognize his ascendancy in an expeditious manner.

I find that the letter was not delivered to the superintendent's office until April 4, as indicated by the testimony of Moretz, and as corroborated by her practice of date stamping material as it comes into the office. Despite CCPOA's argument to the contrary, I find no reason to doubt Moretz as a result of her testimony on the amount of mail that comes to her office daily.

The Nettle's Letters

Because Collier didn't tell Sacramento-based Nettles, CCPOA says only one inference can be drawn from Respondents silence in the matter. That inference is that SRCC knew of at least Collier's election and passed this information on to Sacramento. Calcote was elected at the same time and it is reasonable to infer that the department knew of Calcote's election, as well.

¹²Moretz testified that approximately 15-20 documents come across her desk in a day and that on some days the mail is heavy from Sacramento but the total is still close to 15-20. When in-house documents are added, the total still remains 15.

Once again, charging party draws too much from too little. Nettles' letter related to Collier, not Calcote. It has been found that Rodriguez did tell Aguilar that Collier was going to serve as job steward on March 9. Aguilar admitted this and, in all probability, that is how Nettles learned of Collier's election that resulted in the March 14 letter from Nettles in Sacramento. In any event, the March 14 letter from Nettles says nothing about Calcote's election. To go beyond that finding, however, in the face of the various versions of when the election was held, and with Calcote's own testimony that the election was on March 13 and that he thought Jackson would be surprised on March 14 when he said he told her of the event, is simply too much. The Nettles' letter carries with it no more than what it facially proclaims. No inference is drawn that Calcote's election was also known by management on the date it was written.

CCPOA takes issue with Aguilar's testimony that he did not know of Calcote's high blood pressure condition before the decision was made to transfer Calcote to Marshall. It failed to show, however, that Aguilar would have known of Calcote's condition. By its own evidence, the medical findings of the Workers' Compensation Appeals Board were not issued until May 4, 1984. The decision to transfer Calcote to Marshall was made in March. There is no evidence from which it can be discerned that Aguilar knew of Calcote's high blood pressure

before the transfer. Calcote told Atesalp of his condition after his transfer. He did not tell Aguilar or Richardson when notified of the transfer on March 28.¹³

In sum, the conclusion is that the first that Aguilar was aware of Calcote's election to CCPOA was in conjunction with the March 26 meeting which Calcote attended as a CCPOA representative. Once again, the decision to transfer Calcote to the Marshall Unit antedated knowledge by the employer of Calcote's protected activity. This point appears to be conceded by charging party. Its post hearing brief expressly states that the fact of Calcote's transfer to Marshall is not in issue. (Pages 6 and 7.)¹⁴

The Denial of Request to Transfer Back to Sutter Unit

On April 26 Calcote requested to be reassigned back to the

¹³By way of further attempting to impeach Aguilar on his knowledge of Calcote's condition, CCPOA refers to the personnel clerk's testimony regarding revision of Calcote's 1983 attendance records because compensation had been accepted. CCPOA failed, however, to establish when the revision took place. Gigi Eletreby, the personnel clerk, did not testify that the revisions took place before the Worker's Compensation Appeals Board award was issued on May 4, 1984.

¹⁴CCPOA also contends that Richardson failed to consider Calcote's prior performance evaluation in the transfer to Marshall. Richardson, however, did not make the decision to transfer Calcote to Marshall. Aguilar made the transfer decision. Richardson was asked for three names of youth counselors who might be considered for transfer. Calcote was but one of three names advanced by Richardson. The record does not support CCPOA's argument that Richardson failed to apply the transfer guidelines, as Richardson did not make the transfer decision.

Sutter Unit. Basing his request on a purported vacancy, he asked for the transfer to accommodate his health condition and the fact that he was a single parent. Aguilar, by his own admission, knew at the time of the request that Calcote was vice-president of CCPOA. He learned of the request of Calcote's position both by the meeting of March 26 and by the letter that came to his office on April 4. Thus, in this instance, charging party has met the threshold of the Novato test. Mere knowledge, however, is insufficient to raise an inference of unlawful motive. Novato, supra.

CCPOA asserts that the denial of Calcote's request to return to the Sutter Unit was wrong because he was medically unsuited for the Marshall position. It urges that the department accommodated John Grijalva who had family problems but denied the same consideration to Calcote. It labels the department's contention of ethnic balance as "chimerical" in that the slots at Sutter were interchangeable, Calcote could have filled another slot for a black, and Cole, who was the only white at Marshall, was transferred from the unit despite the fact that there were others at the Marshall Unit with more seniority. CCPOA questions how Aguilar could know that Juarez was going to fill the vacancy in early April, since Aguilar did not inform Richardson of Calcote's request to return to Sutter. These arguments are not persuasive.

Having determined that Calcote was placed into the Marshall program without regard to his election to the CCPOA vice

presidency, the Novato analysis does not justify an inference of unlawful motivation in the department's denial of his request to return to the Sutter Unit. While Calcote contended that he was medically unfit for the Marshall program, he did not secure the advice of his doctors for such extreme diagnosis but rather rested on his own viewpoint that he was not suited for the position. Unlike the previous July and August (1983), when he did take disability leave, no such absence occurred in 1984. Interestingly, in November 1984 he expressed preference for the Marshall program rather than being afforded the opportunity to return to the diagnostic side.

That the department accommodated Grijalva on a shift change does not demonstrate disparate treatment regarding transfers from the Marshall Unit to the diagnostic side. Changing one's shift within the same unit is not the same as transferring an employee from one unit to another. Charging party has failed to establish disparate treatment in the denial of Calcote's request for transfer to the Sutter Unit.

CCPOA'S argument about the department's position on ethnic balance is likewise without merit. While the slots at Sutter were interchangeable, there is no showing that, upon Calcote's request to return to Sutter, there were any blacks at Sutter willing to go to Marshall in Calcote's place. There is nothing in the record to suggest that, based upon an employee's request for a transfer, other employees were required to leave their position in one unit for transfer to the Marshall program.

Secondly, the department's ambition for ethnic balance focused upon the Sutter Unit, not on Marshall. These settings were and are distinct. The Sutter Unit houses wards in an evaluation setting. It was there that the department sought to have an ethnic balance. The Marshall program was a long term residential setting. The department never contended that Calcote's presence at Marshall was in line with an ethnic balance at Marshall. In any event, the record is totally void of any suggestion that Cole was transferred from Marshall because of his union activity or ethnic balance. Thus, Cole's treatment in the transfer is irrelevant to this issue.

Finally, Aguilar's knowledge of Juarez' assignment to Sutter for June was facilitated by Richardson's request to the administration in early April when he was faced with the Martinez promotion. He testified that the changes occurring in March, April and May led him to go to the administration for help in resolving the ethnic balance problem.

The employer's response to Calcote's request for the transfer to Sutter was based upon the absence of a position. The department had a legitimate interest in preserving the ethnic profile it was attempting to recreate with Radillo's departure. The record does not suggest that the department was taking adverse action against Calcote because of his election as vice-president of CCPOA, but rather that it denied his request for retransfer to Sutter on the basis that it had no

vacancy at Sutter for Calcote to occupy. In addition, it differed with Calcote on his assessment of the stress level at Marshall. While the record suggests that Marshall is more stressful than the diagnostic unit, that does not justify a conclusion that the denial of Calcote's request to re-transfer, based upon another valid contention, that is the absence of a vacancy, was otherwise based upon unlawful motivation. Accordingly, it is concluded that the denial of Calcote's request for retransfer to Sutter was not a violation of the SEERA. The charge must, therefore, be dismissed.

PROPOSED ORDER

Upon the foregoing finds of fact and conclusions of law, and the entire record in the case, it is hereby ordered that the unfair practice charge and complaint against the State of California, Department of Youth Authority are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 27, 1985, 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 itself at the headquarters office in

Sacramento before the close of business (5:00 p.m.) on June 27, 1985, 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, section 32300 and 32305.

Dated: June 7, 1985

~~GARY M. GALLÉRY~~
Administrative Law ~~Judge~~