STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO SUBSTITUTE TEACHERS ORGANIZATION. Charging Party.	)	Case No. SF-CE-972
v.	)	PERB Decision No. 573
SAN FRANCISCO UNIFIED SCHOOL DISTRICT. Respondent.	)	May 23, 1986

Appearances; Norma Lee Cook, High School Representative, for the San Francisco Substitute Teachers Organization; George Agnost, City Attorney, and Jerry J. Spain, Deputy City Attorney, for San Francisco Unified School District.

Before Burt, Porter and Craib, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Francisco Substitute Teachers Organization (SFSTO or Charging Party) to the attached decision of the administrative law judge (ALJ). In that decision, the ALJ dismissed charges that the San Francisco Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by barring Norma Cook, a substitute

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated all statutory references are to the Government Code.

Section 3543.5 provides, in pertinent part:

teacher, from future assignments at certain District schools in retaliation for her organizational activity.

The District's action followed an isolated security incident at one of the schools. Although the memo implementing the assignment restriction stated only that Cook had proven "inappropriate" in dealing with students at its special schools, the District administrators called as adverse witnesses testified at hearing that this incident was the sole basis for the restriction.

At the close of SFSTO's case, the ALJ granted the District's motion to dismiss for failure to establish a prima facie case of retaliation. The missing element in Charging Party's prima facie case was proof of an anti-union motive to establish the nexus between protected activity and adverse action. Charging Party argued that this nexus could be inferred from the District's treatment of Cook, a previously acceptable or even desirable substitute, coupled with a conversation in which the District administrator who imposed the restriction abruptly assumed a hostile tone on learning of Cook's union activities.

It shall be unlawful for a public employer to:

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

The ALJ concluded that:

> . . . no matter how distasteful the procedure followed by the District in dealing with a security breach by a well-intentioned employee, this conduct, standing alone, does not warrant a continuation of the hearing and a shifting of the burden of proof.

He indicated that had there been any evidence of anti-union animus in addition to the evidence of the District's "distasteful" procedures, he could have found a prima facie case. However, he found that Cook's testimony about her conversation with the administrator failed to establish a hostile change in tone related to her disclosure of union activities, and that there was no other evidence of anti-union animus by District administrators directly involved or by the District in general.

DISCUSSION

We find that the ALJ's findings of fact are free from prejudicial error, and we adopt them as our own.[2] Charging Party's exceptions were prepared and signed by Norma Cook herself on behalf of SFSTO, and reflect Cook's personal involvement in every detail of this dispute with her employer. For the most part, the findings excepted to are not actually adverse to Charging Party's case. Even if these exceptions

[2]In adopting the ALJ's findings of fact and affirming his decision, we do not adopt his comments about the District's actions which are peripheral to the resolution of the case.

were upheld. Charging Party would still fail to establish a prima facie case. As summarized below, only one of these exceptions warrants serious examination.

Her exceptions consist of five numbered paragraphs. The first three exceptions essentially quibble with the ALJ's factual findings concerning Cook's responsibility for the alleged security breach. None of the points raised by Cook are inconsistent with the ALJ's findings, which are supported by the record. In any event, even if these exceptions were well-taken, they would have no impact on the outcome of the case because the ALJ's findings on responsibility for the breach are not adverse to Cook's case. His decision acknowledges the District's poor handling of the incident.

In her fourth exception. Cook offers additional evidence that the District's reasons for terminating her Youth Guidance Center (YGC) assignment earlier than she had anticipated were pretextual. Cook claims that she first became aware of Principal Gloria Burchard's reason for terminating her assignment when she testified at hearing that Cook's assignment was to last until the end of the year "unless she (Burchard) was able to fill a learning specialist position." Cook would show by the testimony of additional witnesses that the "supposed learning specialist" who filled her position did the same job she had done.

We reject this exception on two grounds. In the first place. Charging Party was represented by counsel at the hearing. On learning of this new aspect of the case during examination of an adverse witness, counsel could have arranged to present additional relevant evidence.

Moreover, the relevance of the early termination of Cook's assignment to the District's action restricting her future assignments was never established. The ALJ found no evidence indicating that the termination of the assignment was a factor in the later decision to restrict assignments. The ALJ acknowledged that his view of the decision to restrict assignments would be different if the record showed that other District actions had improper motivation. However, there is no evidence in the record that Burchard was motivated by Cook's activities to terminate her assignment early, notwithstanding Cook's suspicions.

In her fifth exception. Cook questions the ALJ's conclusion that her union activities were of no concern to Burchard. She also expresses her view that both Ana Horta, Burchard's District supervisor who wrote the restricting memo, and Burchard wanted to get rid of her because of her activity in speaking on behalf of teachers at the YGC.

Her version may well, in fact, express the reality of the case. However, the difficulty is that she relies upon several matters, most of which were touched on briefly, if at all, in

the record. In any event, this exception really challenges the ALJ's overall decision in the case.

The Board established its test for discrimination in Novato Unified School District (1982) PERB Decision No. 210. When the allegation is that of reprisals against an employee for protected activity, charging party must establish that the employee was engaged in protected activity and that that activity was known to the employer. Charging party must also introduce evidence sufficient to raise an inference that the employer's action was motivated by that conduct, since unlawful motive is the nexus required to establish a prima facie case. Unlawful motive may be established by circumstantial evidence and inferred from the record as a whole. Once the Charging Party has made a prima facie showing sufficient to raise the inference that protected activity was a motivating factor, the burden shifts to the employer to prove that its actions would have been the same regardless of the protected activity. This shift in the burden of producing evidence must operate consistently with the Charging Party's obligation to establish an unfair practice by a preponderance of the evidence.

This is consistent with both California and National Labor Relations Board (NLRB) precedent (Martori Brother Distributors v. Agricultural Labor Relations Board (1981) 29 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].

The Board has considered several circumstances as indications of unlawful motivation, see Novato, supra, which are present here, including: inadequate explanation to the employee. Rio Hondo Community College District (1982) PERB Decision No. 226. San Diego Community College District (1983) PERB Decision No. 368; inadequate investigation. Baldwin Park Unified School District (1982) PERB Decision No. 221; the prior record of the employee, Baldwin Park, supra. San Joaquin Delta Community College District (1983) PERB Decision No. 261; unusually harsh treatment, Baldwin Park, supra. San Joaquin Delta, supra; and the fact that usual procedures were not followed. Santa Clara Unified School District (1979) PERB Decision No. 104. Novato, supra, Baldwin Park, supra.

Here, Charging Party has superficially presented a classical outline of a prima facie case of retaliation. An acceptable or even desirable employee is subject to arbitrary discipline by a senior administrator shortly after a conversation with that administrator in which (a) the employee reveals her status as a union activist and (b) she engages in the protected activity of discussing teacher difficulties at an institution under that administrator's control. The discipline is arbitrary in that it is excessive. It is handled differently than usual in that the evidence indicates that the ,normal course would be for Burchard rather than Horta to take action with regard to an incident at the institution she administered.

Moreover, it is unclear that Burchard alone would have taken action with regard to Cook's actions at the YGC, and she had no authority to take action with regard to other schools.

However, the Charging Party has presented a more complex picture, by virtue of the adverse witnesses called to establish various aspects of its own case. These witnesses, even in their conflicting testimony, show another motive (although it is difficult to characterize that motive as a "business justification"). In the face of this evidence, the ALJ found that Charging Party would never be able to establish that the discipline of Cook was more likely than not a result of her protected activity. In essence the ALJ found that the testimony presented by the adverse witnesses effectively rebutted her case that the action was taken in retaliation for protected activity rather than for another reason. He therefore stopped the hearing, and entertained a motion to dismiss, so that the District's case was never fully presented.

We are somewhat troubled by the ALJ's failure to go forth with the hearing since, as noted above, the elements of a prima facie case are arguably there. Further, because of the way the case was presented and decided, the distinction between failure to establish a prima facie case by the Charging Party and the affirmative defense of an alternative justification offered by the District is blurred. On the whole, however, after thorough review of the record, we agree with the ALJ that the

Charging Party has not carried its burden of establishing that discrimination was more likely than not the reason for the adverse action--that the case is simply too circumstantial—and that no purpose would have been served by continuing the hearing. We therefore affirm the decision of the ALJ.

ORDER

The unfair practice charge in case No. SF-CE-972 is hereby DISMISSED.

Members Porter and Craib joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO SUBSTITUTE TEACHERS ORGANIZATION, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-972 PROPOSED DECISION (6/20/85)

Appearances: Ernest Fleischman, attorney for the charging party; Jerry Spain, deputy city attorney, for the respondent.

Before: Barry Winograd, Administrative Law Judge.

PROCEDURAL HISTORY

The issue to be decided is whether the charging party has presented a prima facie case of unlawful reprisal against an active member of an employee organization.

On December 10, 1984, the charging party San Francisco Substitute Teachers Organization (hereafter SFSTO) filed an unfair practice charge against the San Francisco Unified School District (hereafter District). The charge alleged that in June 1984 the District barred Norma Cook, a substitute teacher, from working at certain schools in retaliation for her organizational activity. According to the charge, this ban was discriminatory and violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or Act).[1]

[1]The EERA is codified at Government Code section 3540

On January 4, 1985 a complaint was issued. The District's answer was filed on January 25, admitting certain facts but generally denying the allegations of unlawful employer conduct. A settlement conference on January 25, 1985 failed to resolve the dispute.

The formal hearing took place on April 4, 9 and 16, 1985. At that point, after presentation of the charging party's case-in-chief, respondent moved to dismiss the case, contending that the evidence did not demonstrate a prima facie violation of the Act. The hearing was recessed to permit briefs on the issue. The matter was submitted on June 12, 1985.

FINDINGS OF FACT

A. The Youth Guidance Center.

The setting for this case is the Youth Guidance Center (YGC), a short-term youth detention facility in San Francisco that also contains a functioning court, medical clinic and school. The District runs the educational program, which includes about eight teachers as well as several instructional

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et seq., and is administered by the Public Employment Relations Board (hereafter Board or PERB). Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5 of the Act provides that it shall be unlawful for a public school employer to:

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

aides. From time to time, substitute teachers also are used. The principal for the past three years has been Gloria Burchard. In 1983-84, her supervisor was Ana Horta, an administrator based at the District's downtown headquarters.

Within the YGC facility, employees known as counselors have main responsibility for security, although all workers are expected to abide by established rules and procedures. Visitors to the central lockup are required to have a written pass and to sign a record book. The procedure for access to the classroom teaching areas appears to be less strict, as long-term teachers are given keys which they retain for ongoing use until they stop teaching. Day-to-day substitutes also are given keys, but are required to return them each day. A secretary in the principal's office maintains a log to regulate the distribution and return of keys.

While there is no formal security orientation for substitute teachers working at YGC, there is a four-page "information sheet" that is passed out by the principal's secretary. The information sheet instructs substitutes to return their key to the school secretary after school. There is no guidance, however, about the need for passes and signing-in when visiting a main lockup area.[2]

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[2]The evidence is insufficient to support admission of the information sheet as a business record customarily disseminated to incoming substitutes. (See Evid. Code sec. 1271, 1280.) The secretary was not called as a witness, Burchard had no checklist

B. Cook's employment and organizational activity.

Norma Cook has been a District substitute since the late 1960's. In the past several years she has worked mostly in the general high schools, but also has worked occasionally at the YGC school. In March 1984 her service at YGC increased following Burchard's specific request for Cook's assignment to an extended substitute position. Burchard expected the assignment would last until the end of the school year unless she was able to fill a learning specialist position that was vacant. Cook worked as a continuous substitute for 32 days, from March 23 until May 14, 1984.[3]

The SFSTO was formed in the early 1980's, and Cook has been an active member since 1982. Following certification by the PERB, Cook has been on the negotiating team and participated in more than two years of talks with the District. She also has

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or sign-off system that would confirm receipt of the document, and Cook claimed she had not seen the instructions. Nonetheless, since PERB, with limited exceptions, is not bound by the rules of evidence (see Cal. Admin. Code, tit. 8, sec. 32176), some weight can be given to the material as evidence of security consciousness at YGC. Also, distribution by the school secretary would be consistent with testimony about other functions performed by that employee, namely, key control and signing substitutes' time sheets for payroll use.

[3]Continuous service beyond 20 days entitled Cook to a per diem bonus. She did not, however, meet the District's standards for long-term status that would have placed her on the regular teacher salary schedule. There is evidence that payment status is a major concern for substitute employees, but there is no indication that it was a factor affecting the District's limitation on Cook's employment that is at issue in this case.

served as the organizational representative for high school teachers. Burchard was aware of Cook's activities, at least by summer 1983 when Cook had informal contacts about substitute employee concerns. Once in a while, Cook and Burchard also discussed the protracted negotiations, with Burchard even suggesting a mileage reimbursement idea at one point.

The only indication of possible union animus by Burchard concerned her denial of Cook's request to be released from one class hour to attend a factfinding session on April 11, 1984. The request, which was made either the afternoon before or the morning of the meeting, was personal in nature, and was not based on any released time arrangement that had been negotiated with SFSTO. In any event, Cook attended the session during a preparation period and over her lunch hour. There is no evidence that Burchard objected to this particular use of non-class working hours for an organizational purpose.

Although Cook's extensive SFSTO involvement was known to Burchard, and also to Albert Cheng, the District's personnel coordinator who had duties related to negotiations, there is no evidence that Ana Horta, Burchard's supervisor, knew of Cook's activities, except as Cook herself allegedly told Horta about them during a meeting on May 25, 1984. The conflicting evidence about that meeting will be reviewed below.

C. Events related to the May 15 incident.

On May 14, 1984, Burchard told Cook that she would no longer be needed as a continuous substitute because a vacancy

had been filled. Cook was disappointed with the news, but it was not entirely unexpected given previous conversations on the subject. Burchard did believe, however, that Cook would return at some point as a day-to-day substitute.

The prospect of Cook teaching again at YGC was conceded in Burchard's testimony, despite her misgivings based on two work-related areas. One involved the principal's earlier notice to Cook about procedures to follow when checking in each day. The second concerned Cook's possibly excessive two-day suspension of a disruptive student. Since, by the admission of District witnesses, these facets of Cook's work did not form the basis for the later disciplinary limitation imposed by the District, further analysis of them is unwarranted.

When Burchard notified Cook on May 14 about the end of the extended assignment she did not ask Cook to return the school key. Nor did Cook give the key back when she picked up her time sheet from the school secretary at the end of the day.

After school was over on May 14, Cook visited a female detainee who had recently been sentenced and with whom Cook had developed a rapport. The detainee introduced Cook to her public defender, who was trying to place the detainee in a halfway house rather than in the prison-like facility of the California Youth Authority. The public defender expressed interest in ongoing visits by Cook with the detainee to help on her case, particularly a pending rehearing on the sentencing.

The next day, May 15, Cook returned in mid-morning to see

the detainee. Cook met first with a probation officer working on the case and was given permission to go into the lockup receiving area. Cook still had her key and, perhaps for this reason, was not given a pass. Once inside, after Cook had been talking to the detainee for a few minutes, a counselor asked Cook to leave because she had no authorization pass. When Cook did not depart, the counselor telephoned her supervisor who also directed Cook to leave. Cook complied with the request.

Cook's visit inside the lockup without a pass, and her initial failure to follow the counselor's instruction, prompted immediate interagency concern at the YGC. Burchard was informed while the event unfolded, but Cook, who was in a hurry to go elsewhere, failed to answer Burchard's page until a phone call that night. Burchard spoke with probation officials during the morning of May 15, and, in the afternoon, the issue was discussed at a YGC administrative meeting of key staff officials from different departments. Burchard also informed Horta of the day's events, promising to follow up with an investigation report.

That night, Cook explained her view of what occurred when she spoke with Burchard. Burchard instructed Cook about the need for a pass and for signing-in for visits. The next day Cook returned the school key to the principal's office. Burchard also confirmed Cook's account of having received the probation officer's permission to enter the lockup. In a letter Burchard later wrote to the chief probation officer

summarizing her findings, there was no recommendation for discipline. In the same letter, Burchard did observe that Cook was no longer in a school employee capacity when she visited on May 15, or thereafter.

Cook visited the detainee a few times after May 15, using passes issued by the public defender, and without any infraction of YGC rules. This series of encounters by Cook with the detainee, although permissible, seemed to create tension with the probation office and perhaps with Burchard over the appropriate role for teachers. However, even if Cook may have overstepped the preferred boundary for teacher involvement, there is no direct evidence that this contributed to her later discipline.

D. The May 25 meeting.

Cook testified that on May 25, 1984 she had a lengthy discussion with Horta on a variety of topics. Cook stated that she visited Horta at her downtown office in order to borrow language tapes to help a foreign-born student. Cook said she had previously borrowed tapes from Horta the year before for the same purpose. According to Cook, Horta said she was no longer in charge of that resource material and told Cook where to get it. The conversation turned to other subjects, among them were whether finances was the basis for the end of Cook's continuous assignment on May 14, unspecified problems at YGC, Cook's organizational involvement as a high school

representative, and the District's emphasis on hiring minorities.

From the context and references in Cook's testimony, it can be inferred that she visited Horta, known to be the YGC supervisor, at the suggestion of other teachers, to determine why the substitute assignment had been ended before conclusion of the school year, contrary to Cook's hopes. (See Reporter's Transcript (R.T.), pp. 21, 159-160.) If Cook suspected that the District's financial concerns to avoid higher pay to long-term substitutes was the true reason her assignment ended, the stated reason of her visit to Horta—to borrow language tapes--was an unrelated purpose that provided an opportunity to raise the financial issue.

The factual statement accompanying the unfair practice charge alleged that during the May 25 meeting, Horta's tone of voice abruptly changed when Cook referred to her organizational activities on behalf of SFSTO. However, Cook's testimony at the hearing did not support this crucial aspect of her charge.

At one point, Cook stated "I don't know if it was when we were on this topic" (R.T. 25), referring to her organizational status. At another point, Cook suggested that Horta reacted when Cook mentioned the minority recruitment emphasis allegedly preferred by personnel official Cheng. (R.T. 23.) Cook, it may be noted, is white; Horta of Hispanic background. Cook also testified that Horta's change of tone

was related, at least in part, to Cook's description of problems at the YGC school, an institution under Horta's supervision. (R.T. 163.) Hence, based on this uncertain, shifting and equivocal record, there is insufficient evidence to find that a reaction or change of expression by Horta during the meeting was based on Cook's reference to her protected organizational affairs.

Horta's recollection of the encounter with Cook differed dramatically from Cook's version. Horta remembered only that Cook visited seeking to borrow language tapes and was directed elsewhere. Horta did not recall discussion of any of the other topics described by Cook and noted above. She specially denied that Cook's SFSTO involvement was mentioned.

Overall, although Cook's memory of the meeting suffered from some uncertainty and confusion about the order, scope and relationship of topics discussed, it was a more credible account in its detail. In contrast, Horta's memory was very poor. She believed, for example, that the meeting took place in fall 1984 and not in the preceding spring. But, curiously, she also could not recall whether the disciplinary action taken against Cook following the May 15 detainee visit came before or after their encounter about the language tapes.

E. The June 6 memo.

On June 6 Horta wrote a memo barring Cook's future assignment as a substitute at YGC or at five other special,

non-detention facilities run by the District.[4] The memo stated:

> Ms. Cook has proven very inappropriate when dealing with students in our court system or special schools.

Beyond this comment, and the listing of schools covered, there was no explanation at all of why the action was taken. Before sending the memo, there had been no conversation by Horta with Cook about any inappropriate behavior, nor had there been any adverse written inquiry, warning, or evaluation. (Cook, it will be recalled, had been viewed by Burchard as a satisfactory teacher for future reassignments, at least up to May 14.)

The reason given by Horta (and confirmed by Burchard) for the disciplinary restriction at the YGC was that Cook had visited the central lockup on May 15 without a pass and had not followed the counselor's initial instruction to leave. There is no evidence that any other employee was disciplined in connection with the incident.

Horta testified that the assignment bar was implemented at

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[4]circumstantial evidence suggests that issuance of the memo was sparked by an erroneous double-assignment of substitutes to YGC on June 6 during the absence of the regular assignment clerk downtown. Cook was one of the two employees assigned. This surprised Burchard, perhaps because two assignments were made, but perhaps also because she didn't expect to see Cook, based on Burchard's talks with Horta after May 15. After the double-assignment was discovered, Horta was informed that substitute restrictions had to be in writing. The June 6 memo followed. Although Cook was informed of the limitation over the phone that same day, she did not receive a copy until later in the month, after it had been processed through another District office.

Burchard's request following the May 15 security breach. Burchard's testimony confirmed that there was consultation, although Burchard claimed she expressed concern only about YGC and not the other facilities. Horta explained that she applied the ban to all of the special schools under her authority because of their unique functions and because other public agencies also are involved in their operations.[5]

On July 3, 1984, Cook submitted her formal reply to the memo restricting her assignments. Personnel official Cheng, who received Cook's letter, never responded. This unfair practice charge followed several months later.

CONCLUSIONS OF LAW

By its terms, section 3543.5(a) of the Act prohibits discriminatory action against an employee for engaging in conduct protected by the EERA, 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. (Sec. 3543.)

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[5]The only evidence of another teaching restriction for security reasons involved a YGC ban imposed by Burchard about three months before the hearing in this case, after an employee left a key in a YGC door. (R.T. 221.) Another teacher was excluded from YGC assignments in 1983, but there is no evidence tying the restriction to a security violation. (R.T. 263.) On the basis of the abbreviated testimony introduced by the charging party, neither example supports a factual finding of disparate treatment. In particular, the more relevant security-related incident took place after Cook's, and there is no indication that it was coupled with a refusal to abide by a direct counselor request.

In Carlsbad Unified School District (1979) PERB Decision No. 89, and in Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct under section 3543.5(a) are to be decided. The Board summarized its test in a decision issued the same day as Novato:

> . . . a party alleging a violation . . . 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 engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by a preponderance of the evidence. (California State University, Sacramento (1982) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations 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) 29 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]; NLRB v. Transportation Management Corp.

(1983) _____ U.S. _____ [76 L.Ed.2d 667].)[6]

At this stage of the proceeding, although the charging party called District officials Burchard and Horta as witnesses, in addition to Cook, it is not the charging party's burden to prove by a preponderance of the evidence the ultimate issue of discrimination. It is sufficient to state a prima facie case if the evidence presented shows that protected activity was a substantial or motivating factor for the employer's action. (See California State University, Sacramento, supra; NLRB v. Transportation Management Corp., supra, 76 L.Ed.2d at 674-675.) If the evidence does not support a conclusion that discrimination was more likely than not the reason for the employer's decision, the burden does not shift to the District to explain or justify its conduct. (Cf. Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248.)

Based on the evidence introduced by the charging party, it is concluded that a prima facie case of likely discrimination

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[6]The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. (See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.) Compare section 3543.5(a) of the Act with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights. The Supreme Court analysis in Transportation Management has been applied by the PERB in Santa Clara Unified School District (1985) PERB Decision No. 500.

has not been presented, that the charging party could not prevail even if the District declined to present evidence of its own, and that there is no need to continue the hearing and shift the burden to the employer.

The theory of the charge is that Horta's June 6 memo was a retaliatory response to Cook's disclosure of her organizational activity during the May 25 discussion. To buttress this theory of proximate cause, the charging party claims that discrimination can be inferred because the District disciplined Cook, an otherwise satisfactory employee, without good cause.

A vital feature of the charge is the claim that Horta's tone abruptly changed on May 25 when informed of Cook's SFSTO connection, thus providing a link with the memo two weeks later. But the testimonial evidence not only fails to support this allegation, it suggests that Cook herself was uncertain about when and why an abrupt change occurred. Indeed, Cook never directly connected her organizational comment with the change in tone. Instead, other reasons were suggested by her account, including her references to minority employment practices and to unspecified problems in the administration of YGC.

Absent an evidentiary showing of actual animus on the part of Horta, the only remaining discriminatory inference rests on the asserted absence of good cause for her assignment limitation, focusing on both procedural and substantive

deficiencies. From the detailed testimony offered by Cook, Burchard and Horta, it is apparent that the District acted irresponsibly in disciplining cook without stating verbally or in writing any explanation for its decision. This was compounded by Cheng's later refusal to offer even the courtesy of a reply to a long-time employee presumably known to him through the extensive negotiations. In this light, given Cook's prior satisfactory teaching service and the absence of any direct inquiry or evaluation by Horta, the June 6 memo was plainly unfair and one-sided, and perhaps misdirected. If, as the evidence suggests, Cook actually breached established security procedures to some degree, the blame was not necessarily hers to bear alone. The record indicates that there was probably a lax attitude about orientation and monitoring shared by higher District officials as well as by some personnel from other agencies. In addition, it is less than clear why she was barred from teaching at non-detention facilities, especially because the alleged security breach was a single modest infraction that was not repeated.

In regard to the issue of cause, however, the lack of procedural or substantive justification is not the equivalent of anti-union motivation. (See, e.g., University of California (Berkeley) (1983) PERB Decision No. 305-H at p. 12.) It is not the PERB's function to render decisions about the wisdom of personnel decisions unless protected organizational activity is

implicated, a conclusion that cannot be inferred on this evidentiary record. (Moreland Elementary School District (1982) PERB Decision No. 227 (neither timing nor lack of just cause prove discriminatory discharge).)

Ironically, what the charging party demonstrated was not the substantial likelihood of an anti-union reprisal, but rather prima facie evidence of an administrative decision to find a scapegoat for a mistake shared by others and for tension that existed between agencies that had to work together at the YGC. Thus, in the process of discrediting the manner and basis for the District's decision to discipline Cook, the charging party exposed the District's decision as, more likely than not, a narrow-minded bureaucratic punishment that avoided a deeper probing of fault and a wider allocation of responsibility for a security breach.

If the charging party had presented any other evidence suggesting anti-union discrimination, a prima facie finding might be warranted because of the disciplinary shortcomings. However, there was no evidence of disparate treatment or animus by Horta, the District agent accused of discrimination. Nor was there evidence of prior discriminatory acts at YGC that might indicate an underlying hostility to organizational activities.[7] In the final analysis, no matter how

[7]Burchard's denial of one hour off in April 1984, to allow Cook to attend a factfinding session, does not sustain an

distasteful the procedure followed by the District in dealing with a security breach by a well-intentioned employee, this conduct, standing alone, does not warrant a continuation of the hearing and a shifting of the burden of proof.

For the foregoing reasons, it is concluded that the charging party has failed to establish a prima facie case. The unfair practice charge and the complaint shall be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is hereby ordered that the complaint is DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on July 10, 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 at its headquarters office in Sacramento before the close of business (5:00 p.m.)

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adverse inference when viewed in the context of the long-term, continuous contacts between the two regarding organizational affairs and the absence of any wrongful employer conduct during that period.

on July 10, 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, sections 32300.

Dated: June 20, 1985

BARRY WINOGRAD
Administrative Law Judge