STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,	)	
Charging Party,	)	Case No. SF-CE-105
v.	)	PERB Decision No. 227
MORELAND ELEMENTARY SCHOOL DISTRICT,	)	July 27, 1982
Respondent.	)	

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Service Employees International Union, Local 715; Margaret E. O'Donnell, Attorney (Breon, Galgani and Godino) for Moreland Elementary School District.

Before Gluck, Chairperson; Jaeger and Jensen, Members.

DECISION

Service Employees International Union, Local 715 (SEIU) excepts to a Public Employment Relations Board (PERB) hearing officer's dismissal of its charge alleging that the Moreland Elementary School District (District) violated subsection 3543.5(a) of the Educational Employment Relations Act (EERA)[1]

---

[1]The EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

Subsection 3543.5(a) provides:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

by (1) unlawfully discharging an employee[2] because of his participation in organizing on behalf of SEIU and (2) thereby interfering with, restraining and coercing other employees in the unit in the exercise of their rights under the Act.

The hearing officer found (1) that SEIU failed to prove that Doe would not have been discharged but for his union activity and (2) that there was no interference, restraint, or coercion of other employees because the District's business justification for the discharge outweighed any harm to the employees' rights.

FACTS

The District discharged Doe on March 22, 1977 for the alleged March 16 theft of $39 worth of postage stamps. Doe denies the theft allegation and claims he was discharged for his involvement in a decertification campaign against the California School Employee Association (CSEA).

The District voluntarily recognized CSEA in May 1976. In the fall of that year, the Service Employees International Union, Local 77 initiated a drive to decertify CSEA, holding

---

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

[2]Because of the basis for the discharge, the employee is hereafter referred to as Doe.

meetings off campus. In December, Local 715 replaced Local 77 in the decertification effort.

Doe worked out of the District warehouse as a delivery driver to the 12 District campuses and as a gardener and custodian. He was active in the decertification effort from the earliest meetings and was a member of the organizing committees of both Local 77 and 715. In December, he signed a Local 715 authorization card and took several cards to distribute to other employees. After work one evening, he solicited and received two signed cards; the evidence does not indicate whether the solicitations occurred on school property.

Present at a restaurant where Local 715 held its first organizing meeting were Mike Evans, Richard Stahl, and Richard Martin, elected CSEA officials. The three men worked in the warehouse area with Doe. Evans was the District storekeeper and among his duties was responsibility for the issuance of postage stamps; Martin was an audio-visual technician; Stahl was a locksmith. They did not participate in the Local 715 meeting, but sat close enough to observe the proceedings and saw that Doe was present.

Doe testified that he believed that the District was aware prior to March 16, 1977 of his organizing on behalf of SEIU. He claimed that Dan Droke, the District Assistant Business Manager, knew about the drive through his relationship with the three CSEA officials who worked under him. However, the only

conversation Doe recalled was between Droke and Evans concerning a reclassification request by Evans and he admitted that he never heard Evans, Stahl or Martin talk or pass information to Droke or his superior, Robert Bjoring, Business Manager, about CSEA or union activities.

Doe testified that Evans had informed him that Superintendent Richard Davis disliked "unions," as contrasted to "CSEA," and had told Evans that he would never permit a union in the District. He remembered this conversation as occurring around the time he was hired and prior to the decertification drive. Both Evans and Davis denied that Davis ever made such a reference about unions. Doe admitted that he had never had any discussions about the union with Davis or any other member of management.

SEIU contends that the District had knowledge of the organizing campaign because it had mailed a copy of its PERB petition to the District on March 14. It produced a declaration of service by mail. SEIU acknowledged that on March 18 it had sent an "amended" petition to the District which was virtually identical to the original except for the date. Davis testified that the District received only the latter petition on March 23. The hearing officer took administrative notice that PERB received the March 18 petition

on March 25.[3] Davis, Bjoring, and Droke indicated that they had no knowledge of SEIU organizing prior to receipt of the petition. SEIU witnesses admitted that they had had no discussions with these men prior to the March 16 discharge.

The only District manager with apparent knowledge of SEIU's organizing was Jay Hederick, Supervisor of Maintenance and Doe's immediate supervisor. In February, Vernon Crawford, a bus driver, posted SEIU materials on a bulletin board. Hederick told Crawford to remove the information because the board was for school use only. Crawford also testified that CSEA material was occasionally posted on the bulletin board.[4] In March, a second bulletin board was placed in the drivers' room and, although Hederick informed Crawford that only CSEA material could be posted, the board was divided to permit use by SEIU after receipt of its petition.

According to Crawford, Hederick also prohibited distribution of SEIU materials during school hours and told him some time in March that he should not distribute authorization cards. Doe claimed that some time in December or January, during lunch, Hederick came by a table where a group of

---

[3]Further, the Board takes administrative notice that PERB files fail to reveal receipt of the alleged earlier petition.

[4]There is nothing in the record to indicate whether the CSEA material was ordered removed or allowed to remain posted.

employees were sitting, picked up an SEIU newspaper, and said that "there will be no union material around here." Hederick did not testify at the hearing.

The Theft of March 16, 1977

During November 1976, Mike Evans realized that there were discrepancies between his postage stamp inventory and the number of stamps actually in his possession. At that time, he did not suspect that the stamps were being stolen but thought that either he had made a recordkeeping error or that someone had distributed stamps without his knowledge. He informed Droke that he thought some stamps were missing.

In mid-February 1977, after continuing to experience stamp shortages, Evans came to believe that someone was stealing the missing stamps. Droke ordered a new lock put on Evans' door. Stahl installed the lock which had a recapture tumbler preventing the withdrawal of a key which does not fit. Evans and Droke received the only two keys that fit the new lock.[5]

Stahl, upon learning the reason for the change in locks and believing that his job as locksmith entailed security duties, called the San Jose Police Department to see if there were any further measures that could be taken. According to Stahl, the

---

[5]Doe contends that, on a day Evans was absent in March, Droke attempted to give him a key to Evans' office and that when he refused the key, claiming that he did not need it to fill his delivery orders, Droke urged him to hold on to it. Droke denies this.

police suggested the placement of a hidden camera. Stahl, Evans and Martin then secured Droke's permission to install one. On March 9, Stahl and Martin set up the camera so that it would be focused on the desk drawer where the stamps were kept and be activated by pulling out the drawer. Doe was not informed of the change in locks or the hidden camera.

On the morning of March 16, at approximately 8:20 a.m., Evans removed one roll of stamps from his desk drawer and left his office to deliver them. He testified that at that time all stamps were accounted for. He could not recall precisely the length of time he was away from his office but approximated it to be 20 minutes, between 8:20 and 8:40 a.m. He also could not remember whether he had left his door open while he was gone. However, he was certain that if the door were closed, it was locked and that he would have closed the door before leaving the warehouse later at approximately 8:40 a.m.

Rather than making his usual morning deliveries, Doe, on orders from Droke, remained at the warehouse to assist Evans, Martin, and Droke in moving some furniture. Droke, however, later told him that he was not needed, and Doe left to make his deliveries.

Evans suggested that the moving took approximately 20 minutes and that he returned to his office at approximately 9:00 a.m. Several minutes thereafter he became aware that the camera had been activated. He then took an accounting of the

stamps and found that two or three roles were missing. He notified Droke who later had the film developed.

Evans could not detect any signs of forced entry into his office. Stahl testified that while there were scratches which might indicate that the lock had been jimmied, they could have been there for over 10 years. Droke testified that on March 8 or 9, Stahl tried to see if the door could be jimmied. Droke was not sure whether that test had left the scratches.

On March 18, Droke, Bjoring, Evans, Stahl and Martin viewed the developed film. It first pictured Evans, Stahl and Martin behind Evans' desk. They had been filmed on March 9 to test the camera's operation. It then showed approximately 10 seconds of a figure dressed in Levis and a green jacket standing next to the desk drawer and taking something from it. The figure is pictured only from the knees to mid-torso, with portions of both arms and hands visible. A bulge appears in the back right pants pocket. The screening convinced all five viewers that the figure in the film was Doe. They claimed to have identified him by his clothes, the location of his wallet (the bulge), his physique, and movements.

Bjoring held a second screening for Superintendent Davis and Bob Williams, Director of Administrative Services. Davis identified the figure in the film as Doe because of the way he was dressed and his configuration. According to him, ". . . there was no one else it could have been . . . because there is

no one else who looks like that in the District." Williams did not testify, but Davis testified that Williams concurred in the identification.

SEIU disputed the identifications, arguing that the only evidence used to identify Doe is a figure in a film and Doe's alleged presence in the area. It claimed that Doe could not have been the culprit because (1) he carried his keys on his belt and they were not shown in the film; (2) he carried his wallet in his left rear pocket; (3) he did not wear either a watch or a bracelet and the person in the film appeared to be wearing some type of wrist jewelry; (4) other District employees wear green jackets and blue jeans to work; (5) Doe is black but no one so identified the man in the film; (6) Doe was making his deliveries at the time of the theft; and (7) he did not have a key to Evans' office door.

On March 18, Davis prepared a letter to Doe notifying him that he was being recommended for discharge because of the theft of three rolls of thirteen cents stamps. Davis based his recommendation on the film, a summary of an investigation conducted by Bjoring and Droke, and Evans' stamp inventory records.

Bjoring described his investigation as consisting of a review of the inventory records and determining who was in the vicinity of the warehouse at the time of the theft and had access to Evans' office. He said that he had already concluded

prior to viewing the film that a theft had, in fact, occurred; the film then revealed, in his mind, who had committed the theft. Bjoring also said he had an officer of the San Jose Police Department view the film, but the record does not indicate the officer's reaction. Further, Bjoring presented all the above evidence to the county counsel who, according to Bjoring, concluded that there was sufficient evidence to link Doe to the incident. The counsel did not testify.

On March 21, Doe met with Bjoring and Droke and was accused of the theft and informed that he would be recommended for dismissal. Doe testified that neither Bjoring nor Droke asked him any questions about the incident.

The District Board of Trustees adopted Davis' recommendation at a meeting at which Doe failed to appear. He did appeal the discharge to the Moreland Personnel Commission which, after a full hearing, upheld the Trustees' decision by a 2-1 vote.

DISCUSSION

The Discharge

The hearing officer found that SEIU failed to establish that the District was unlawfully motivated and, specifically, that it had no knowledge of Doe's participation in the organizing activity. In its exceptions, SEIU argues that the District had such knowledge through its officials, Davis, Bjoring, and Droke, and that the knowledge of Evans, Stahl, and

Martin can be attributed to the District. It further argues that knowledge of Doe's activity can be inferred from the totality of the evidence of the District's anti-union animus.

In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board held that in cases alleging reprisal or discrimination the charging party has the burden of showing that the employer's act was motivated by the employee's participation in protected activity and that motivation can be established by circumstantial evidence. An essential element of such proof is the employer's knowledge of the protected activity. Doe's organizing activity is not disputed. The District's knowledge thereof, up to and including the time of the discharge, is disputed. The record supports the District.

Indeed, there is nothing in the record to justify overturning the hearing officer's credibility finding that Davis, Bjoring and Droke had no knowledge of SEIU's organizing drive prior to receipt of the petition five days after Doe's discharge.

The only District official that had some knowledge of SEIU's activity was Hederick.[6] But there is no evidence to indicate that Hederick knew that Doe was involved.

The allegation contained in the charge that Evans, Stahl and Martin, all of whom had knowledge of Doe's activity, were

---

[6]SEIU did not name him as an agent whose knowledge could be imputed to the District.

agents of the District is not supported by the record. No evidence was produced to show that they were informants (Amyx Industries, Inc. v. NLRB (8th Cir. 1972) 457 F.2d 904 [79 LRRM 2930]) or in any other way serving as agents or representatives of the District. Cf. Rexart Color and Chemical Co. (1979) 246 NLRB No. 40, (employer held responsible for acts of a nonsupervisory employee who occupied such a position that other employees could reasonably believe that he was speaking and acting on behalf of management); NLRB v. American Thread Co. (1953) 204 F.2d 161 [32 LRRM 2044] (employer held responsible for anti-union conduct of nonsupervisory employee where it instigates, encourages, ratifies, or condones such activity).

Several federal circuits have held that knowledge of the protected activity can be inferred from circumstantial evidence of anti-union motive:

> There is no good reason why the two factual propositions - a knowledge of general union activity and a anti-union motivation in discharging a particular employee-need be proved by different types of evidence. As to each direct evidence may not be obtainable and circumstantial evidence and "inferences of probability drawn from the totality of other facts, are perfectly proper.
>
> NLRB v. Long Island Airport Limosine Service Corp. (2nd Cir. 1972) 468 F.2d 242 [81 LRRM 2445]; NLRB v. Wal-Mart Stores, Inc. (8th Cir. 1973) 488 F.2d 114 [84 LRRM 2865].

Similarly, the NLRB has held that when there is sufficient circumstantial evidence to establish improper motive, an

employer's defense that there is lack of evidence to establish the employer's knowledge is without merit. Rosen Sanitary Wiping Cloth Co. (1965) 154 NLRB 1185 [60 LRRM 1114].

SEIU argues that unlawful motive can be inferred from (1) the timing of Doe's discharge, (2) the animus of District representatives, and (3) the insufficiency of cause for the discharge.

Doe's discharge did coincide with his organizing efforts. However,

> mere coincidence in time between the employee's union activities and his discharge does not raise an inference of knowledge on the part of the employer without some direct or persuasive circumstantial evidence in the record of knowledge. Amyx Industries, supra.

The evidence of Davis' alleged animus was Doe's uncorroborated testimony that Evans had informed him of Davis' comments about unions. The hearing officer did not credit this testimony in the face of Davis' and Evans' denials.[7]

Even if we were to find some animus in Hederick in view of his prohibition against the distribution of authorization cards during working hours and the presence of SEIU materials during lunch time, we would not impute it to the District. Hederick was not involved in Doe's discharge. In the absence

---

[7]SEIU contends that the evidence should be credited because it falls under one or more of the hearsay exceptions. (See sections 1220, 1230 and 1235 of the California Evidence Code.) The exceptions go to the admissibility of hearsay rather than its credibility.

of evidence of some communication between Hederick and the other officials, neither his actions nor state of mind should be attributed to the District. Cf. Frank Paxton Lumber Co. (1978) 235 NLRB 582 [98 LRRM 1072] (animus of supervisor attributed to employer where supervisor contributed directly to decision to terminate employee); see also Antelope Valley Community College District (7/18/79) PERB Decision No. 97.[8]

SEIU asserts that it is incumbent upon the Board to determine whether or not there was just cause for the discharge; if there was not, improper motive may be inferred. It also contends that, to make a proper determination of just cause, it is necessary to resolve the numerous conflicts in the testimony of the District and SEIU witnesses.[9]

The Board has reviewed the film in question and, while we may not share the District's estimate of its value in identifying the miscreant,[10] we cannot, for that reason

---

[8]While SEIU asserts that both Droke and Bjoring harbored animus, it presented no evidence to substantiate its claim.

[9]The hearing officer's findings here are confusing. After reviewing the film several times, he said that the District reasonably could have identified Doe as the man in the film and that it was unnecessary to resolve the conflicts in testimony which raised questions regarding the reliability of the identification. Later, however, he went on to conclude that Doe's testimony (portions of which were not disputed), as well as the other (sic) circumstantial evidence presented by SEIU, was not sufficiently credible to find the District's identification to be unreasonable.

[10]Indeed, the film fails to show that the individual removed any stamps.

alone, attribute anti-union animus to the employer. Assuming, arguendo, that such is the case here, lack of "just cause" is nevertheless not synonymous with anti-union animus. By itself, it does not permit such a finding. Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy.[11] Local 715 bore the burden of producing evidence which would permit the conclusion that the injustice here was an act of employer retaliation against Doe for his organizing efforts. The totality of its evidence is insufficient to permit an inference that the District was unlawfully motivated against Doe. Therefore, there is no basis for inferring that the District had knowledge of his activities.

The Interference Charge

SEIU excepts to the finding that the District did not interfere with the rights of other unit employees by its discharge of the grievant. It argues that it is legally unnecessary for the charging party to provide evidence that the discharge of a known activist for protected activity had an adverse impact on other unit members. It maintains that such discharge is per se inherently destructive of the rights of other employees.

---

[11]E.g., mistaken identity, personal dislike, discrimination based on nationality, religion, or sex, etc.

The thrust of this charge is not clear. If it proposes that the unlawful discharge of a union organizer inherently interferes with the EERA rights of unit employees, it must fail according to the facts. We do not find that Doe was unlawfully discharged. If the contention is that the discharge of an organizer, irrespective of cause, constitutes such a violation, it must be rejected in accordance with the principles articulated in Carlsbad Unified School District (1/30/79) PERB Decision No. 89. There, the Board concluded that, while proof of unlawful motive is generally not required in interference cases, the charging party must demonstrate some nexus between the employer's act and the protected activity with resultant harm to employee rights under EERA. In such event, the Board will balance the operational justification claimed by the employer against the harm done.

Here, the justification was the need to protect against the theft of school property and the right to take disciplinary action against offenders. To find that the harm inherent in the discharge of a dishonest employee who happens to be a union organizer outweighs the employer's legitimate needs and interests would make a mockery of Carlsbad's balancing principle and preclude employers from ever disciplining union activists irrespective of just cause.

ORDER

Based on the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that

the unfair practice charge filed by the Service Employees' International Union, Local 715 against the Moreland Elementary School District in Case No. SF-CE-105 be DISMISSED.

By: Harry Gluck, Chairperson

John W. Jaeger, Member

Virgil W. Jensen, Member