STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE EMPLOYEES TRADES COUNCIL, LOCAL 1268, LIUNA, AFL/CIO,	)	
Charging Party,	)	Case No. LA-CE-70-S
v.	)	PERB Decision No. 328-S
STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION),	)	July 29, 1983
Respondent.	)	

Appearances; Thomas E. Rankin, Attorney for State Employees Trades Council Local 1268, LIUNA, AFL/CIO; Francis C. Buchter, Attorney for State of California, Department of Parks and Recreation.

Before Gluck, Chairperson; Jaeger and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State Employees Trades Council, Local 1268, LIUNA, AFL/CIO, (SETC or Union) to the hearing officer's proposed decision dismissing the SETC's allegations that Frank Pearson was retaliated against because of his participation in protected activity in violation of subsections 3519(a),(b) and (d) of the State Employer-Employee Relations Act (SEERA or Act).[1]

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

Section 3519 states in pertinent part:

On September 8, 1981, the SETC filed a charge alleging that Frank Pearson was retaliated against for his participation in protected activity when he was evaluated for a promotional opportunity to enter a state park ranger training program. The Association excepts to the hearing officer's conclusion that the ranking Pearson received from the ranger selection panel was not "based on anti-union animus". SETC also excepts to the hearing officer's construction and application of PERB's test for unlawful discrimination.

The Board has reviewed the entire record in light of these exceptions. We reverse the hearing officer's decision, and

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It shall be unlawful for the state to:

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

(b) Deny to employee organizations rights guaranteed to them by this chapter.

. . . . . .

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

find that the Department of Parks and Recreation (Department) violated subsection 3519(a).

FACTS

Frank Pearson has been employed as a groundskeeper at the Department of Parks and Recreation (Department) Lake Perris Recreation Area since 1979. In 1980 he was promoted to lead groundskeeper. The alleged discriminatory acts occurred in September 1981 when Pearson was not selected for the state park ranger training program.

Prior to the Department's September 1981 actions, Pearson became active in the State Employees Trades Council. He was a SETC job steward. In that capacity, Pearson was involved in grievance-related matters that required interaction with various park supervisors.

In June 1981, Pearson represented the grounds crew in a dispute with Supervisor Dave Powers over the appropriate hour to schedule the crew's lunch break. The crew had succeeded in moving their starting time up to 6 a.m. in order to avoid the summertime afternoon heat. Powers, in turn, wanted to move their lunch break to 10 a.m. However, Pearson, through a series of discussions culminating in a letter to Powers' supervisor, Robert Freeman, succeeded in maintaining the lunch break at 11 a.m. Powers expressed anger over what he perceived to be Pearson's attempt to go over his head to higher supervisors.

In July 1981, park management prohibited employees from using the public concessions for lunch or breaks. Again, Pearson represented his crew in this dispute, and management ultimately rescinded the rule.

In addition, in March and April 1981, Pearson took a four-week unpaid leave of absence to organize on behalf of SETC in the SEERA elections. As a result of these activities, Pearson's union activity was well known to his immediate supervisor, Dave Powers, Maintenance Supervisor Leon Hamilton, Area Manager Robert Freeman, and Deputy Regional Director Ronald McCullough. All were involved in the selection process for the park ranger training program.

In May or June 1981, during the organizing effort for the SEERA elections, Pearson wore a SETC button on his uniform. He was told by Area Manager Freeman that, according to regulations, the button was not allowed and that it had to be removed. He obeyed the order but consulted with the Union and was informed that at another state park an unfair practice charge over wearing a union button had been informally settled in the Union's favor. On the advice of the Union, Pearson put the button back on his uniform. Freeman again told him to remove the button. In response, Pearson told Freeman to consult the Department's labor relations officer. Several days later, Freeman contacted that official and was informed that Pearson should be permitted to wear the button. Freeman, in

turn, told Pearson. Freeman testified that he originally objected to the button because it did not conform to uniform regulations. However, he admitted that he had not objected to the wearing of other buttons even though they did not conform to regulations. Shortly after Pearson was permitted to wear the union button, Freeman objected to Pearson wearing an SETC belt buckle. Pearson removed the buckle.

In August 1981, Pearson was reprimanded by Powers for speeding and running a stop sign while operating a Department motor scooter. Testimony was presented at the hearing by a Department mechanic that the motor scooter Pearson was using could travel a maximum speed of only 17 mph. The posted speed limit was 15 mph. Powers admitted that he did not see Pearson run the stop sign.

During the summer of 1981, Pearson was prohibited from drinking coffee on the job as part of management's attempt to curtail the practice. Area Manager Robert Freeman testified that employees working at a desk could drink coffee and carry it to their desks. Pearson, whose job required regular desk work, nonetheless received a written "mini-memo" on September 17 for carrying a coffee cup. Both Powers and Freeman testified that they verbally warned several other employees besides Pearson not to carry coffee cups. None, however, other than Pearson, received a written reprimand.

In late summer 1981, Pearson applied for the in-house park ranger training program. The application process required the

filing of both an "Employee Questionnaire" and a "Supervisor's Endorsement" for review by the program's selection panel.

On September 1, 1981, pursuant to the application process, Pearson picked up an endorsement from his immediate supervisor, Dave Powers. Powers was assigned the responsibility of filling out the required evaluation by the area manager, Robert Freeman. Powers gave Pearson two copies of Part B of the endorsement, one in pencil with a portion of the answer to one of the questions erased but still legible, and the other a typewritten final version. The partly-erased response to question 7 stated:

> I think that Frank, given proper guidance and training, would make an adequate state park ranger. If he puts as much effort into his career as he put into his job steward position he had, he will have more than enough drive to become an excellent ranger. (Underlining indicates the erased portion.)

The handwritten and typed versions of the evaluation are identical except the erased portion is omitted from the typed copy. The comment was deleted when Powers' immediate supervisor, Leon Hamilton, reviewed the document and believed that the comment might be "misinterpreted by other people".[2] Freeman merely signed the typed copy that Powers completed.

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[2]The hearing officer, after reviewing the testimony and observing the demeanor of the witnesses, concluded that the erased portion was intended to be a negative reference to Pearson's union activities. The credibility findings of hearing officers are ordinarily given deference if they are supported by the record as a whole. Santa Clara Unified School

Powers was responsible for evaluating two candidates, Pearson and Allen Garrity, a Lake Perris groundskeeper with three years of service.

There are a number of differences between the evaluations of Pearson and Garrity. In response to a question regarding whether the candidate met all the qualifications, Garrity's evaluation stated: "Yes, I feel that Al will make every effort to become the best of the rangers"; whereas Pearson's evaluation stated: "He has good qualifications in natural resources due to his present position." With respect to the inquiry about the candidate's strongest and weakest qualities, Powers responded that Garrity's strongest quality was "A good level headed attitude" and his weakest, "I have seen no bad qualities in this individual." Pearson's stated that his strongest quality was his "interpretation of natural resources and accompanying pest-disease detection and control" and his weakest was that "He takes authority of any kind and uses it in a manner that tends to exceed the limits given." When cross-examined about the basis of this comment, Powers expressly admitted that Pearson's union activities were a factor in his perception that Pearson exceeded authority.

District (9/26/79) PERB Decision No. 104. Since we find the hearing officer's credibility determination is supported by the record as a whole, we hereby adopt it as the factual determination of the Board itself.

The State's witnesses offered two different explanations for the authority comment. Freeman claimed that Pearson exceeded his authority by responding to emergencies outside his assigned area of duties. However, when examined as to specific incidents of misconduct, Freeman could only cite an incident which occurred after the evaluation was submitted to the ranger selection panel. Freeman was unable to cite a single example of Pearson's abuse of authority prior to the date of the evaluation. Pearson testified that the incident referred to was life-threatening and extraordinary and, furthermore, that his supervisors required him to work outside of assigned boundaries for other purposes.

Powers supported the reference to Pearson's difficulty with authority by citing an incident in June 1981 in which Pearson allegedly brought in an outside contractor to supply information without the consent of management. Pearson testified, and the hearing officer also concluded, that prior to Powers' assuming supervisory responsibility, Lee Banks, Pearson's previous supervisor, authorized Pearson to set up the meeting with the contractors. Furthermore, during the hearing, Powers expressly admitted that his criticism regarding Pearson's use of authority relied in part on his knowledge of Pearson's union activity.

Finally, Powers' evaluation of the candidates' potential as rangers stated that Garrity " . . . seems career oriented to

me. I think he would make a very good park ranger." Pearson's stated, omitting the erased comments noted previously, "I think that Frank, given proper guidance and training, would make an adequate state park ranger." (Emphasis added.)

Pearson submitted his application, the supervisor's endorsement, plus an optional career development plan, on September 1. Eight others applied in his region but two withdrew leaving seven candidates, including Pearson, to be interviewed.

The interviews were conducted by a three-member panel which included Deputy Regional Director Ronald McCullough and two other members. Prior to the interviews, each panelist received and reviewed the papers submitted by the applicants. The panel then questioned each candidate for approximately 20 minutes. The individual panel members then graded each candidate according to categories specified on a form entitled "Statistical Competitive Rating Report." After the interviews, the panelists discussed the candidates' presentations. The candidates were then ranked according to their scores on the rating forms. After the ranking, the forms were sent to the Department's affirmative action officer for a brief review.

According to McCullough, the panel generally considered the application and supervisor's evaluation to account for about one half of the overall score. He further testified that the supervisor's evaluation had the most impact on the grading of the categories "Experience" and "Attitude."

Based on these grades, Frank Pearson, a white male, was ranked fourth on the list. Ranking first was Joseph Juarez, an Hispanic; second was Mirlita Dennis, a woman; and third was Allen Garrity, a white male. The State contended that affirmative action goals determined and justified the outcome of the selection process. This claim is substantiated in relation to the two top candidates. However, Pearson is most closely matched to Garrity, who is also a white male and therefore affirmative action goals do not explain why Pearson ranked below Garrity. Pearson's rank was .17 of a point below Garrity's.

Due to extraneous events, including a statewide hiring freeze, only Garrity was able to enter the training program. The candidates who placed first and second did not actually enter the program because their original positions could not be back-filled. The evidence was inconclusive as to whether Pearson's lead groundskeeper position could have been back-filled.

DISCUSSION

The proposed decision was issued after the Board established its test for discriminatory employer conduct in Novato Unified School District (4/30/82) PERB Decision No. 210. However, the hearing officer failed to apply or cite the Novato test, instead relying on an inappropriate application of Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

Under Novato, where a charging party has alleged discrimination, he or she has the initial burden of making a showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision to take adverse personnel action. In recognition of the fact that direct evidence of motivation is seldom available, unlawful motivation may be demonstrated circumstantially. Accord, Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party is able, by direct or circumstantial evidence, to raise the inference that the employer was motivated to take adverse personnel action by its knowledge of the employee's protected activity, the burden shifts to the employer to demonstrate that it would have acted as it did regardless of the employee's participation in protected activity. Novato, supra; Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]; NLRB v. Transportation Management Corp. (1983) _____ U.S. _____ [113 LRRM 2857].

The charging party must first demonstrate that he was engaged in, and the employer was aware of, the protected activity. Based upon Pearson's job steward activities, including the union button incident, the lunch break incident, the park concession incident, and his leave without pay to organize for SETC, as well as his supervisor's admitted awareness of his union activity, we conclude that Pearson produced sufficient evidence to meet this aspect of the test.

Next, the charging party must establish that Pearson's protected activity was a motivating factor in the Department's low rating of him. Viewing the record in its totality, we find that there is sufficient circumstantial evidence to support an inference that the Department unlawfully discriminated against Pearson because of his participation in protected activity. In our view, the record reveals a pattern of discriminatory conduct on the part of the Department culminating in Pearson's relatively poor rating in the evaluation process.

On three occasions prior to the evaluation incident, Pearson was discriminatorily reprimanded. We find that when the timing of these reprimands is viewed against the background of Pearson's concentrated efforts on behalf of the union at the same time, an inference of anti-union animus is raised.

In May or June, 1981, Pearson was ordered by Robert Freeman to remove a union button from his uniform. Freeman testified that he ordered Pearson to remove the button because by wearing it Pearson was breaking Department regulations concerning the appearance of employee uniforms. Nevertheless, he admitted that he did not require employees wearing non-union-related badges or buttons to remove them from their uniforms. From such conduct we infer that Freeman's conduct was merely pretextual and evidences anti-union animus. San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261.

In August 1981, Pearson received a verbal reprimand for speeding and running a stop sign while operating a Department vehicle. The uncontroverted testimony of the Department's mechanic indicated that the vehicle was mechanically incapable of moving faster than two miles per hour above the speed limit. During the hearing, Powers admitted that he did not observe Pearson run the stop sign. Thus, the reprimand was given for an insignificant violation of the speed limit and was based, in part, on unsupported allegations of misconduct. Discipline based on unsubstantial allegations or on mere technical violations of employer work rules may raise an inference of unlawful motion. San Joaquin Delta Community College District, supra; North Sacramento School District (12/20/82) PERB Decision No. 264.

Similarly, Pearson's reprimand for violation of the Department's coffee policy also discloses disparate treatment. The evidence establishes that the policy was ill-defined and inconsistently applied. Robert Freeman testified that employees could drink coffee at their desks. Despite the fact that Pearson's job duties required regular use of a desk, he was nonetheless reprimanded for carrying a coffee cup. Although Powers and Pearson testified that they verbally warned other employees not to carry coffee cups, no other employee besides Pearson received a written reprimand.

Both the hearing officer and the witnesses for the Department characterized the written reprimand which Pearson received as a "counseling device," implying that it was, therefore, no more serious than a verbal warning. However, although the record does indicate that the memorandum was not placed in Pearson's personnel file, Powers admitted that an informal written reprimand is considered by the Department to be more serious than a verbal warning. Moreover, unlike the verbal warnings given to other employees, the reprimand given Pearson was circulated to his superiors. In any event, the Department introduced no evidence to show how the reprimand was, or could have been, used by the Department to "counsel" Pearson. As such, we are persuaded that the written reprimand represented disparate treatment of Pearson from which we infer unlawful motive. North Sacramento School District, supra.

The main evidence of unlawful employer conduct arises from the events surrounding Pearson's application to the park ranger training program. Pearson's overall less favorable rating than Garrity's was based, in large part, on comments which evidence anti-union animus on the part of Powers. First, as noted above, Powers rated as Pearson's weakest quality his tendency to exceed authority. Powers expressly admitted that this comment was, in part, based on Pearson's union activities. Moreover, when examined at the hearing as to the basis of this comment, neither Powers nor Freeman offered a credible

alternative justification. The justification they offered was based on incidents which arose after the evaluation was completed or which evidence no misuse of authority. Such shifting justifications have often been held to evidence a pretextual motivation. North Sacramento School District, supra; Marin Community College District (11/19/80) PERB Decision No. 145; Wright Line, supra; Firestone Textile Co. (1973) 203 NLRB 89 [83 LRRM 1039]; Shell Oil Co. (5th Cir., 1942) 128 F.2d 206 [10 LRRM 670].

Second, and perhaps more significantly, Pearson's evaluation contained an incompletely-erased reference to Pearson's enthusiastic approach to his shop steward responsibilities. As noted, supra, consistent with the hearing officer's credibility determination, we find that the erased portion of the draft evidences anti-union bias on the part of Powers. The partially-erased draft of Pearson's evaluation, in combination with the other negative aspects of the evaluation, raises an inference of unlawful motivation on the part of the Department. As a result of this anti-union animus, Pearson received an overall less favorable evaluation from Powers and Freeman than he would have otherwise received.

The Department offers three arguments to rebut the inference drawn from this evidence. First, it argues that the decision-making panel never saw the erased comment, and was, therefore, not motivated by anti-union animus. Second, the

Department argues that Freeman's independent review cleansed any unlawful motivation from the evaluation. Third, the Department argues that affirmative action goals justified the resulting ratings.

We find no merit in the Department's first contention. Although the final version of the evaluation did not contain any express reference to Pearson's activities on behalf of SETC, the lower ranking Pearson received from Powers was utilized by that panel to rank Pearson below the other candidates. Thus, according to the testimony of the chairperson of the selection panel, the panelists based their rankings on their overall impression of each candidate, impressions formed from the interviews, applications, and evaluations. Hence the rank score which the panel assigned each candidate was based partially on information derived from their supervisor's evaluations. The final ranking of the top four candidates closely matches the relative strengths of their supervisors' evaluations and, as such, these evaluations played a significant role in the panel's selection process. The fact that the panel may have only unwittingly relied upon the evaluation's biased appraisal of Pearson's performance does not neutralize the taint of unlawful motivation. Unlawful animus may be found where an evaluation panel, even innocently, relies upon the inaccurate and biased evaluations of other management officials. See Hambre Hombre Enterprises, Inc. v. NLRB (9th

Cir. 1978) 581 F.2d 204, 207 [99 LRRM 2541]; Allegheny Pepsi-Cola Bottling Co. v. NLRB (3d Cir., 1962) 312 F.2d 529, 531 [52 LRRM 2019]; NLRB v. Buddy Schoellkoph Products, Inc. (5th Cir., 1969) 410 F.2d 2089 [71 LRRM 2089].

Next, the Department argues that Freeman engaged in an independent review of Pearson's work record, thus cleansing Powers' evaluation of any anti-union animus. We find the Department's argument unconvincing. In the first place, given the incident concerning Pearson's wearing of a union button, Freeman's potential to be an independent evaluator free from anti-union animus is questionable. More importantly, we find no basis in the record to support the contention that Freeman engaged in an independent review of Pearson's work record. Freeman initially testified that he reviewed the comments on the evaluation. His testimony, however, was undermined by his inability to explain the basis for the comments he endorsed. Despite the fact that Pearson complained to Freeman about the contents of the evaluation as well as the objectivity of Powers as an evaluator, Freeman merely signed the typed copy as delivered. Thus, there is no evidence that Powers' evaluation received any more than a cursory review by Freeman.

Finally, the Department claims that affirmative action goals determined, and therefore justified, the outcome of the selection process. This claim might have had some validity in relation to the two top candidates. But Pearson was most

closely matched to Garrity, who is a white male. Thus, affirmative action goals alone cannot explain Pearson being ranked below Garrity.

Since the District has offered no legitimate justification to rebut the evidence of unlawful motive, we conclude that the Department violated subsection 3519(a) when it retaliated against Frank Pearson for engaging in protected activity.

We dismiss that portion of the charge alleging a violation of subsection 3519(b), since no independent evidence was introduced to prove that the Department, by its conduct, violated SETC's rights under the Act. Novato Unified School District, supra.

The Board dismisses the alleged violation of subsection 3519(d) since the Union failed to present evidence in support of this charge.

REMEDY

Subsection 3514.5(c) empowers the Board to fashion a remedy which will effectuate the purposes of the Act. While we have determined that Pearson's overall ranking was adversely affected by the anti-union animus that tainted the evaluation portion of the selection process, we find that the purposes of the Act can best be effectuated without voiding Allen Garrity's appointment.

In Lemoore Union High School District (12/28/82) PERB Decision No. 271, where the Board found that a job selection process was tainted by anti-union animus but was unable to

conclude that the employee who was retaliated against would have been promoted in the absence of anti-union bias, it ordered the employer to retest all the candidates. However, in Lemoore, the vacancy for which the charging party competed was a one-time opening for a permanent position. No other openings were anticipated in the foreseeable future. Thus, absent a new test, the charging party could never be granted an effective remedy. In this case, the record establishes that testing and selection for the park ranger training program is continuous and may occur any time when appropriate state park ranger positions become vacant. Garrity, an innocent party, may have completed his training and served as a permanent ranger for more than a year. There is no evidence that his test score was unwarranted. Rather than require his removal from the position, we find it appropriate to order the Department to place Pearson, without additional testing, at the head of the current list, if any, or at the head of the next list generated.

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is ORDERED that the State of California, Department of Parks and Recreation shall:

A. CEASE AND DESIST FROM:

1. Violating SEERA subsection 3519(a) by discriminating against Frank Pearson because of his participation in protected activity.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE PURPOSES OF THE ACT:

1. Place Pearson, without additional testing, at the head of the current list, if any, or at the head of the next list generated for the park ranger training program. Our order will not affect the Department's affirmative action criteria. In no event shall the Board's order affect the current job placement of Allen Garrity.

2. Within 10 working days following service of this Decision, post copies of the Notice to Employees as set forth in the attached Appendix for a period of thirty (30) consecutive workdays in all locations where notices to employees are customarily posted.

3. At the end of the posting period, notify the Sacramento regional director of the Public Employment Relations Board, of the action taken to comply with this Order.

Chairperson Gluck and Member Burt joined in this Decision.

Appendix

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-70-S, State Employees Trades Council, Local 1268, LIUNA, AFL-CIO v. State of California, Department of Parks and Recreation, It has been found that the Department of Parks and Recreation violated subsection 3519(a) of the State Employer-Employee Relations Act (SEERA) by retaliating against its employee, Frank Pearson, by failing to evaluate him fairly for selection for the state park ranger training program because of his exercise of rights guaranteed by SEERA.

As a result of this conduct, we have been ordered to post this Notice, and we will:

A. CEASE AND DESIST FROM:

1. Violating SEERA subsection 3519(a) by discriminating against Frank Pearson because of his participation in protected activity.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Place Pearson, without additional testing, at the head of the current list, if any, or at the head of the next list generated for the park ranger training program.

Dated:_____ By: _____
Authorized Agent of the
Department

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.