STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-91-S
v.	)	PERB Decision No. 459-S
STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION),	)	December 12, 1984
Respondent.	)	

Appearances: Robert W. Feinstein, Attorney for California State Employees' Association; William M. McMillan, Attorney for State of California (Department of Transportation).

Before Tovar, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: The instant case is before the Public Employment Relations Board (PERB or Board) based on exceptions filed by the State of California (Department of Transportation) (Caltrans) to an administrative law judge's (ALJ) proposed decision, attached hereto. The ALJ upheld the unfair practice charge as filed by the California State Employees' Association (CSEA) and concluded that Caltrans had unlawfully disciplined a Caltrans employee and CSEA job steward because he exercised rights guaranteed by the State Employer-Employee Relations Act (SEERA).[1]

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[1]SEERA is codified at Government Code section 3512 et seq. In the ALJ's proposed decision, Caltrans' conduct was

Based on our review of the entire record in this case, including Caltrans' exceptions and CSEA's response thereto, we find the ALJ's proposed decision to be free from prejudicial error. Consistent with the following discussion, we affirm his findings of fact and conclusions of law.

FACTUAL SUMMARY

While we expressly adopt the findings of fact as set forth in the proposed decision, a brief summary is in order.

The original charge involved one letter of warning and two suspensions ordered by Caltrans to discipline William Onderdonk, a structural steel painter at the Vincent Thomas Bridge in San Pedro.

There is no dispute that Onderdonk engaged in protected activity. In addition to his role as CSEA job steward, Onderdonk initiated several grievances and filed numerous requests for expedited safety reviews concerning working conditions on the bridge. Onderdonk's activities were well

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found to have violated Government Code section 3519(a) and (b). Section 3519 provides, in pertinent part, as follows:

> 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.

known to his superiors and occurred during the period of time when the three disputed disciplinary actions cited in the instant charge were initiated by Onderdonk's supervisor.

The warning letter, dated July 8, 1981, admonished Onderdonk for his failure to provide a doctor's excuse for his absence on July 6, 1981 due to a sunburn.

The letter ordering a two-day suspension, dated November 19, 1981, listed a number of transgressions Onderdonk allegedly committed. Specific incidents were cited where Onderdonk had allegedly failed to submit an accident report regarding damage to a truck door, had refused to pressure-wash the underside of a crane truck, had been tardy and failed to submit a doctor's excuse for his absence because of a sunburned face, had failed to report for work or to telephone his supervisor, and had refused to wash skid rails and cords.

The other disciplinary action complained of in the original charge involved a four-day suspension, dated March 15, 1982. The letter that advised Onderdonk of this suspension alleged that he had threatened his supervisor, Val Picotte, and had played dominoes during work hours and had refused to wash the windows of a truck.

DISCUSSION

The exceptions submitted by Caltrans refer only to the

suspension issued in November 1981.[2] Certain factual points are contested.

Accident Report

Caltrans argues that the ALJ's proposed decision contains the erroneous finding of fact that Picotte, Onderdonk's supervisor, knew that Simon Jenkins was driving the truck when damage to the door occurred and, yet, questioned and ultimately disciplined only Onderdonk.

Upon review, we find the record inconclusive on this factual point. Jenkins' testimony was that he was not sure whether or not Picotte was aware that he was driving the truck. He also stated, however, that he was sure Picotte knew he was in the truck. Picotte testified that he was not aware of the fact that Jenkins was the driver and that he did not ask Onderdonk who the driver was.

Caltrans' exception is correct to the extent that the record does not establish that Picotte knew that Jenkins was the driver. Nevertheless, the fact remains that, while Picotte knew Jenkins was in the truck and, thus, might well have some knowledge about how the accident occurred, Picotte questioned only Onderdonk. Although the incident was not immediately reported, it was Onderdonk who eventually reported the

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[2]Caltrans takes no exception to the ALJ's conclusion that the March suspension evidenced disparate treatment and was not a justified response to Onderdonk's conduct. On April 19, 1983, this suspension was rescinded by order of the State Personnel Board (SPB).

accident. Jenkins never came forward to report the incident. While one might find that the responsibility to report an accident rests only with the person who was responsible, Picotte's testimony was that the person who had the accident (in this case, the door flew from Onderdonk's hand) is the one primarily responsible for reporting it. Thus, under the rules of the shop, although Jenkins had less responsibility than Onderdonk to initiate the accident report, it seems that Jenkins failed to fulfill whatever responsibility he had to promptly follow the accident reporting rules. In any event, the ALJ's finding (that Picotte knew that Jenkins was the driver) does not undermine his conclusion, since whether or not Jenkins was the driver does not affect his reporting responsibility. The salient point remains undisturbed: Onderdonk was disciplined for late reporting of the accident, and Jenkins, who made no report, received no discipline.

Attendance Record

Concerning Onderdonk's attendance record, Caltrans argues that Jenkins' four or five incidents of tardiness in the past year are not comparable to Onderdonk's absences or tardiness on seven occasions during June and July 1981. This contention is inaccurate in two respects. First, as the ALJ states, Jenkins was late four or five times in the past year and also called in with car problems three or four times. These seven to nine incidents of tardiness or absences are more appropriately compared to Onderdonk's seven incidents of tardiness or

absences. The Caltrans argument also overlooks the fact that Onderdonk's seven incidents, which occurred in June and July, stand alone and presumably reflect all of Onderdonk's attendance problems. As the ALJ noted, at p. 31:

> Neither the November 1981 or March 1982 letter of suspension cites any attendance violations by Onderdonk for the period July 1981 to March 1982. It is assumed that any violations during this period would have become part of the disciplinary action. Thus, it is apparent that Onderdonk's attendance record after July 1981 was satisfactory.

Absent from Caltrans' argument is any mention of Paul Ramirez, whose attendance problems, according to Picotte, persisted through his probationary period and several months thereafter. Rather than initiate disciplinary action to remedy Ramirez' attendance problem, Picotte found it sufficient to work with him in order to remedy the situation.

In sum, given the fact that the record describes a work environment where attendance violations were legion, the ALJ's conclusion that Onderdonk received disparate treatment is amply supported. Even though Jenkins and Ramirez may never have failed to call in when absent, this fact alone does not justify their serious attendance problems and, in isolation, does not justify the disparity with which Onderdonk's attendance violations were handled.

Nexus

Caltrans also reiterates its argument that the absence of action taken against other union members disproves the nexus

between disciplinary action against Onderdonk and his protected activity. This claim clearly is without merit. First, the record reveals Onderdonk to be more active than other employees. Second, as the ALJ noted, Picotte's discipline of Onderdonk because of his protected activity is not disproved by Picotte's failure to discipline any other employees who also exercised SEERA rights. Cases cited in the ALJ's proposed decision reveal that, under federal precedent, "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." Nachman Corp. v. NLRB (7th Cir. 1964) 337 F.2d 421 [57 LRRM 2217]; NLRB v. Instrument Corp. of America (4th Cir. 1983) 714 F.2d 324 [113 LRRM 3649].

SPB Decisions

Finally, Caltrans claims that this Board must defer to the SPB's ruling which upheld the November 1981 two-day suspension. Based on that decision, Caltrans claims that PERB lacks authority to order it to rescind Onderdonk's two-day suspension.

The Board's jurisdictional authority is to insure that any disciplinary action taken against a State employee is initiated for reasons other than the exercise of SEERA rights. As stated by the court in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487, 624, P.2d 1215]:

> . . . PERB and the State Personnel Board are not in competition with each other; rather, each agency was established to serve a

> different, but not inconsistent, public purpose. The State Personnel Board was granted jurisdiction to review disciplinary actions of civil service employees in order to protect civil service employees from politically partisan mistreatment or other arbitrary action inconsistent with the merit principle . . . .
>
> PERB, on the other hand, has been given a somewhat more specialized and more focused task: to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by SEERA. Although disciplinary actions taken in violation of SEERA would transgress the merit principle as well, the Legislature evidently thought it important to assign the task of investigating potential violations of SEERA to an agency which possesses and can further develop specialized expertise in the labor relations field. [Citations and footnote omitted.] Thus, insofar as possible, we should construe the relevant provisions to permit an accommodation of the respective tasks of both the State Personnel Board and PERB. (Pp. 197-198.)

Thus, while the SPB has been granted the authority to review disciplinary actions, PERB is, at the same time, charged with reviewing those same disciplinary actions when the charge involves a claim that the exercise of SEERA rights was a motivating factor in the decision to discipline.

In the instant case, both agencies have reviewed the disciplinary action and have rendered decisions. In spite of Caltrans' assertion, however, the two determinations are not incompatible, nor does PERB's order intrude on SPB's jurisdictional authority. Thus, whereas the SPB concluded that Onderdonk engaged in proscribed conduct for which discipline

was justified, the PERB ALJ concluded that Onderdonk would not have been disciplined but for his protected activity. As in any mixed-motive case, the employer's conduct is unlawful when, despite employee misconduct, the evidence demonstrates that the employer would not have elected to discipline the employee as it did but for the employee's union activity. See Novato Unified School District (4/30/82) PERB Decision No. 210; and Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. denied (1982) 455 U.S. 989 [109 LRRM 2779]. Finding no basis to disturb the ALJ's express factual conclusion that the employer would not have disciplined Onderdonk save for his protected activity, the SPB decision poses no impediment to our order that Caltrans remove both suspensions (and the warning letter) from Onderdonk's file.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is hereby ORDERED that the State of California (Department of Transportation) and its representatives shall:

1. CEASE AND DESIST FROM:

a. Imposing reprisals on or discriminating against William Onderdonk for engaging in protected activity under SEERA.

b. Denying the California State Employees' Association the right to represent its members by imposing reprisals on or

discriminating against William Onderdonk, a CSEA steward, for engaging in protected activity under SEERA.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE STATE EMPLOYER-EMPLOYEE RELATIONS ACT:

a. Immediately remove from William Onderdonk's personnel file and destroy: (1) the July 8, 1981 letter of warning; (2) the November 19, 1981 letter of suspension; and (3) the March 15, 1982 letter of suspension.

b. Immediately rescind disciplinary actions referred to in paragraph "a" above and make William Onderdonk whole for the wages or benefits he lost as a result of these actions, including reimbursement for lost wages with interest at the rate of ten percent per annum.

c. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are posted, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

d. Written notification of the actions taken to comply with this Order shall be made to the regional director of the

Public Employment Relations Board in accordance with her instructions.

Members Tovar and 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-91-S, California State Employees' Association v. State of California (Department of Transportation), in which all parties had the right to participate, it has been found that the State employer violated Government Code section 3519(a) and (b).

As a result of this conduct, we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

a. Imposing reprisals on or discriminating against William Onderdonk for engaging in protected activity under SEERA.

b. Denying the California State Employees' Association the right to represent its members by imposing reprisals on or discriminating against William Onderdonk, a CSEA steward, for engaging in protected activity under SEERA.

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b. Immediately rescind disciplinary actions referred to in paragraph "a" above and make William Onderdonk whole for the wages or benefits he lost as a result of these actions, including reimbursement for lost wages with interest at the rate of ten percent per annum.

Dated: _____

STATE OF CALIFORNIA
(DEPARTMENT OF TRANSPORTATION)

By_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION), Respondent.	)	Unfair Practice Case No. LA-CE-91-S PROPOSED DECISION (10/14/83)

Appearances: Robert Feinstein, attorney, California State Employees Association; William McMillan, attorney, Department of Transportation.

Before: Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

On December 31, 1981, the California State Employees Association (hereafter CSEA or charging party) filed this unfair practice charge against the Department of Transportation, State of California (hereafter Caltrans or respondent). The charge alleges that respondent violated section 3519(a) and (b) of the State Employer Employee Relations Act (hereafter SEERA or Act) by disciplining a CSEA job steward with a letter of warning and two suspensions.[1] The charge also alleged that the steward was unlawfully denied

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[1]SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code.

representation at the meeting where he was given the letter of warning.

The Regional Attorney of the California Public Employment Relations Board (hereafter PERB or Board) issued a complaint on March 1, 1982. Respondent filed its answer on March 22, 1982. It denied all allegations and asserted that all actions were taken for lawful reasons.

An informal conference was held on April 7, 1982, but the case was not settled. A formal hearing was held in Los Angeles on November 4, 1982. The briefing schedule was completed on February 11, 1983.

FINDINGS OF FACT

William Onderdonk is employed by Caltrans as a structural steel painter at the Vincent Thomas Bridge in San Pedro, California. He has been a CSEA steward since 1980. His supervisor is Val Picotte.

Fred Beck became the superintendent of bridges and pavement, including the Vincent Thomas Bridge, on February 1, 1981. Shortly thereafter, he learned from Picotte that there were "personnel problems" on the bridge, including the abuse of leave and poor attendance. Upon checking attendance records for the previous year, Picotte concluded that Onderdonk had the worst record.

On April 3, 1981, a meeting was held to discuss, among other things, Onderdonk's attendance. Present were Onderdonk,

Picotte, Beck and Sam Rea, assistant superintendent. Onderdonk was told that he had a zero balance of sick leave and his superiors felt he had abused the use of sick leave. He was instructed to present a signed statement from his doctor when off on sick leave in the future. Onderdonk asked for a representative to accompany him to this meeting but the request was denied.[2]

On April 7, 1981, Picotte gave Onderdonk a letter spelling out in detail the amount of sick leave and vacation leave in lieu of sick leave he had used during the period July 1, 1980 to April 3, 1981. During this nine-month period, according to the letter, Onderdonk used 11 days of sick leave and 13.2 days of vacation in lieu of sick leave. He was docked 4 hours for lack of accrued sick leave and vacation leave for other absences. The letter did not mention the fact that Onderdonk had three job-related accidents which caused him to use several weeks of sick leave, nine days of which were eventually re-credited to his total. The letter also reiterated the

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[2]Although CSEA's brief appears to raise this denial of representation as a separate violation, it was not alleged as such in the charge and it was not fully litigated at the hearing. Therefore, it will not be considered here as a separate violation. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230. In addition, the April 3 meeting occurred more than six months before the instant charge was filed and therefore is time-barred. See section 3514.5. However, circumstances surrounding this meeting may be considered as background evidence of unlawful motive.

requirement that Onderdonk provide a doctor's certificate when sick, and it directed him to notify his supervisor no later than 7:15 a.m. on the day of the absence of his intent to use sick leave. These steps were taken to correct Onderdonk's abuse of sick leave.[3]

Onderdonk was given a letter of warning dated July 8, 1981. Citing the April 3 meeting and the April 7 letter, it alleged that on July 6, 1981, Onderdonk called Picotte to tell him he would be off on sick leave because of a sunburn, and on July 7 he reported to work without having seen a doctor and without a doctor's statement. Thus, the basis for the letter was the July 6 absence and failure to produce a doctor's excuse on July 7. Onderdonk grieved the letter of warning.

In fact, Onderdonk was absent on July 6 due to a sunburn. He called Picotte to say he would not be at work that day. When he reported to work on July 7, he did not have a doctor's certificate and Picotte reminded him of the requirement outlined in Beck's April 3 memo. On July 8 Onderdonk presented Picotte with a doctor's certificate verifying his illness.

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[3]Although other painters, Simon Jenkins and Calvin Deroshia, also maintained zero sick leave balances on occasion, they have never been told to provide a doctor's certificate when sick. However, Jenkins has never been sick while his leave balance was zero. Additionally, although Picotte testified that Onderdonk had the worst attendance record when compared with the records of other crew members, no concrete evidence, such as attendance records or other official

The letter of warning was presented to Onderdonk at a meeting attended by Onderdonk, Beck and Picotte on or about July 8 under the following circumstances. After being told by Picotte to attend the meeting in Beck's office, Onderdonk requested representation by Lafayette King, a CSEA staff representative. The request was denied. Picotte told Onderdonk he had no right to a representative. The meeting lasted only a few minutes. Onderdonk was given the letter and attempted to explain his position. Beck said almost nothing. Picotte was silent.

On November 19, 1981, Onderdonk received a letter suspending him for two days effective December 3, 1981. The letter contained a list of "acts of omissions" upon which the suspension was based. Each allegation will be dealt with as it appeared in the letter.

The first charge dealt with the failure to file a timely Vehicle Accident Report (Form 270). It read as follows:

> A. On March 31, 1981 you informed your supervisor, Mr. Val Picotte, that the door of the 1967 Chevrolet one-ton pickup truck, CHC #6376, would not close. When he asked you how it happened, you responded that "the wind blew it open a few days ago."
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> . . . . . .

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documents, were presented to substantiate this claim, despite the fact that Picotte had these records in his possession.

C. On April 3, 1981, when Mr. Picotte attempted to discuss the circumstances surrounding the broken door on State pickup truck, CHC #6376, you responded, "I'm not going to show you till Si (Jenkins) is here. Not till I've got a witness." This was a mandatory investigation to determine the cause of damage and did not require a witness or representative on your part.

On this date, at approximately 1:15 p.m., Messrs. Fred Beck, Caltrans Maintenance Superintendent II of Bridges and Pavement Rehabilitation, Sam Rea, Caltrans Maintenance Superintendent I, and your supervisor, Val Picotte, met with you for a counseling interview.

During the discussion, Mr. Beck reiterated the importance of timely completion of the Vehicle Accident Report (Form 270).

The factual allegations contained in this part of the letter are not in dispute. According to Beck's memo of April 3, accidents should be reported on the day they occur, and the appropriate form turned in to Beck. The goal is to submit the report to the safety office within 48 hours. In this case, the accident occurred on March 26. Onderdonk reported it to Picotte on March 31, and the appropriate report was received by Beck on April 2. It is Picotte's responsibility to prepare the report once the accident is reported.

Picotte testified that Form 270 should be filed within three days of the accident. He further testified that he asked Onderdonk about the incident because only Onderdonk was present at the time. In fact, Jenkins was also present and he corroborated Onderdonk's testimony to the extent that Onderdonk

requested Jenkins' presence as a witness. Onderdonk felt he needed a witness because he didn't trust Picotte, and Picotte told him that he (Picotte) would seek punitive action for the incident. Significantly, Jenkins credibly and without contradiction testified that he, not Onderdonk, was driving the truck at the time of the incident, and Picotte was aware of this when he attempted to question Onderdonk. Jenkins was not disciplined for failure to file Form 270, nor was he even questioned about not filing Form 270.

The next charge dealt with Onderdonk's refusal to wash the underside of a crane truck. The letter of suspension states:

> B. On April 2, 1981, at approximately 7:30 a.m., Mr. Picotte assigned you to pressure-wash the underside of the crane truck to enable the mechanic to find an oil leak.
>
> At 10:39 a.m., Mr. Picotte observed that the truck had not been washed. When he asked you why, you replied, "it's not my job."
>
> At 10:45 a.m., Mr. Picotte again directed you to wash the truck. You respondend, "fine, put it in writing ordering me to do it."
>
> At 11:00 a.m., you asked Mr. Picotte if he had documented his request in writing. He answered that he had not because you had performed this task in the past. You stated that you were not obligated to do any work other than clean and paint the Vincent Thomas Bridge.

Once again, the essential facts are not in dispute. Onderdonk, who was given several assignments that morning, wanted Picotte to put the work order in writing so he could use

it to file a grievance. Work orders were routinely posted on a bulletin board in the shop. He told Picotte that the truck-washing assignment was out-of-class work for a bridge painter. Furthermore, Onderdonk testified that, in his view, it was a mistake to wash the truck because if the truck was clean the mechanic would not be able to see the source of the leak on a clean truck.[4] Picotte disagreed; he thought that a clean truck would assist the mechanics in finding the source of the leak. Also, at the time the work order was given, the unit to be used for washing the truck was out of service due to lack of air pressure. The mechanics eventually arrived and fixed the truck without it being washed. The air pressure on the washing unit was still out of service at the time the leak was fixed.

Picotte did not put the request in writing. Onderdonk didn't wash the truck and the matter was dropped. Later, Picotte gave the same assignment to Cal Deroshia, also a bridge painter. Although the record is unclear as to whether the assignment to Deroshia involved the same truck or a different truck, the record is clear that Deroshia responded in exactly

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[4]Approximately two days earlier Onderdonk had asked for a safety review of the truck. His complaint was that one of the hydraulic units was leaking onto the muffler, causing a great deal of smoke which impaired the vision of trailing vehicles. This was the first safety review requested by Onderdonk.

the same way as Onderdonk. Picotte did not put the assignment to Deroshia in writing. Deroshia did not wash the truck and the matter was dropped.

Picotte later asked Jenkins, also a bridge painter, to wash another truck. Jenkins asked for the assignment in writing and Picotte gave him a written work order. Picotte said he put the assignment to Jenkins in writing because he was tired of hassling over the matter. Jenkins washed the truck under protest. He then filed a grievance and was represented by Onderdonk.

Neither Jenkins or Deroshia were disciplined for their responses to Picotte's directives to wash the trucks. Nor were these two workers ever counselled as a result of their actions.

The letter of suspension next cites the fact that, on April 3, 1981, Onderdonk was counselled about his attendance; it restates the requirement that Onderdonk provide a doctor's certificate for future absences where sick leave is requested; and it requires that Onderdonk secure advance supervisory approval for vacation leave requests. The letter then cites several incidents where Onderdonk did not comply with these directives.

D. On June 16, 1981, you were 6 minutes late for work.

E. On June 22, 1981, you were 25 minutes late for work.

F. On July 6, 1981, you telephoned Mr. Picotte

and informed him that you were sick and would not be at work.

G. On July 7, 1981, you returned to work. When Mr. Picotte requested a doctor's certification for your absence, you replied, "You have to be kidding. I need a doctor to say I have a sunburned face?" Mr. Picotte advised you that the certification was necessary, as outlined in Mr. Beck's memo to you dated April 3, 1981. You then stated, "okay, we're back to the same old game, we start playing the crazies." Later that afternoon, you went to see your doctor.

H. On July 8, 1981, you presented a doctor's statement, verifying your illness of July 6, 1981.

I. On July 8, 1981, you received a Letter of Warning from Mr. Fred Beck, reiterating requirements on sick leave usage. Specifically, Mr. Beck informed you to present a medical certification immediately upon your return to work.

J. On July 14, 1981, you were 5 minutes late for work.

K. On July 15, 1981, you were 9 minutes late for work.

L. On July 16, 1981, you were 20 minutes late for work.

Onderdonk testified that he could not remember being late on June 16, 1981 (paragraph D) or June 22, 1981 (paragraph E). He conceded that if he was late on June 22 it may have been the fault of another state employee, an electrician with whom he car-pooled. He further testified that he could not recall being late on July 14, 1981 (paragraph J), July 15, 1981 (paragraph K), or July 16 (paragraph L).

According to Onderdonk, however, there is not a single painter who has not been late on more than one occasion, and none of these painters have ever been disciplined for lateness. Jenkins corroborated Onderdonk's testimony in this regard. He said he was late four or five times in the past year and was not disciplined. Also, Jenkins testified that he has called in approximately three or four times with car problems since 1981. Each time he spoke to Picotte, he explained that he was having car trouble and might not report to work. Sometimes Jenkins' car was fixed and he reported for work. Other times the car was not fixed and he did not report to work. On the occasions when his car was not fixed, he did not call Picotte to say that he wouldn't be coming to work that day. According to Jenkins, Picotte never objected. Jenkins was never counselled or disciplined as a result of these incidents.

Picotte's version of Jenkins' absences due to car problems is slightly different. He testified that on the occasion Jenkins had car problems he always called to say whether he would or would not be reporting for work. According to Picotte, even when Jenkins could not get his car fixed he would call in to say he would not be coming to work. Picotte said he charged Jenkins' absence against vacation time when he was late or missed work due to car problems. However, on cross-examination, Picotte contradicted himself when he said

that he never docked any employees who missed work due to car problems.[5]

In addition, Paul Ramirez, another member of the painting crew, was late for work "a lot," according to Picotte, due to personal problems. The problems persisted throughout Ramirez' probationary period and for several months after. Picotte said he "worked with" Ramirez on his lateness problem, and he "leaned over backwards" to help. Eventually the problem was solved without Ramirez receiving any disciplinary action.

Picotte also testified about another employee named Mack who occasionally showed up for work late without calling in. On one occasion when Mack was late for work, Picotte orally reprimanded him. Mack gave Picotte "some static," but apologized later and the matter was dropped.

The attendance problem at the Vincent Thomas Bridge was such that it prompted Picotte, at the direction of his supervisors, to implement a system whereby he logged the

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[5]There is a dispute in the testimony regarding whether Picotte docked employees who were late because of car problems. Jenkins says he cannot recall being docked. Onderdonk says he was docked. Picotte first testified he docked all employees. Later he testified he never docked employees when late due to car problems. It appears that the attendance policy at the bridge was so loose that no clear practice existed. In any event, it is unnecessary to resolve this dispute, since the central issue is whether employees were uniformly disciplined--not docked--for missing work. As more fully discussed herein, only Onderdonk was disciplined.

minutes of every worker who either came late or left early. When a worker accumulated one hour of time, Picotte charged it against vacation time. According to Picotte, implementation of this system resolved the problem.

No testimony was presented regarding paragraphs F, G and H of the November 20, 1981, letter of suspension. These paragraphs have been addressed earlier. They simply describe the exchange between Onderdonk and Picotte on July 6-8, 1981, and their contents apparently are not in dispute. They will be considered as part of the discussion below.

Paragraph I of the suspension letter is not a substantive charge. It simply restates the fact that Onderdonk received a warning letter on July 8 and reemphasizes the requirement that Onderdonk present a medical certificate when absent.

Paragraphs M and N represent occasions when Onderdonk didn't show up for work.

> M. On July 22, 1981, you did not report for work nor telephoned your supervisor. At 9:36 a.m., Mr. Picotte called your home and spoke to your wife. When Mr. Picotte asked her why you were not at work, she answered, "I guess he doesn't feel well, he's still in bed sleeping."
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> N. On July 23, 1981, you were 10 minutes late for work. You told Mr. Picotte, "I have no excuse for not calling in yesterday, so dock me.

Onderdonk conceded in testimony that July 22, 1981, was the only time he didn't report for work without calling in.

However, he filed a grievance about this absence seeking to have the missed time taken out of his vacation rather than have himself considered AWOL. The charging party presented no evidence to contradict the allegation that Onderdonk was late 10 minutes on July 23, 1981.

The last allegation in the initial suspension letter dealt with Onderdonk's failure to properly carry out an order to wash skid rails and cords along the sidewalk of the bridge.

> On this date, [July 23, 1981] at approximately 9:00 a.m., Mr. Picotte assigned you to wash the skid rails and cords along the sidewalk of the bridge.
>
> At 12:15 p.m., when Mr. Picotte returned to the maintenance yard, he observed that you (and two co-workers) were sitting in a pickup truck. You called Mr. Picotte over to the truck and asked, "How do you want the job washed out there?" Mr. Picotte replied, "washed clean." When Mr. Picotte asked you how many cords you had washed you informed him that you had not done any washing.
>
> At approximately 1:25 p.m., when Mr. Picotte went to the job site, he observed that the cords had not been washed. When he mentioned this to you, you became argumentative and said you had done hand cleaning. This was not your job assignment for the day.

Jenkins was given the same assignment (washing skid rails and cords) as Onderdonk, and he reacted in exactly the same way as Onderdonk. In fact, Picotte testified that, in his view, Jenkins failed in the same way as Onderdonk. Jenkins received no letter of warning, nor was he otherwise disciplined as a result of the skid rail incident.

On March 15, 1982, Onderdonk was suspended for another four days based on two additional allegations. The first accused him of threatening Picotte:

> A. On November 20, 1981, your supervisor, Mr. Val Picotte, Structural Steel Painter Supervisor, accompanied you to the District Personnel Office where you were served a Notice of Punitive Action. This action suspended you for two working days.
>
> On this date, at approximately 2:05 p.m., you stated to Mr. Picotte, "You are right on the edge." When Mr. Picotte asked, "The edge of what?" you replied, "You are close to the edge of dying, and when you do, it's going to be real slow."

Whether Onderdonk made the statements attributed to him is highly disputed. Onderdonk testified that he had a conversation with Picotte on the afternoon of November 20, 1981, where Picotte, in a reference to their working relationship, asked him what it would take to "get the job back on an even keel." Onderdonk replied,

> No you're not. . . . I know exactly what you're doing."

Coming on the heels of a two-day suspension, Picotte's comments were not well received by Onderdonk. He felt that Picotte was less than truthful in his overture, and he told him the subject wasn't "worth discussing." In any event, according to Onderdonk, he made no threat to Picotte on November 20 or any time thereafter.

As a possible explanation Onderdonk testified that, on a

couple of occasions, he told Picotte to "settle down" or he would have another heart attack, but he said he never mentioned dying. Onderdonk described as "ridiculous" the entire notion that he would deliver such a threat to Picotte.

In describing the conversation of November 20, Picotte agreed that the two men discussed whether they could put things back on an "even keel," but he said Onderdonk was not willing to do so at that point. Picotte further testified as follows regarding the threat cited in the amended letter of suspension.

> And Onderdonk informed he, he says, you're right on the edge, you know, and I says, right on the edge of what. He says, you're right on the edge of dying. And I says, hell, Bill, we've all got to die, you've got to die, Cal's got to die, I've got to die. I said, hell, we're all going to die someday. And he says, yeah, but you're right on the edge. And I says, are you threatening me. And he turned to Cal and he says to Cal, hey, am I threatening him, I'm not threatening him, am I. And Cal says, no, he's not threatening you. And then Bill says, and when you go, he says, it's going to be real slow.

For the following reasons, I adopt Picotte's version of the November 20 conversation and conclude that Onderdonk made the statements attributed to him. Picotte demonstrated almost total recall of the conversation. He testified in much greater detail and appeared on the witness stand to be comfortable and at ease in describing his version of the exchange between the two men. Also, because he recorded in writing the comments made by Onderdonk at the time, more credibility is attached to

his recollection. Onderdonk, on the other hand, did not demonstrate the same level of recall. He wasn't as specific in his answers and attempted to divert his answers to other conversations he had had with Picotte, such as the one where he told Picotte he might have a heart attack. His demeanor was not impressive. When testifying about this subject he appeared a tense and uncomfortable witness, and he had trouble responding directly to questions by his representative. Lastly, Picotte's unrebutted testimony established that Cal Deroshia was present during the November 20 conversation. Deroshia, Onderdonk's co-worker, was called as a friendly witness by the charging party and his testimony supported much of what Onderdonk had to say about use of sick leave and the truck-washing incident, as well as the December 1981 statements (discussed below) by Picotte. Yet Deroshia was not asked about the death threat. Under these circumstances, I infer that if asked about the death threat while under oath, Deroshia would have responded in a manner adverse to the charging party's interest.

The last charge in the March 15 suspension letter dealt with the allegation that Onderdonk played dominos during work hours and refused to wash the windows of a truck.

> B. On January 18, 1982, at approximately 7:38 a.m., your supervisor, Mr. Val Picotte, requested that you (and a co-worker) stop playing dominos during working hours. You replied, "Hey, I don't care what you say.

> Right now I'm under M.E.T.A. (Maintenance Equipment Training Academy), so you don't have anything to say." When Mr. Picotte asked you to wash the windows of the State pickup truck, you responded, "We're not doing anything, so go on in and write it up."

Onderdonk testified that he and several other workers were scheduled to attend the Maintenance Equipment Training Academy (META) in San Luis Obispo on January 18, 1982. Early that morning Onderdonk and Deroshia were sitting at a table in the lunchroom, talking and waiting for other workers (Jenkins and Ramirez) to arrive so they could all depart for San Luis Obispo. There were dominos on the table but, according to Onderdonk, the two men were not playing dominos. Onderdonk said the two other workers eventually arrived and all four men departed for the training sessions. He said he did not even speak to Picotte that day.[6]

Picotte testified that he saw the two men playing dominos and advised them that they were not permitted to do so on work time. At that point Picotte directed both Onderdonk and Deroshia to wash the windows of the pickup truck. They refused. Picotte said Onderdonk responded to the request not to play dominos and to the request to wash the windows as indicated in the letter of suspension as quoted above. Shortly

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[6]Because this matter will be resolved on other grounds, it is unnecessary to resolve the dispute as to whether Onderdonk made any statements to Picotte on January 18.

thereafter all the employees scheduled for META training departed for San Luis Obispo. Deroshia was not disciplined for his participation in this incident.

Threats by Picotte.

Jenkins testified about an informal meeting in November 1981 attended by Picotte and members of the crew. He said "some type of argument" arose during which Picotte said "You guys," referring to Onderdonk and Jenkins, "I'll get you one way or the other." Picotte flatly denied making the statement.

At another meeting in December 1981, according to Jenkins, Picotte said that the reason Onderdonk was suspended was,

> . . . to set a precedent for the rest of the crew, as an example for the rest of the crew.

Deroshia corroborated Jenkins' version of the meeting. Onderdonk was not at the meeting. Picotte denied saying he would make an example of Onderdonk. He testified that, at some point, possibly the December meeting, he stated that some good might come out of the many grievances that had been filed because "they would probably be used as a precedent later on."

For the following reasons, I find that Picotte made the statements attributed to him at both the November and December 1981 meetings. Jenkins was an extremely credible witness. His demeanor while on the witness stand and his sincerity in answering questions were impressive. Also, as

evidenced by the grossly disparate treatment he meted out to Onderdonk, Picotte's behavior throughout has been consistent with a desire to "get" Onderdonk or make "an example" out of him. It is not surprising under the circumstances that Picotte would make such statements.

Protected Activity.

Onderdonk's protected activity is undisputed. He became a CSEA job steward in July 1980. Shortly thereafter, along with CSEA staff representative Lafayette King and other employees, he began to participate in a variety of protected activities. In September Onderdonk and King filed a grievance arguing that coning the bridge and bridge approaches was out-of-class work for painters. In December, King filed a grievance on behalf of Onderdonk and others alleging that Picotte had retaliated against employees for filing the coning grievance in September. On July 30, 1981, Onderdonk grieved the July 13, 1981 letter of warning for abuse of sick leave. Another undated grievance, filed by King on behalf of the entire crew, addressed, among other things, communications problem between employees and management at the bridge, beginning shortly after Onderdonk became a steward and filed the September 1980 coning grievance.[7] The communications grievance charged that

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[7]In his response to the truck washing grievance filed by Onderdonk and Jenkins, G. V. Hodd, Chief of Division of

Picotte had taken "punative (sic) and demoralizing" and "vindictive" actions against employees as a result of the grievance. More specifically, the grievance stated that,

> Mr. Onderdonk is the job steward for the crew and seemly (sic) they (management) seek to discourage him from performing in this capacity.

In addition, Onderdonk filed several requests for expedited safety reviews of working conditions at the bridge. And he charged that two accidents which occurred on the bridge, including one of his own injuries, were caused by Picotte's disregard for accepted safety practices.

Onderdonk continued his protected activity after he received the initial suspension on November 20, 1981. He filed more grievances and safety-related claims during the period beginning with the initial letter of suspension and continuing after the second letter of suspension.

Specifically, on December 16, 1981, Onderdonk requested, on behalf of employees, an expedited safety review of the lane closure procedures on the bridge. The concern was that the removal of the first tapes in the lane had increased the speed of traffic, making it hazardous to set the closure.

The record shows that Onderdonk's protected activity

Administrative Services, described the communications problem at the bridge as "serious."

leveled off for about two months. Then, in early March 1982, the activity picked up considerably. On March 3, Onderdonk and Jenkins filed a grievance challenging Picotte's directive ordering them to build a fence in the shop loft. On March 12, Onderdonk, on behalf of Jenkins and Deroshia, filed a grievance challenging, as out-of-class and hazardous, Picotte's order to scrub and disinfect the outhouse under the bridge. Apparently, the grievance contended that the outhouse was suspended in mid-air and the men had no experience in using the chemicals needed to clean it.

On March 15, 1982, Onderdonk and other employees filed another request for expedited safety review. This request expressed their concern over the location and safe use of two electric Incinolet toilets which are located in the catwalk area on both sides of the bridge.[8]

ISSUES

1. Whether the respondent unlawfully retaliated or discriminated against William Onderdonk for engaging in protected activity by suspending him on November 20, 1981, and on March 15, 1982?

2. Whether the respondent unlawfully retaliated or

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[8]An Incinolet toilet is a waterless electric incinerating toilet system that will dispose of both feces and urine into an odorless inorganic ash.

discriminated against William Onderdonk for engaging in protected activity by issuing him a letter of warning on July 8, 1981?

3. Whether the respondent unlawfully denied William Onderdonk representation at the July 8, 1981, meeting where he was presented with a letter of warning?

DISCUSSION

Introduction.

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

> . . . the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Sec. 3515)

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the Board set forth the test for determining when employer actions interfere with the rights of employees under section 3919(a) of the Act.[9] That test is summarized as follows. Where there is a nexus between the employer's acts and the exercise of employee rights, a prima facie case is established upon a showing that those acts resulted in some

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[9]Precedent developed under the EERA is applicable to unfair practice charges brought under the SEERA. See, e.g., State of California, Franchise Tax Board (7/29/82) PERB Decision No. 229-S.

harm to the employee's rights. If the employer offers operational necessity in explanation of its conduct, the competing interests of the parties are balanced and the issue resolved accordingly. If the employer's acts are inherently destructive of employee rights, however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by inference from the record. Under this test, unlawful motive is not necessary to sustain an interference charge. See also Santa Monica Community College District (9/21/79) PERB Decision No. 103.

Subsequently, in Novato Unified School District (4/30/82) PERB Decision No. 210, the Board clarified Carlsbad by setting forth the standard by which charges alleging discriminatory conduct under section 3519(a) are to be decided. The Board summarized its test in a decision under the Higher Education Employer Employee Relations Act 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 the preponderance of the evidence. (California State University, Sacramento (4/30/82) 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) 611 F.2d 899 [108 LRRM 2514].[10]

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Once employer misconduct is demonstrated, the employer's action should not be deemed an unfair practice

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[10]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 SEERA. 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 3519(a) of the Act with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

unless the Board determines that the complained-of action would not have been taken,

> . . . but for his union membership or his performance of other protected activities. (Ibid.)

It is this test which will be applied to resolve the instant dispute.

The November 20 Letter of Suspension.

It is undisputed that Onderdonk became a highly visible CSEA activist in July 1980. Beginning on September 1980, he filed grievances and requests for expedited safety reviews. When he felt Picotte retaliated against him for filing an early grievance, he filed yet another grievance to protest the retaliation. Additionally, in his capacity as CSEA steward, Onderdonk repeatedly challenged Picotte on issues ranging from routine assignments of work to safety conditions at the bridge. Simultaneously with this activity, communications between the workers and Picotte deteriorated to the point where practically nothing could be discussed in a meaningful way. At the center of this situation was Picotte, the supervisor, and Onderdonk, the union steward.

The fact that Onderdonk engaged in protected activity does not, however, make out a prima facie case. There must be some nexus between the protected activity and the complained-of conduct by the employer. The nexus is found in the unlawful motive. Novato Unified School District, supra, p. 6.

Ultimately, direct proof of unlawful motive is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, in many instances unlawful motive must be established by circumstantial evidence and inferred from the record as a whole. Novato Unified School District, supra, p. 6; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].

It is well-established that an unlawful motive can be inferred from a situation where an employee who has engaged in protected conduct, Onderdonk in this case, is treated differently than other employees for identical or similar conduct. Novato Unified School District, supra, p. 7; San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261, p. 8; San Leandro Unified School District (2/24/83) PERB Decision No. 288, p. 11. The record in this case is replete with instances where Onderdonk suffered disparate treatment at the hand of Picotte.[11]

The first allegation against Onderdonk concerned his

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[11]Charging party argued at the hearing that respondent attempted to cover the disparate treatment of Onderdonk by giving three other employees (Jenkins, Deroshia and Ramirez) letters of warning after the instant charge was filed and shortly before the hearing. Limited evidence was presented at the hearing on these letters. Since charging party has not addressed this argument in its brief, it is considered abandoned. And since the evidence has little probative value in resolving the underlying unfair practice charges at issue here, it will not be considered.

failure to timely file a vehicle accident report. It is true that the report was filed a few days late. However, Onderdonk was not the driver of the truck when the wind blew the door open. It seems reasonable that the driver and the passenger should be held at least equally responsible for filing the report. Jenkins, who was the driver at the time, made no attempt to do so, yet Picotte did not discipline him, nor did Picotte even discuss the matter with him. The obvious disparate treatment meted out by Picotte in this instance suggests an unlawful motive was at work. Had Picotte truly been interested in applying the report filing requirement in a balanced manner he would at least have discussed the matter with Jenkins, who was easily reached because he worked at the bridge. He did not do so, despite Onderdonk's request for Jenkins to be present when he spoke to Picotte. Picotte rejected the opportunity to include Jenkins in the discussion, expressly denying Onderdonk's request even though he knew at the time that Jenkins was the driver. The fact that Picotte didn't pursue the matter in a balanced fashion suggests that he was more interested in disciplining Onderdonk than he was in equally applying the rule about filing accident reports.

A similar situation exists with respect to Picotte's order to Onderdonk to wash the underside of the crane truck. Onderdonk's request for the order in writing was not unusual since written work orders were routinely posted in the shop.

He wanted to grieve the assignment as out-of-class work and felt he needed the order in writing to do so. Picotte refused and instead he told Deroshia to wash the truck. Deroshia responded in exactly the same way as Onderdonk, and Picotte again dropped the matter. Yet Deroshia was not disciplined for his conduct. He was not even counselled for refusing to wash the truck. It is difficult to conceive of a more blatant example of disparate treatment.

Still later, Picotte asked Jenkins to wash another truck. Jenkins asked for the work order in writing so he could file a grievance, and this time Picotte complied with the request. Jenkins washed the truck and the matter became the subject of a grievance. Jenkins was not disciplined or counselled for his conduct. Once again, the record presents a clear example of disparate treatment, this time between Onderdonk and Jenkins, which compels the inference of an unlawful motive.

The next series of allegations deals with Onderdonk's attendance record. The handling of these charges similarly evidences disparate treatment.

Granted, Onderdonk's attendance record is nothing to boast about. As set forth in the letter of suspension, he was late six times, for a total of 75 minutes, during June and July 1981.[12] Also, he admittedly did not show up for work on

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[12]Onderdonk did not seriously contest these facts in his

July 22, 1981, and he did not call in to say he would not appear. This record notwithstanding, it is clear that Onderdonk was treated differently from other employees with respect to attendance.

It does not appear from the record that Onderdonk's conduct represented anything out of the ordinary with respect to attendance at the Vincent Thomas Bridge. Employees under Picotte's supervision virtually came and went as they pleased. The most popular excuse given--and accepted--was "car problems." Several workers at one time or another developed a series of car problems which significantly affected their attendance. In fact, the situation got so bad that it became necessary to implement a new procedure to record absences.

For example, Jenkins testified that he was late four or five times in the past year and was not disciplined. He also called in three or four times to report car problems.[13] Sometimes he would report to work later in the day. There were other occasions when, due to car trouble, he would call in and

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testimony. And, since Picotte recorded each tardy or absence as it occurred, the dates and amount of time cited in the letter are accepted as accurate. He was late on June 16 (6 minutes), on June 22 (25 minutes), on July 14 (5 minutes), on July 15 (9 minutes), on July 16 (20 minutes), and on July 23 (10 minutes).

[13]Thus, Jenkins was late or called in with car problems approximately seven or nine times. In comparison, Onderdonk was late or absent only seven times.

would not report to work. Jenkins said that he did not recall being docked for any of these incidents. Most importantly, he was not disciplined for his attendance record.

Ramirez was another worker who, according to Picotte's own testimony, had an attendance problem which persisted throughout his entire probationary period and for several months thereafter. Picotte said he "worked with" Ramirez and, in contrast to his handling of Onderdonk's absences, "leaned over backwards" to help. Eventually, the problem was solved without discipline.

In comparison, Onderdonk was absent or late on only seven occasions during a limited two-month period in June-July 1981. And, unlike Ramirez, Onderdonk apparently remedied his own attendance problems. Neither the November 1981 or March 1982 letter of suspension cites any attendance violations by Onderdonk for the period July 1981 to March 1982. It is assumed that any violations during this period would have become part of the disciplinary action. Thus, it is apparent that Onderdonk's attendance record after July 1981 was satisfactory.

In addition, the counselling session on April 3, 1981, and the "sick leave usage" memo of April 7, 1981, focused on Onderdonk's abuse of leave. It was upon this counselling session and follow-up memo that the July 8, 1981, letter of warning was based. Totally ignored, however, in this process

was the very significant fact that Onderdonk had suffered several job-related injuries and had been forced to use up several weeks of sick leave, approximately 9 days of which were later reimbursed. It is inherently inconceivable that a fair and objective review would overlook these facts when examining an employee's attendance record for purposes of bringing disciplinary action against him. This oversight becomes particularly significant when viewed in light of Picotte's willingness, indeed enthusiasm, to consider Ramirez' personal problems with empathy when evaluating his attendance infractions. The only logical conclusion one can draw from the failure of either Picotte or Beck to consider, or even mention as a mitigating factor, the amount of sick leave Onderdonk used as a result of job-related injuries is that they were more interested in disciplining Onderdonk than they were with policing the leave usage policy. Such conduct is evidence of an unlawful motive in my view.

In sum, attendance irregularities were routinely condoned by Picotte, except when it came to Onderdonk. Although Onderdonk's record objectively does not appear to be significantly worse than either Jenkins' or Ramirez', only Onderdonk was disciplined. Such action by Picotte with respect to attendance represents yet another clear example of disparate treatment from which an unlawful motive must be inferred.

The next example of disparate treatment in the November 20

letter of suspension deals with Onderdonk's refusal to wash the skid rails and cords. That a supervisor need not tolerate an employee's refusal to carry out a legitimate assignment cannot be disputed. However, when analyzing the record for purposes of determining whether disparate treatment of union activists exists, one must look beyond the mere work order. Here, Jenkins was given the same assignment at the same time as Onderdonk, and his reaction was exactly the same as Onderdonk's. Picotte admitted that, in his view, Jenkins failed in the same way as Onderdonk. Yet Jenkins was not disciplined or even counselled for his conduct. It is hard to imagine a more striking example of disparate treatment.

In addition to the overwhelming incidents of disparate treatment, there are the statements made by Picotte at the November and December 1981 meetings.[14] As a general rule, statements alleged to interfere with, restrain or coerce employees in violation of the Act must be analyzed to determine whether they contain threats of force or reprisal. Rio Hondo Community College District (5/19/80) PERB Decision No. 128. The Board has held that the analysis should be made:

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[14]The November and December 1981 statements by Picotte were not litigated as separate violations. Therefore, they are not considered here as such. See San Ramon Valley Unified School District, supra. They are, however, analyzed here as evidence of unlawful motive.

> . . . in light of the impact that such communication had or was likely to have on the [listener] who, as an employee, may be more susceptible to intimidation or receptive to a coercive import of the employer's message. Rio Hondo, supra, at p. 20; Sinclair Co. (1967) 164 NLRB No. 49 [65 LRRM 1987] aff'd sub nom. NLRB v. Grissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481].

Moreover, as the Board reasoned in Rio Hondo, comments are to be viewed "in light of the totality of the surrounding circumstances." Ibid, p. 23. When Picotte's comments are analyzed under these principles, they emerge with the taint of unlawful motive.

First, Picotte's comments fit a lengthy pattern of action directed at Onderdonk by Picotte which make them particularly plausible. Given the unequal treatment of Onderdonk by Picotte, it is not unlikely that he would make comments which suggest to the reasonable person that he was out to "get" Onderdonk or make "an example" out of him. Furthermore, these comments were made to employees who were well aware of the disparate treatment and the pattern of conduct directed at Onderdonk. As such, they were more susceptible to intimidation or receptive to the coercive import of the comments. Lastly, the November 1981 statement was made at about the time Onderdonk was suspended, and during an argument, thus suggesting that it had more charge than a routine statement. For all of these reasons, I view the November and December 1981 comments by Picotte as further evidence of an unlawful motive.

Additionally, under the scheme of representational rights established by the Board, a strong argument can be made that Onderdonk had a right to a representative at the April 3, 1981, meeting where his attendance record, which ultimately led to discipline, was discussed in some detail. See, e.g., Redwoods Community College District (3/15/83) PERB Decision No. 293. The denial of representation at this meeting, while not treated as a separate violation (see fn. 2, supra), is certainly evidence from which an unlawful motive can be inferred.

On the strength of the foregoing evidence, it is concluded that a sufficient unlawful motive exists to prove a nexus between Onderdonk's protected activity and the complained-of conduct by respondent. A prima facie case having been established, it is the obligation of the employer to show that it would have taken the action even in the absence of protected activity. Respondent has failed to do so.

Caltrans initially takes the straight-forward position that the disciplinary actions taken against Onderdonk were for just cause and unrelated to his protected conduct. Granted, as a general rule the employer is arguably entitled to discipline an employee for one or more of the charges leveled against Onderdonk in the letters of suspension. Under the teachings of Novato, however, the employer is prohibited from taking disciplinary action when the action is motivated solely by unlawful motive and, therefore, would not have been taken but

for the exercise of protected activity. Respondent in this case has violated that prohibition.

With respect to the allegations already discussed above where disparate treatment was found to exist, it may be true that Onderdonk's record is less than desirable. He may have failed to timely file an accident report. He may have objected to washing the truck, the skid rails or the windows. And he may have had a spotty attendance record.[15] But the evidence is overwhelming that other employees were guilty of the same violations, yet they were not disciplined. It is rare that so many obvious examples of disparate treatment are present in a single case. This compels one to conclude that Picotte's attention was focused only on Onderdonk in these situations, and, but for Onderdonk's protected activity, he would have been treated the same as Jenkins, Deroshia, Ramirez and Mack. Since these other employees were not disciplined or counselled for the same or similar activities, and since respondent has offered no concrete evidence to explain this disparate treatment, one is left with the inescapable conclusion that but for his protected conduct Onderdonk would have escaped disciplinary action.

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[15]As stated earlier, the evidence shows that Onderdonk's attendance record was not objectively worse than that of other employees. It is noted that the respondent produced no attendance records to rebut the evidence in the record, despite the fact that these records were within Picotte's possession.

Moreover, there are other aspects of the employer's claims which render them suspect. The truck-washing incident appears to be pretextual, a smokescreen thrown up by Picotte to get Onderdonk. Onderdonk, who was given several assignments that morning, never refused to wash the underside of the crane truck. He merely called for the order in writing so he could file a grievance. Since Picotte willingly gave Jenkins a written order in similar circumstances, respondent cannot now claim that Onderdonk's request was out of line. Moreover, as it turned out, it appears that Onderdonk was correct in his assessment that the truck did not have to be washed, for the mechanics were able to fix the leak without the truck having been washed. Lastly, the air pressure was down at the time Picotte made the order and was still down at the time the leak was fixed. Given this fact, it is questionable that the truck could have been properly washed anyway.

With respect to the broken door incident, it is true that Onderdonk (and Jenkins) failed to report the damaged door, but in view of his overall diligence in reporting a variety of unsafe conditions to management via the expedited safety review procedure, he can hardly be criticized for this single instance when he failed to call a broken door to Picotte's attention. Moreover, Onderdonk's conduct in this regard amounted to no more than an insignificant matter. The accident was not a serious one and the report was eventually filed on April 2 by

Picotte. Significantly, after Picotte became aware of the accident on March 31, it took him two days to file the report. Thus, he did not act much faster than Onderdonk, despite the fact that Beck had advised both men of the importance of filing the report quickly. Lastly, given the fact that the accident triggered what the letter of suspension describes as a "mandatory investigation to determine the cause of damage," and considering further the poor relationship between these two men, it was not unreasonable for Onderdonk to ask for a witness.[16]

All of the foregoing, when considered in view of Picotte's statements in November and December 1981 to the effect that he would make an example out of Onderdonk, and the denial of Onderdonk's request for a representative at the April 3 meeting, lead one to the conclusion that the charges in the November 20 letter of suspension were pretextual. But for Onderdonk's protected activity, he would not have been disciplined for these so-called infractions.

One other allegation in the November 20 letter of suspension has not yet been addressed. This is Onderdonk's

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[16]The record is unclear as to why Picotte persisted in further investigating the matter by discussing it with Onderdonk on April 3. Picotte had already filed his report with Beck one day earlier, and, according to the letter of suspension, Onderdonk had already explained to Picotte that the door was broken when a strong wind blew it out of his hand.

conduct on July 6-8, 1981, regarding his failure to provide a doctor's excuse.[17]

It is true that Onderdonk did not provide a doctor's certificate on July 7 for his absence on July 6. As the letter of suspension indicates, he apparently felt his sunburned face was proof enough. When Picotte told him to provide a doctor's certificate, Onderdonk complied the very next day. Onderdonk's action--providing the doctor's certificate the next day--was interpreted by Picotte as violative of the earlier directive and therefore subject to discipline. This interpretation is questionable in my view. A more reasonable interpretation is that Onderdonk acted in full compliance with the requirements established by Beck's memos. Specifically, he secured advance approval for the absence. He did not provide a doctor's certificate on July 7 because he obviously assumed his sunburned face was satisfactory proof. However, when he learned from Picotte that a certificate was necessary, he did not resist. Instead, he immediately secured the certificate and presented it to Picotte the next day. Moreover, since none of the earlier directives to Onderdonk required that the

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[17]The failure to provide a doctor's excuse on July 7 is the same incident that made up the basis for the letter of warning issued to Onderdonk on July 8, which is a part of the instant charge. Since the July 7 incident is addressed in the context of the letter of suspension, there is no need to discuss the letter of warning separately.

certificate be presented within any particular time period, it can hardly be argued that Onderdonk was "late" in this instance.

It is hard to imagine how a quick response to a clearly trivial incident could be raised to such a level that it forms the sole basis for a letter of warning and a partial basis for a later letter of suspension. Discipline based on insignificant allegations or on mere technical violations of the employer's work rules raises an inference of unlawful motive and renders the action suspect. See State of California (Department of Parks and Recreation) (7/29/83) PERB Decision No. 328-S, p. 13, and cases cited therein.

Under these circumstances, I conclude that, since there was no basis for this allegation and the incident was so insignificant, it can only be viewed as pretextual.[18]

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[18]All of the other allegations contained in the November 1981 letter of suspension occurred on July 23, 1981, or earlier. The letter of suspension issued almost four months after the last infraction occurred. In my view, the slowness with which respondent responded to correct these matters casts doubt upon their seriousness, and lends support to the conclusion that they are insignificant or mere technical violations. Furthermore, respondent issued the letter of warning on or about July 8, 1981. As of that date, at least four (the truck door and truck washing incident and the attendance infractions on June 16 and 22) violations which were ultimately included in the first letter of suspension had already occurred, yet they were not included in the letter of warning. Overlooking these matters at the time of the July 8 letter, and then subsequently including them as part of the November 20 suspension, in my view, casts further doubt as to their seriousness, and suggests they were pretextual.

The March 15, 1982 Letter of Suspension.

The March 15 letter of suspension sets forth yet another example of disparate treatment. According to Picotte, he told Onderdonk and Deroshia to stop playing dominos and to wash the windows on a pickup truck, but they did not do so. However, even accepting Picotte's version of this incident, the unequal treatment is obvious. Onderdonk and his co-workers were scheduled to go to San Luis Obispo for META training that day, and they were scheduled to depart early in the morning, at about the time Picotte says he told them to wash the windows. It is understandable, therefore, that Onderdonk and Deroshia did not remain to wash the windows. More importantly, Deroshia was given the same assignment as Onderdonk and he too was accused of playing dominos on the job. Yet Deroshia was not disciplined for refusing to wash the windows, nor was he disciplined for playing dominos on the job. This unequal treatment strongly suggests an unlawful motive, and, once again, leads to the conclusion that but for his protected conduct Onderdonk would have been treated the same way as Deroshia.

I next turn to the death threat. Under most circumstances, a serious death threat must be viewed as a significant matter which would justify some disciplinary action. In this case, however, I decline to view the threat in this way for the following reasons. First, Picotte's response to Onderdonk

suggests that he did not take the matter seriously. His testimony indicates he responded in jest. He said,

> Hell, Bill, we've all got to die, you've got to die, Cal's got to die, I've got to die . . . we're all going to die someday.

And when Picotte asked if Onderdonk, who had no history of physical violence, was threatening him, Onderdonk and Deroshia responded in the negative. In my view, Picotte's overall characterization of the conversation in the letter of suspension and in this proceeding is exaggerated. The conversation is more consistent with inconsequential bantering between a supervisor and a contentious union steward than it is with a serious death threat.

Furthermore, Picotte's actions thereafter are consistent with this view. There is no indication that the threat was mentioned to Onderdonk or any disciplinary or other steps taken by Picotte between November 20, the date of the comment, and early March, the time of the suspension. Specifically, there was no evidence to show that Onderdonk was counselled during this period, nor does the record show that Picotte took any precautionary steps consistent with those which one might expect to be taken by a person who just received a serious death threat. Thus, the nature of the conversation, as described by Picotte himself, and his subsequent behavior point to the conclusion that the matter was not a serious one.

More importantly, however, is the timing of the

disciplinary action in relation to the threat. As stated earlier, the suspension did not come until March 18, approximately four months after the so-called threat was made. In the period immediately following the date of the comment (November 20) Onderdonk's protected activity slowed to some extent. Then, shortly before March 15, the activity picked up again. On March 3 Onderdonk filed a grievance challenging an order to build a fence in the loft. On March 8 the notice of suspension was served on Onderdonk.[19]

The length of time it took Picotte to respond to the threat, and the timing of the threat with respect to the renewed protected activity are crucial facts that simply cannot be overlooked. These factors leave one with the inescapable conclusion that the threat was not taken seriously by Picotte, and but for the renewed protected activity the matter would have been forgotten. Had Picotte disciplined Onderdonk on November 20 or shortly thereafter for making the threat, assuming the threat could be viewed as serious, these concerns would not exist and Picotte would have been justified in imposing the discipline without running afoul of the prohibitions in the Act. However, he did not do this, and

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[19]Onderdonk's protected activity continued. On March 12 he filed a grievance over the order to clean an outhouse. And on March 15 he raised the Incinolet toilet issue via the expedited safety review route. Onderdonk played a key role in each of these cases.

respondent introduced no evidence to explain the four month delay or the overall timing of the suspension with respect to the renewed protected activity. In sum, the record shows that Picotte overlooked the threat and dug it up later to retaliate against Onderdonk for resuming his protected activities. Such conduct violates the Act. See, e.g., Webb Industrial Plant Service, Inc. (1982) 260 NLRB 933 [109 LRRM 1245], where a threat of physical violence made by an employee over the telephone was found by the NLRB to be pretextual because the supervisor hung up the phone and later that evening called the employee to tell him he was fired, and where the supervisor's conduct the next day showed that he had no fear of the employee.

Other Arguments by Caltrans.

Respondent states for the first time in its brief that

> . . . it is not the function of the PERB to determine the validity of disciplinary action per se. (Respondent's Brief, pp. 3-4.)

That authority, according to respondent, is within the purview of the State Personnel Board, and

> PERB's authority is limited to the question of whether the actions against an employee are pretextual. (Ibid.)

This decision does not undertake to "determine the validity of disciplinary action per se," or to usurp SPB jurisdiction.[20]

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[20]At the time of the hearing in this matter, the two letters of suspension were on appeal to the SPB.

Rather, it seeks to carry out the legislative mandate embodied in SEERA. The Legislature has given PERB the specialized task of protecting both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by SEERA. Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 198 [172 Cal.Rptr. 487]. With respect to the instant case, carrying out this broad legislative mandate means determining whether the disciplinary actions taken against Onderdonk would not have been taken but for his exercise of rights guaranteed by SEERA. The State Personnel Board's constitutional power to "review disciplinary actions" does not necessarily mean that specialized agencies, such as PERB, cannot also consider disciplinary matters. As the Supreme Court stated in Pacific Legal Foundation v. Brown, supra, the Legislature is not precluded

> . . . from establishing other agencies whose specialized watchdog function might also, in some cases, involve the consideration of such disciplinary action. (Ibid, pp. 198-199.)

Thus, considering the disciplinary actions brought against Onderdonk does not exceed PERB jurisdiction or infringe on SPB jurisdiction.[21]

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[21]In any event, to the extent that PERB should consider SPB proceedings, including evidence and arguments offered by the parties or SPB findings and conclusions, the respondent in this case has not requested deference, collateral estoppel or any means of harmonizing the respective jurisdictions of these

Respondent next argues in its brief that the difference between Onderdonk and other employees is that Onderdonk committed a wide range of offenses and, therefore, his conduct could not be overlooked. This argument is unpersuasive. At first glance, it may appear that Onderdonk committed a range of offenses. However, on closer scrutiny the transparency of this argument becomes evident.

Granted, Onderdonk was charged with a large number of violations. That respondent was able to make these charges, however, is attributable more to the unequal treatment of Onderdonk than to the fact that in reality he committed such a large range of infractions. In other words, but for the disparate treatment, Onderdonk would not have been charged with filing a late accident report, refusing to wash the underside of the crane truck, developing a poor attendance record, refusing to wash skid rails, playing dominos on the job, or refusing to wash the windows of a pickup trick. Had Onderdonk been treated like other employees who were involved in these so-called violations, it could not be said that he committed a wide range of offenses.[22]

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two agencies. See Pacific Legal Foundation v. Brown, supra, pp. 197-200.

[22]It bears repeating that at least two other employees had records similar to Onderdonk's. Jenkins admitted in his testimony to at least 7 to 9 attendance-related violations.

In its brief, respondent also argues that, while other employees were involved in the same incidents, Onderdonk's case was different because he alone was insubordinate. To support this argument respondent points to two comments made by Onderdonk and cited in the letter of suspension: (1) Onderdonk's comment after refusing to wash the windows on a pickup truck, and (2) Onderdonk's threat to Picotte.[23] Taking these comments in reverse order, I find them not to be insubordinate. Although the death threat has been discussed above, it bears repeating that this comment was initially taken lightly and then ignored by Picotte for approximately four months. Even then it was only after Onderdonk intensified his protected conduct that the matter was brought up. Under these circumstances, one cannot conclude that anyone, especially Picotte, seriously considered this comment to be insubordinate.

And Ramirez, according to Picotte, repeatedly called in with car problems over a period of several months. Thus, when the sheer number of infractions is considered, it appears that at least two other employees had the same, if not more, attendance violations than Onderdonk. Moreover, attendance at the bridge was apparently so bad that Picotte had to implement a new system to keep track of the records, thus suggesting that Onderdonk was not the only employee with attendance violations.

[23]The letter of suspension involves other comments by Onderdonk. Since respondent did not raise or argue these comments in its brief as grounds for finding Onderdonk insubordinate, it is assumed that respondent does not view these other comments as insubordinate. Further arguments based on these comments are thus deemed waived and will not be considered here.

The remaining comment was in response to Picotte's order to wash the windows on the pickup truck. Assuming Onderdonk said "We're not doing anything, so go on in and write it up", the comment, in my view, was not out of line. Shortly after making this statement, Onderdonk, along with Deroshia and other employees, departed for META training in San Luis Obispo. Thus, the state of the evidence is that Onderdonk did not refuse to carry out a work order. Rather, he already had an assignment (in San Luis Obispo), and he left the shop along with Deroshia and others to attend the training. While his comment to "write it up" may have been ill-advised, it does not, in my view, rise to the level of insubordination justifying the employer's action under these circumstances. Moreover, it must be remembered that the same order was given to Deroshia; and Picotte, by his own admission, considered Deroshia equally accountable. Thus, it cannot be concluded that Onderdonk was any more insubordinate than Deroshia, who, by his silence and inaction, in effect conducted himself in the same way as Onderdonk. Therefore, respondent's argument, based as it is on these two incidents, that Onderdonk's insubordinate behavior somehow set him apart from other employees must be rejected.

Lastly, respondent points out that other employees, past and present, have engaged in protected activities while working for Picotte and have not suffered discrimination or reprisals.

This evidence, according to respondent's argument, shows that it is highly unlikely that Picotte would now discriminate against Onderdonk for exercising his guaranteed rights under SEERA. This argument is not persuasive. It is well established that a discriminatory motive, otherwise proved, is not disproved by an employer's proof that it did not discriminate against all union adherents. Nachman Corp. v. NLRB (CA 7 1964) 337 F.2d 421 [57 LRRM 2217]; NLRB v. Instrument Corp. of America (CA 4 1983) ____ F.2d ____ [113 LRRM 3649]. Also, in this case the record is clear that other employees were not nearly as active as Onderdonk. While other employees engaged in protected conduct, it was Onderdonk who took the lead. He became the CSEA steward and set out to represent others. He challenged Picotte on a variety of matters and filed grievances and safety-related complaints. It has been shown that Picotte was motivated by an unlawful motive, treated Onderdonk in a disparate manner in comparison with other employees, and brought charges against him, some of which were clearly pretextual. Under these circumstances, it cannot be concluded that the employer's actions were lawful simply because it did not treat other employees who had engaged in protected activity the same way it treated Onderdonk.

Denial of Representation at the July 8, 1981, Meeting.

In NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689], the Supreme Court indicated that employees have

a protected right to the presence of their union representative at an investigatory interview which the employee reasonably believes will result in disciplinary action. Later, in Baton Rouge Water Works Company (1979) 246 NLRB 995 [103 LRRM 1056], the NLRB reaffirmed its rule that the right to union representation applies to a disciplinary interview, whether labelled investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined. The NLRB stated, at p. 997:

> . . . To the extent that the Board has in the past distinguished between investigatory and disciplinary interviews, in light of Weingarten and our instant holding, we no longer believe such a distinction to be workable or desirable. It was this distinction which Certified Grocers abandoned, and to that extent we still believe the decision was correct. Thus, the full purview of protections accorded employees under Weingarten apply to both "investigatory" and "disciplinary" interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action.
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> . . . . . .
>
> We stress that we are not holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under Weingarten may be applicable. . . .

In Rio Hondo Community College District (11/30/83) PERB Decision No. 260 the Board, although finding a violation on the facts in that case, indicated its approval of the NLRB's application of Weingarten to situations where the exclusive purpose of the interview is to inform the employee of a disciplinary decision already made.

The meeting on July 8 was called for the sole purpose of giving Onderdonk a letter of warning due to his attendance record. It is undisputed that the meeting was very short. Neither Beck nor Picotte asked any questions, nor did they in any way seek to investigate the matter. The only discussion consisted of Onderdonk seeking to explain his position, with little or no response by Beck or Picotte, the two management officials in attendance. To the extent that anything was said, it was due to Onderdonk's insistence in explaining his position, not to any attempt by Beck or Picotte to investigate or even discuss the matter. As stated above, it was their intent simply to give Onderdonk the letter of warning. Under these circumstances, Onderdonk did not have a right to a representative. Rio Hondo Community College District, supra, PERB Decision No. 260; Compare Redwoods Community College District, supra, where the Board found a violation for denial of meaningful union representation at a meeting between an employee and her supervisor where the employee's evaluation was to be discussed.

CONCLUSION

Based on the foregoing, it is concluded that respondent violated section 3519(a) by issuing William Onderdonk a letter of warning and suspending him on two separate occasions. Since Onderdonk was a highly visible and aggressive CSEA steward, it is also concluded that respondent has violated section 3519(b). Unlawful discriminatory action against an employee organization officer and activist constitutes a concurrent violation of section 3519(b). San Joaquin Delta Community College District, supra. All other aspects of unfair practice charge LA-CE-91-S are dismissed.

REMEDY

Caltrans has been found to have violated subsection 3519(a) and (b) of the Act by discriminating and retaliating against William Onderdonk because of his exercise of protected rights. Subsection 3514.5(c) provides that in remedying unfair practices PERB has the power to:

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Accordingly, it is appropriate to order respondent to cease and desist from retaliating and discriminating against employees for exercising rights guaranteed by the SEERA.

In addition, it is appropriate to order Caltrans to remove

from William Onderdonk's personnel files and destroy the: (1) July 8, 1981, letter of warning issued to Onderdonk and referred to in this opinion; (2) November 20, 1981, letter of suspension; and (3) March 15, 1982, letter of suspension. This remedy is consistent with that imposed by the Board on other cases where documentation was unlawfully placed in an employees' personnel file. See, e.g., San Ysidro School District (6/19/80) PERB Decision No. 134; San Diego Unified School District (6/19/80) PERB Decision No. 137.

Further, it is appropriate to order the letter of warning and suspensions rescinded, and Onderdonk made whole for any wages or benefits he lost as a result of these actions. Reimbursement for lost wages shall be at the interest rate of 7 percent per annum. This remedy is consistent with that imposed by the Board in circumstances where employees have been unlawfully disciplined. See, e.g., Baldwin Park Unified School District (6/30/82) PERB Decision No. 221.

It also is appropriate that the respondent be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the State of California (Department of Transportation) indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the state employer has acted in an unlawful manner and is being required to cease and desist from this

activity and to take the affirmative steps outlined in the order immediately below. It effectuates the purposes of the SEERA that employees be informed of the resolution of the controversy and will announce the state employer's 's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3514.5(c), it is hereby ordered that the State of California (Department of Transportation) and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Imposing reprisals on or discriminating against William Onderdonk for engaging in protected activity under the SEERA.

(b) Denying the right of the California State Employees Association to represent its members by imposing reprisals on or discriminating against William Onderdonk, a CSEA steward, for engaging in protected activity under the SEERA.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE STATE EMPLOYER-EMPLOYEE RELATIONS ACT:

(a) Immediately remove from William Onderdonk's personnel file and destroy the (1) July 8, 1981, letter of

warning; (2) November 20, 1981, letter of suspension; and (3) March 15, 1982, letter of suspension.

(b) Immediately rescind disciplinary actions referred to in paragraph (a) above and make William Onderdonk whole for the wages or benefits he lost as a result of these actions, including reimbursement for lost wages at the interest rate of 7 percent per annum.

(c) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to classified employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(d) Within twenty (20) workdays from service of the final decision herein, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 3, 1983, 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.) on November 3, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: October 14, 1983

Fred D'Orazio
Administrative Law Judge