

employee Michael Chevalier (Chevalier) for his exercise of protected rights.

The Board has reviewed the entire record in this case, including the ALJ's proposed decision, the hearing transcript and the filings of the parties. The Board hereby reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint in accordance with the following discussion.

BACKGROUND

On September 4, 1996, Chevalier was hired on a probationary basis as an assistant safety engineer in the San Bernardino Department of Industrial Relations Office of the Division of Occupational Safety and Health (DOSH). On September 23, 1996, Chevalier's direct supervisor, the district manager, was demoted and assigned to another office. On November 12, 1996, after a series of interim district managers, David Sullivan (Sullivan) became the new district manager.

On or around November 20, 1996, Chevalier received his first probationary evaluation. Because Sullivan had only recently been appointed, the report was prepared by the senior safety engineer. Chevalier was rated standard in all categories and was provided with extensive guidance concerning the "willingness, readiness

employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

and capability to work effectively and efficiently" which he would be expected to demonstrate in order to successfully complete probation.

On December 23, 1996, Chevalier was assigned by Sullivan to assist the clerical staff in answering phones and doing paperwork. Chevalier questioned the point of the assignment given his other work, and questioned whether he would be working outside his classification. After Sullivan and Chevalier discussed the assignment, Chevalier somewhat reluctantly performed it. Chevalier also contacted his PECG representative who called Sullivan on December 26, 1996, to discuss the clerical assignment.

On December 31, 1996, Sullivan sent Chevalier a one-page memorandum concerning Chevalier's performance deficiencies, which criticized him for not seeking sufficient guidance and discussing case problems as he had been advised to do in his first probationary report. This memorandum contained a reference to the clerical assignment and the call from the PECG representative. The memorandum stated:

During the past two weeks, I have asked you to 'assist clerical' during a period of time that part of our clerical staff was absent. This is a normal duty for all personnel in a CalOSHA District Office, and is also considered an essential learning opportunity for new employees to understand some of the rudiments of case-assembly, clerical functions, telephone duties, etc. Normally, this is of short duration.

I have noticed that you have exhibited very little, if any, enthusiasm or curiosity about our missions and goals. Rather than

accepting the opportunity to be a helper to clerical short-staffing, I perceived a 'passive-resistance' to this duty. This was also indicated by your continuing to operate by your own directions; i.e., researching manuals and texts of your own selection.

What I thought was an opportunity for you, was apparently taken as duty of an unacceptable nature. To clarify the matter, and to "set the record" straight, we conferred in my office on Thursday, 12-26-96. According to a call I received from Mr. Stephen Beck, our PEGC representative, you resented being given the assignment and saw no significant value in the assignment as a training and orientation tool.

On January 4, 1997, Chevalier sent a two-page reply to Sullivan's December 31, 1996, memorandum which, among other things, requested "specific foundational just cause" for some of Sullivan's statements included in the "Performance Deficiencies" memorandum. Chevalier stated that he felt that the problem was about "Personality Conflicts."

On January 13, 1997, Chevalier was given his second probationary report by Sullivan. He was rated standard in skill, knowledge and learning ability, but unacceptable in the areas of work habits, relationships with people and attitude. With regard to Chevalier's work habits, Sullivan noted the guidance Chevalier had been given in the first probationary report, and stated that Chevalier "appeared to use an industrial hygienist as your principal source of procedural and substantive guidance" and "failed to seek me out for clarification and guidance." Sullivan's comments with regard to Chevalier's relationships with people stated that Chevalier's relationships with his safety

engineer colleagues were unacceptable. Sullivan's comments with regard to Chevalier's attitude stated in part:

The fact that you did not exhibit much, if any, enthusiasm or curiosity about the Division's missions and goals, and your attitude with respect to the assignment to temporarily assist clerical and gain a familiarity with their support work, resulted in your unacceptable rating in this performance area.

Sullivan again cited the call he received from the PEGC representative concerning the clerical assignment.

Sullivan gave Chevalier an unacceptable rating overall, noting that such a rating "would motivate an immediate rejection of a probationary employee" in most cases, but he stated Chevalier might still have an opportunity to pass probation if he showed "substantial improvement" in the areas evaluated as unacceptable.

On February 4, 1997, Sullivan issued a "Performance Deficiencies" memorandum which again criticized Chevalier for failing to seek the appropriate advice and guidance as he had been counseled to do in the December 31, 1996, memorandum and the second probationary report. Also, on February 4, 1997, Sullivan issued a memorandum criticizing Chevalier for "Inattention to Direction." Sullivan advised Chevalier that certain duties were being removed from his assignment "until such time as you and I agree that you are capable of following direction. . . ."

On February 18, 1997, the chief of DOSH issued Chevalier a notice of rejection during probation. The notice criticized Chevalier's work habits, relationships with people and negative

attitude toward some of his assignments. The notice referred to the clerical assignment, stating:

In a memo to you dated December 31, 1996, Mr. Sullivan commented on your passive resistance to the above assignment, and indicated the need for teamwork in the District office.

The notice also criticized Chevalier's productivity, citing several specific assignments and cases which Chevalier had handled. The suggestions included in Chevalier's first probationary report, the concerns expressed in Sullivan's December 31, 1996, memorandum, the unacceptable performance described in the second probationary report, and the issues referenced in the two February 4, 1997, memoranda were all described in the notice of rejection.

Chevalier appealed his rejection to the State Personnel Board (SPB). A hearing was held before an SPB ALJ on April 29, June 11 and July 17, 1997, on the appropriateness of the rejection of Chevalier on probation. The SPB ALJ issued his proposed decision on November 24, 1997, affirming the State's rejection of Chevalier on probation and denying Chevalier's appeal. Chevalier argued to the SPB ALJ that his rejection in part was retaliation by Sullivan because of the call Sullivan received from the PEGC representative. The SPB ALJ rejected that argument, stating:

The evidence established that appellant's problems with Mr. Sullivan occurred both prior to [PEGC representative] Mr. Beck's call and after his call. Appellant's allegation of retaliation by Mr. Sullivan for his exercise of protected activity was not supported by the evidence.

The SPB affirmed and adopted the SPB ALJ's decision in December 1997 and subsequently denied Chevalier's petition for rehearing on March 17, 1998.

PECG filed the underlying unfair practice charge on March 24, 1997. On April 15, 1997, the Board's Office of the General Counsel issued a complaint on the charge. The complaint alleges that the State issued the December 31, 1996, performance deficiencies memorandum, the unsatisfactory second probationary report, and the notice of probationary rejection in retaliation for Chevalier's exercise of protected rights, and thereby violated section 3519(a) and (b) of the Dills Act. PERB held an informal settlement conference on June 12, 1997, and the ALJ held a formal hearing on September 29 and 30, October 1 and November 3, 1997. The ALJ rendered a proposed decision on March 16, 1998, finding that the State by its conduct had violated the Dills Act.

POSITIONS OF THE PARTIES

PECG alleges that the State took the retaliatory actions against Chevalier because he contacted his exclusive representative about the clerical assignment, questioned the propriety of the assignment, and submitted a memorandum in response to a critical performance deficiencies memorandum he received from Sullivan. PECG attacks the validity of the unacceptable performance rating and notice of probationary rejection received by Chevalier, and argues that Chevalier would not have been rejected had he not engaged in protected activity.

The State responds that it was not motivated by Chevalier's protected activity in rejecting him on probation. The State further argues that the decision of the SPB, denying Chevalier's appeal of the probationary rejection, should be given collateral estoppel effect with regard to this PERB proceeding.

PECG responds that collateral estoppel should not apply in this case, and that the State has failed to demonstrate that it would have rejected Chevalier regardless of his participation in protected conduct.

DISCUSSION

Collateral Estoppel

As the Board noted in California Union of Safety Employees v. State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S at pp. 13-15, the doctrine of collateral estoppel precludes a party to an action from relitigating in a second proceeding, matters litigated and decided in a prior proceeding. (People v. Sims (1982) 32 Cal.3d 468, 477 [186 Cal.Rptr. 77] (People v. Sims).) Collateral estoppel is an aspect of, but not co-extensive with, the broader concept of res judicata. "Where res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates . . . to obviate the need to relitigate issues already adjudicated in the first action." (Lockwood v. Superior Court (1984) 160 Cal.App.3d 667, 671 [206 Cal.Rptr. 785].) The purpose of the doctrine is "to promote judicial economy by minimizing repetitive litigation, to

prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation." (Ibid.)

Collateral estoppel traditionally has barred relitigation of an issue if: (1) the issue is identical to one necessarily decided at a previous proceeding; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. (People v. Sims at p. 484.)

At issue here is whether collateral estoppel effect should be given to the SPB decision in which Chevalier's appeal of his probationary rejection was denied.

The specific issue before the SPB in that proceeding was whether there was substantial evidence to support the reason or reasons given by the State for rejecting Chevalier during probation, or whether that rejection was made in fraud or bad faith. In PERB's proceeding, the specific issue is whether Chevalier was rejected during probation because he engaged in conduct protected by the Dills Act. While the consideration of both of these issues involves the review of the parties' conduct leading to Chevalier's probationary rejection, the issues are not identical. They involve the application of different statutory provisions, and significantly different legal standards.

The State points to the statement by the SPB ALJ that Chevalier's allegation of retaliation for protected conduct was

not supported by the evidence. However, a review of the SPB ALJ's decision reveals that the issue of the alleged retaliation against Chevalier for Dills Act protected conduct was not fully litigated in the SPB proceeding. It is clear that the issue considered by the SPB is not identical to the issue before PERB, and the first element of the standard for collateral estoppel established in People v. Sims has not been met. Therefore, the Board concludes that collateral estoppel effect can not be given to the SPB proceeding in this case.

Retaliation Allegation

In order to establish that an employer has engaged in unlawful retaliation in violation of Dills Act section 3519, the charging party must demonstrate that the employee engaged in protected activity; the employer was aware of that activity; the employer took action adverse to the employee; and the employer's conduct was motivated by the employee's protected conduct.

(Novato Unified School District (1982) PERB Decision No. 210 (Novato)).

In this case, it is clear that Chevalier engaged in protected conduct of which the State was aware, and that the State took adverse action against Chevalier. Therefore, this case turns on the question of whether the State's action was motivated by Chevalier's protected conduct.

Direct proof of unlawful motivation is not often present. As a result, the Board reviews the record as a whole to determine if the inference of unlawful motive should be drawn. Factors

which may support such an inference include the timing of the employer's adverse action in relation to the employee's protected conduct (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); the employer's departure from established procedures (Santa Clara Unified School District (1979) PERB Decision No. 104); and the employer's inconsistent or shifting justification for the conduct (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S).

The record here supports the inference of unlawful motivation by the State. Clearly, there is substantial demonstration of the temporal proximity of Chevalier's protected conduct and the State's actions. Chevalier's call to PEGC occurred only days before he received a performance deficiencies memorandum from Sullivan. Additionally, the fact that the memorandum and Chevalier's second probationary report made specific reference to the contact with PEGC suggests a retaliatory motivation. While the evidence of unlawful motivation is limited, the Board concludes that it is sufficient to infer that the State's actions against Chevalier may have been motivated by his exercise of protected activity.

In retaliation cases, once an inference of unlawful motivation is drawn, the burden shifts to the employer to establish that it would have taken the action regardless of the employee's protected conduct. (Novato.) Participation in

protected activity does not insulate or immunize an employee against decisions made by the employer, including adverse employment actions. (Martori Brothers Distributors v.

Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721

[175 Cal.Rptr. 626] (Martori Brothers Distributors^.) The Board will find the employer's conduct to be unlawful if it determines that the action would not have been taken but for the employee's protected conduct. (Id. at p. 730.)

Chevalier's first probationary report, which is dated November 20, 1996, prior to the contact with PECCG, contains extensive guidance concerning the performance expected of him in order to successfully complete probation. Chevalier was advised of specific actions he was expected to take to demonstrate his "willingness, readiness and capability to work effectively and efficiently during a period when mandated work exceeds resource capacity" and successfully complete probation.

The December 31, 1996, performance deficiencies memorandum from Sullivan to Chevalier references the first probationary report, and indicates that Chevalier had not sought sufficient guidance from Sullivan and his safety engineer colleagues, as he had been advised to do. Sullivan also chastised Chevalier for his resistance to the clerical assignment.

The second probationary report in which Chevalier was rated unacceptable overall, also references the expectations described in the first report. Again, Chevalier was criticized for not seeking the appropriate clarification and guidance in performing

his duties, and for his resistance to the clerical assignment, which had occurred during the second probationary rating period. This report also encouraged Chevalier to continue his "recently exhibited apparent interest and enthusiasm for the Division's goals and objectives" and indicated that failure to improve in the cited areas would result in probationary rejection.

The two February 4, 1997, counseling memoranda from Sullivan continue this pattern of criticism of Chevalier's performance.

Finally, the notice of rejection dated February 18, 1997, reiterates the concerns expressed in the prior probationary reports and memoranda, and provides specific examples of Chevalier's casework which contributed to the State's decision to reject him during probation.

This evidence indicates that the State's expectations for Chevalier's successful performance as an assistant safety engineer were thoroughly and consistently explained and documented throughout the probationary period, including the portion of the period prior to the contact with PEGC on December 26, 1996. Similarly, the State's concerns with Chevalier's performance were expressed thoroughly and consistently. The fact that Sullivan's performance deficiencies memorandum and the second probationary report refer to Chevalier's contact with PEGC does not undermine the validity of the consistent performance standards on which the evaluations of Chevalier are based, standards which were explained to Chevalier both before and after his contact with PEGC. As noted above,

Chevalier's protected activity does not insulate him against adverse employment actions by the employer. (Martori Brothers Distributors at pp. 728-729.)

While the SPB decision denying Chevalier's appeal of his probationary rejection is not afforded collateral estoppel effect in this PERB proceeding, it forms a part of the record before the Board. The SPB enforces the statutes governing California's civil service system, and reviews the propriety of disciplinary actions and probationary rejections. As a result of its thorough review of the State's actions, the SPB found substantial evidence supporting the probationary rejection and concluded that Chevalier had been rejected primarily because he failed to follow the instructions of his supervisor. The Board's review of the evidence in this case leads it to the same conclusion.

Based on a review of the record as a whole, the Board concludes that the State's actions in sending Chevalier a performance deficiencies memorandum, rating him unacceptable on his second probationary report, and rejecting him on probation were not motivated by Chevalier's protected activity, and would have occurred irrespective of it. Therefore, the State by its conduct did not violate section 3519(a) and (b) of the Dills Act.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-398-S are DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Amador joined in this Decision.