

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL UNION,)
LOCAL 660, AFL-CIO,)
)
Charging Party,) Case No. LA-CE-204
)
v.) PERB Decision No. 221
)
BALDWIN PARK UNIFIED SCHOOL DISTRICT,) June 30, 1982
)
Respondent.)
)
)

Appearances: Michael Posner, Attorney (Geffner & Satzman) for Service Employees International Union, Local 660, AFL-CIO; John J. Wagner, Attorney (Wagner and Wagner) for Baldwin Park Unified School District.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

Service Employees International Union, Local 660, AFL-CIO, (SEIU) has filed exceptions to the attached proposed decision which dismisses an unfair practice charge against the Baldwin Park Unified School District (District) alleging violations of subsections 3543.5(a) and (d) of the Educational Employment Relations Act (EERA or the Act).¹

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

Section 3543.5 provides:

It shall be unlawful for a public school employer to:

After considering the evidentiary record, the proposed decision and the exceptions thereto, the Public Employment Relations Board (PERB or Board) reverses the hearing officer's proposed dismissal of the subsection 3543.5(a) allegation. We find that the District violated EERA by disciplining employees Armin Coco and Joe Alvarado because of their organizational activities. The Board affirms the proposed dismissal of the subsection 3543.5(d) allegation.

The Board has reviewed the hearing officer's findings of fact and, finding them to be free from prejudicial error, adopts them as the findings of the Board itself. A summary of those facts is set forth below.

FACTS

Joe Alvarado was hired by the Baldwin Park Unified School District in 1968 as a custodian. By September 1977, he had

(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.

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

been promoted three times, and held the title of general maintenance foreman. In this capacity he worked primarily as a working foreman of a painting crew. His job took him throughout the District's various schools and facilities, wherever painting was needed. As of September 1977, he had never been disciplined by the District.

Armin Coco was hired by the District in 1971. As of September 1977, he held the position of heating and air conditioning maintenance worker. Like Alvarado, Coco worked throughout the District, wherever heating or air conditioning equipment needed repair. He too had never been disciplined by the District.

In the fall of 1975, Armin Coco became active in SEIU, and helped in that organization's efforts to organize the District's classified employees, telling them about SEIU Local 660 and requesting that they sign authorization cards. Joe Alvarado also became a supporter of SEIU about the end of 1975 or early 1976. Although he was not as active as Coco in recruiting new supporters, he did express his preference for SEIU whenever he was involved in a discussion on the subject.

On January 26, 1977, a representation election was held for the District's classified employees and on February 3, 1977, SEIU was certified by PERB as the exclusive representative of those employees. Coco served as an observer at the tally of the ballots in that election. The District's superintendent was also present for a short time at the tally of the ballots.

In the spring of 1977, meeting and negotiating between the District and SEIU began. The District was represented at these negotiations by Kenneth Brooks, the assistant director of personnel services. Coco participated on behalf of SEIU in five of seven negotiating sessions from May through July, 1977. Alvarado served as an alternate on the SEIU negotiating team, actually participating in negotiations on one occasion. Testimony at the hearing indicated that these negotiations were not particularly heated. Minutes of each negotiating session, however, were kept by the District, and the District superintendent, who did not attend the sessions, was kept apprised of the progress of the negotiations and of who was in attendance at each session via these minutes.

Negotiations concluded early in September 1977, and on September 13, a two year agreement--the first between SEIU and the District--was signed.²

As of September 1977, Coco was a shop steward for SEIU and was known by the District in this capacity. Alvarado was a substitute shop steward, but there is no evidence that the District was aware of this.

On October 4, the District's assistant director for personnel services (Brooks) sent letters to Alvarado and Coco notifying them of the superintendent's intention to recommend

²The agreement was made effective retroactively to July 1, 1977.

their termination to the District board of education. The proposed dismissal letter alleged that these employees had encouraged other District employees to slow down in the amount of work performed for the District and were therefore guilty of: (1) inefficiency; (2) insubordination; (3) dishonesty; (4) evident unfitness for service; (5) mental condition unfitting an employee for service; and (6) violation of or refusal to obey certain rules and regulations of the District.

Brooks' letters to Alvarado and Coco, which were substantially identical, specified appointment times at which each would be permitted to appear before him to present any reason why the recommendation of dismissal should not be made. Coco and Alvarado met, separately, with Brooks on October 21. Each was accompanied by union representatives. The meetings for each employee were substantially the same: the charges were read to the employee, and he was asked if they were true or false; the employee denied the charge, and when further information about the factual basis of the charges was requested, the request was refused. At the end of Coco's meeting, he was instructed to see the maintenance supervisor, who ordered him to turn in his school keys. On November 8, both employees were suspended without pay.

According to the testimony given at the PERB hearing by the District's superintendent, Jerry Holland, he first heard allegations against Alvarado and Coco from the principal of the

District's Tracy Elementary School. The principal told Holland that the school's head custodian had informed him that Alvarado and Coco had urged him to reduce his work efficiency. Holland testified further that, based on the principal's information, he ordered Assistant Personnel Director Brooks to investigate the matter. Brooks did this, but did not interview or otherwise contact either Alvarado or Coco. It was on the basis of the results of this investigation that Holland made his recommendation to the school board that Alvarado and Coco be dismissed.

On November 23, 1977 and January 9 and 17, 1978, a hearing was held before the school board at which the board considered the superintendent's recommendation to terminate the services of Coco and Alvarado. Such hearings are a normal and necessary step in the District's disciplinary procedure. At this hearing John Devlin, the new head custodian at the District's Tracy Elementary School, and Frank Marks, acting head custodian at Kenmore School, were the District's key witnesses. Devlin testified that Alvarado told him to stay within his job description, that he could paint one hour and then he had to stop. This employee also testified that either Coco or Alvarado told him to slow down his pace of work or he would be transferred part time to another school and that Coco told him to watch Jesse, (another custodial employee), who would teach him how to slow down to stretch his work of stripping out and waxing floors over the whole summer. This witness also

testified that he had time to paint over the graffiti but had not done it because paint was not brought to him. He was told not to paint doors by Coco because that was a painter's job.

At one point in his testimony before the school board, Devlin testified that Alvarado actually asked him (Devlin) to engage in a slowdown. However, when later asked the same question, Devlin testified that Alvarado did not actually say that he wanted Devlin to engage in a slowdown.

On other matters there are instances in which Devlin first answered a question in one manner, then changed to a different answer, and finally responded that he was unsure or did not recall the event.

Acting Head Custodian Marks testified that on September 20, 1977, Alvarado asked him how long he had been painting. He responded saying a couple of hours, and Alvarado told him not to paint more than one hour because if he painted over an hour, he would get himself and his principal in trouble, that another employee and his principal got into trouble for painting over an hour, that Marks should get overtime or painter's wages, that someone might snitch to the union and get the principal in trouble, and that Marks should put in a work order for painting. Alvarado offered to have a union steward come and explain to Marks what work he could or could not do and Marks declined.

Acting Head Custodian Marks' testimony at the school board hearing regarding the allegation that Alvarado had urged a slowdown was also uncertain. He continually avoided answering a question about whether Alvarado actually told Marks that he (Marks) was working too hard.

In contrast, Coco's and Alvarado's testimony at the school board hearing was consistent and clear. So, too, their testimony at the PERB hearing was consistent with their school board hearing testimony (neither Devlin nor Marks testified at the PERB hearing). Coco testified that he got involved with Devlin as a union representative because he did not want to see Devlin, a new employee, get into trouble. Coco denied that he ever told Devlin to slow down. He testified that Devlin's predecessor had a very heavy work load and that he could not believe Devlin had it finished, so he told Devlin that he had better take his time and do the job right.

Alvarado denied he ever told Devlin to slow down. He testified that, when Devlin requested paint because he wanted to paint all the doors, he told Devlin that he had to get a requisition from the principal and that, when all the doors need to be done, the painters are usually assigned to paint the doors. Alvarado also denied that he told Marks to engage in a slowdown or work stoppage, or that he told Marks that Marks and the principal would get into trouble. He testified that he told Marks that he was only supposed to paint for one hour upon learning that Marks had begun painting at 6:30 or 7:00 a.m. and

was still painting at 9:30 a.m., and that he should contact a shop steward about the subject. Alvarado admitted that he had knowledge that custodians were supposed to keep the graffiti off the walls by painting or washing. He stated his awareness that as a foreman he was responsible for seeing that work was performed efficiently for the benefit of the District.

At the conclusion of the school board's disciplinary hearing, the school board upheld all six charges and the factual bases therefor as recommended by the superintendent with respect to each employee. The board ordered that Alvarado be demoted from the position of maintenance working foreman to general maintenance/painter effective January 24, 1978, and that he be suspended without pay from November 9, 1977 through January 23, 1978. Coco was ordered suspended for the same period with no demotion.

DISCUSSION

SEIU excepts initially to the hearing officer's dismissal of the charge that the District violated subsection 3543.5(a) by disciplining Joe Alvarado and Armin Coco as described above. Since the date of the proposed decision in this case, PERB has rendered decisions in the cases of Carlsbad Unified School District (1/30/79) PERB Decision No. 89, and Novato Unified School District (4/30/82) PERB Decision No. 210 in which the Board has developed a comprehensive test by which charges alleging violation of subsection 3543.5(a) are to be

decided. The proposed decision and the exceptions thereto will be reviewed in light of these decisions.

SEIU has charged that Alvarado and Coco were subjected to disparate treatment because of their exercise of rights protected by the EERA. In Novato, supra, the Board explained that a party charging that an employer has discriminated against employees because of their exercise of protected rights has the initial burden of showing that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employees complain. As the Board explained in Carlsbad, supra, because motivation is a state of mind, direct and affirmative proof is not always available. Therefore, a charging party may sufficiently establish the presence of unlawful motivation by inference from the entire record (citing Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM, 620]). If the charging party can make such a showing, then the burden will shift to the employer to demonstrate that it is at least equally likely that it would have taken the same action even in the absence of the identified protected activity.

Protected Activity of Alvarado and Coco

The evidentiary record amply demonstrates that both of the disciplined employees were union activists. Coco was a shop steward, and Alvarado a substitute shop steward. Both employees served on SEIU's negotiating team during the 1977

negotiations with the District, Coco at several negotiating sessions, and Alvarado at one session in his capacity as an alternate. Both had been members of SEIU since early in that organization's organizing efforts, which began late in 1975 and concluded with the organization's certification as exclusive representative on February 3, 1977. Coco was active in SEIU's organizing efforts, while Alvarado stated his preference for SEIU when anyone asked.

In addition, we find, based upon the evidentiary record, that the conversations which took place between Alvarado and other employees, which formed the basis of the District's misconduct charges against him, concerned the subject of adherence to the employment contract between SEIU and the District.³ Such conduct would be protected even if in fact

³Article XII, section F of the employment contract between SEIU and the District provides as follows:

F. Working Out of Classification

An employee who is specifically assigned by the District to work in a specific classification other than his own shall be paid for all such full hours worked either at the first step of the salary range of the classification to which he was assigned or his regular rate of pay, whichever is greater. No out of classification pay shall be granted unless the employee is specifically assigned by the District to work in a classification other than his own. The determination of whether an assignment is out of classification shall be made by the District according to the District job descriptions.

Alvarado's interpretation of the contract was erroneous. As the NLRB explained in The May Department Stores Company d/b/a/ The May Company (1975) 220 NLRB 1096, 1100 [90 LRRM 1444]:

[An employee's comment about the contract] was a protected activity, even if predicated upon an erroneous interpretation of the collective agreement, since the wisdom or unwisdom of the men [sic] [engaging in concerted activity], their justification or lack of it are immaterial to determination of their rights under the Act. NLRB v. Washington Aluminum Company, Inc., 370 U.S. 9, 16 fn. 16 (1962).

David Barker, the District's director of personnel services, was a witness at the PERB hearing. He testified that the contract provision set forth above had been discussed during negotiations, and that his understanding of the provision was as follows:

The intention of the language and the discussion was that if we specifically assign someone to work out of classification, the union accepted the fact that its, there are going to be occasions when we're going to tell them, hey, you know, work out of classification for a short period of time. But it was rather silly to try to boil it down to fifteen minute segments or ten minute segments or whatever it was, and the agreement was that if they were specifically assigned to work out of classification for a one hour period of time, that was a logical time and at that time they would be paid at least on the stated step and range. [Hearing transcript, page 120, lines 20-28].

The testimony of Marks, Devlin, and Alvarado is consistent in asserting that Alvarado's discussions with those two custodians focused on the fact that the custodians had been painting for substantially over one hour. Marks' testimony especially reflects an apparent concern on Alvarado's part that the contract provisions, as he understood them, be observed.

Charging Party Has Raised the Inference that Protected Activity was a Motivating Factor

That Alvarado and Coco were union activists was well-known to the District. The dismissal letter from the superintendent to Coco referred directly to Coco's capacity as a union steward. At the contract negotiations the District had been represented by its personnel director and his assistant, Kenneth Brooks. Thus, Brooks had firsthand knowledge that both Alvarado and Coco had served on the SEIU negotiating team. Significantly, it was also Brooks who investigated the allegations against them on behalf of the District; following the investigation, it was Brooks who prepared the letters recommending dismissal for the superintendent's signature; and it was Brooks who conducted the October 21 meetings with Alvarado and Coco and their union representatives. So, too, the superintendent had received daily reports on the negotiations which named each person present at each session, and thus knew of Alvarado's and Coco's roles in negotiations.

In view of the District's knowledge of Alvarado's and Coco's activism, the timing of its disciplinary efforts is noteworthy. The District's employment contract with SEIU was executed on September 13, 1977. By October 14, the District had already concluded an investigation of Alvarado and Coco, and had sent them letters informing them that it was taking steps to have them terminated.

Significant, also, in our view, is the harsh response of the District to the information which reached them regarding the actions of Alvarado and Coco. The District administration was initially involved in this matter when the superintendent had a conversation with the principal of one of the District's elementary schools. This conversation revealed that the school's head custodian, only recently employed at the school, had informed the principal that Alvarado and Coco had been urging him to limit the amount of work he did. The principal was apparently not sufficiently concerned by this report to contact the supervisors of Alvarado and Coco or the District administration. Rather, the superintendent only learned of it when, upon visiting that school on other business, the principal mentioned the matter.

In response to this information the superintendent launched an investigation of the matter. Neither Alvarado nor Coco were contacted as part of the investigation. The investigation revealed only that two employees (Devlin and Marks), out of more than 500 in the District, had been urged by Alvarado and Coco not to perform certain work tasks or to spend more time on a certain task. Specifically, the investigation of Coco determined that he had spoken to just a single employee on a single occasion, at which time he allegedly urged the employee to work at a slower pace. The investigation of Alvarado showed only that he had spoken to two District employees regarding the

extent to which they, as non-painters, should do painting work pursuant to the new contract. Certainly, no concerted plan by which employees throughout the District were being encouraged to slow down was revealed. The investigation also showed that neither Devlin nor Marks accepted Alvarado's and Coco's alleged suggestions to alter their work practices and thus that a slowdown did not, in fact, occur.

The response of the superintendent was to characterize Alvarado's and Coco's conduct as urging a slowdown and on that basis to seek dismissal--the most severe of all possible disciplinary measures--of these two long-term employees, neither of whom had ever been disciplined before by the District. Even assuming that the superintendent believed Devlin's and Marks' accusations, termination as an initial disciplinary measure appears to be incongruously harsh punishment for the acts allegedly committed by Alvarado and Coco.

The charges leveled against both Alvarado and Coco as a result of the accusations against them included inefficiency, insubordination, dishonesty, evident unfitness for service and mental condition unfitting the employee for service. Yet these charges appear to have no relationship to the conduct of which they were accused. A charge of "inefficiency" would concern the accused's own job performance, yet Alvarado's ability to paint and Coco's ability to repair equipment were never in

issue. Nor is there evidence that either employee disobeyed his superior or was otherwise "insubordinate." Neither did their conversations with Devlin and Marks defraud the District or otherwise involve "dishonesty." The conduct of which Alvarado and Coco were accused would not appear to reflect an inability to discharge their duties and responsibilities or otherwise to show "evident unfitness for service" and, finally, the charge of "mental condition unfitting him for service" is entirely unsupported.

Based upon the extensive union activism of Alvarado and Coco and the District's knowledge of that history, the close proximity in time between contract negotiations in which those men participated and the District's decision to pursue disciplinary measures against them, and the incongruously harsh nature of those disciplinary measures imposed against two employees with lengthy and unblemished employment histories, we find that Charging Party has raised the inference that the identified protected activity and the District's desire to discourage future union activity were motivating factors in the District's decision to discipline Alvarado and Coco. The uncontroverted testimony showing that Alvarado and Coco were not contacted during the assistant personnel director's investigation and were refused any documentation or further information regarding the accusations against them when they met with the assistant director also supports the inference

that the District was not concerned with determining the truth of the matter and resolving the problem in the most expeditious way, but instead was determined to exact punishment upon them.

The Record Does Not Support the District's Claim of Operational Justification

Respondent contends that Alvarado and Coco urged two District employees to slow down in their work, and that they would have been disciplined as they were for this unprotected conduct regardless of any history of union activism.

In evaluating the District's defense, it is not necessary that this Board determine whether in fact Alvarado and Coco in truth urged a slowdown. Dismissal of the charge against the District is proper if it is shown that the District reasonably and in good faith believed that Alvarado and Coco did so, and that any District employee whom the District believed had urged a slowdown would have been disciplined as Alvarado and Coco were. We find, however, that the District has failed to make such a showing.

As discussed above, the District's actions in relation to Alvarado and Coco consistently demonstrate that the District had concerns other than determining the true extent of employee misconduct, if any, and resolving the problem appropriately. The confused testimony of Devlin and Marks at the school board hearing, together with the testimony of Alvarado and Coco which contradicts Devlin's and Marks' versions of the conversations, leaves a tangled picture of the actual events which cannot here

be completely resolved with any certainty. The record is, however, sufficient to establish a number of points. The subject of painting had been extensively discussed during the contract negotiations which concluded just seven days before Alvarado spoke with Marks about the extent to which Marks, as a custodian, should paint. Alvarado's conversation with Devlin on the same subject was only 22 days after execution of the contract. Neither Marks nor Devlin were SEIU members and there is no evidence that they had taken any interest in the contract negotiations or the terms of the resulting contract. In light of this, it appears entirely reasonable that Alvarado, as an alternate member of the SEIU negotiating team, as an alternate shop steward, and as a painting foreman, would be legitimately concerned with the custodian's compliance with the contract's provisions on the subject of painting. It is also not surprising that the non-union custodians, to all appearances unaware of the new contract's provisions regarding painting, might have misunderstood their co-employee's efforts to police the contract as an improper demand to slow down. The testimony of Marks and Devlin, as we have said, does not clarify this matter.

So, too, while the exact text of Coco's conversation with Devlin is in dispute, the surrounding context of that discussion is more consistent with Coco's version than with the District's. The evidence shows that Devlin had worked as the

head custodian at Tracy School for no more than a week or so before his conversation with Coco. As an employee of six years experience with the District, it appears entirely plausible that Coco would discuss with the new worker the manner in which his job should be done. Yet the District insists that the substance of the conversation was that Coco urged Devlin to engage in a "slowdown" in violation of the employment contract. We note that the District has presented no evidence showing that SEIU or any other group of classified employees were attempting to organize a concerted slowdown, nor has it suggested any other purpose behind Coco's alleged suggestion. Neither the investigation of assistant personnel director Brooks nor any evidence brought before this Board has shown that Coco recommended a slowdown to any other District employee, or that his alleged misconduct extended beyond the single conversation with Devlin. If Coco truly desired to effect a reduction in the amount of work performed by the District's classified employees, he could hardly have selected a less promising individual than Devlin, who was both a personal stranger to Coco and a non-union employee. In sum, the circumstances surrounding Coco's alleged conduct lend little support to the District's charges.

Despite the unlikelihood of Devlin's and Marks' accusations, the District has put forth no explanation of why the superintendent and his staff clung so steadfastly to their

claim that Alvarado and Coco were guilty of a dischargeable offense. The record shows, and we find, that the superintendent did have at least some evidence indicating that Alvarado and Coco had made statements to Devlin and Marks which may have been inaccurate or inappropriate. It was because of this evidence and nothing more, so the District's defense maintains, that the superintendent: 1) characterized their conduct as urging a "slowdown;" 2) launched an investigation of Alvarado and Coco and drafted letters recommending disciplinary action prior to speaking with either of them about the allegations; 3) charged them with six different offenses, at least five of which had little or no connection even to the accusations; and 4) recommended to the school board that the appropriate discipline should be dismissal. That this evidence can reasonably justify or explain these actions is a contention we do not accept. We find that the District has failed to demonstrate that a legitimate operational purpose was its motive in disciplining Alvarado and Coco as it did. Thus the District has failed to show that it's actions would have been the same despite the protected activity.

The District Did Not Violate Subsection 3543.5(d)

We affirm the hearing officer's proposed dismissal of the allegation that the District violated subsection 3543.5(d). Upon a review of the record we find that SEIU has failed to prove that the District acted to encourage membership in an

employee organization or dominated or interfered with the formation or administration of an employee organization.

REMEDY

The District has been found to have violated subsection 3543.5(a) of the Educational Employment Relations Act by discriminating against Joe Alvarado and Armin Coco because of the exercise of rights guaranteed to them by the Act. Subsection 3541.5(c) provides that in remedying an unfair practice, PERB has the power:

[T]o 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, the District will be ordered to make whole the disciplined employees by offering to Joe Alvarado immediate reinstatement to the position he held prior to his disciplinary demotion and by repaying to Joe Alvarado and Armin Coco wages and benefits, as augmented by the lawful rate of interest, which were withheld from them as a result of the District's disciplinary action, including wages and benefits withheld from Alvarado as a result of his demotion. The restoration of wages and benefits will be offset by any earnings of Alvarado and Coco as a result of other employment during the period of their unlawful suspension, but such offset will not be made applicable to any outside income earned by Joe Alvarado following the period of his suspension while employed by the District in a demoted position.

The District will also be ordered to purge the personnel files of Alvarado and Coco of all materials relating to the discipline which this Board has found illegal.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that:

The Baldwin Park Unified School District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

1. Violating subsection 3543.5(a) by imposing reprisals on, discriminating against, or otherwise interfering with employees because of their exercise of rights under the EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Immediately offer to fully reinstate Joe Alvarado to his former job, or equivalent position, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

2. Make Joe Alvarado whole for any loss of pay and other benefits he may have suffered by tendering to him back pay, equal to the amount that he would have been paid absent

his unlawful discipline on November 9, 1977 until the date of the offer of reinstatement, this total amount to be offset by Alvarado's earnings as a result of other employment during this period, and with payment of interest at 7 percent per annum of the net amount due. Wages lost as a result of Alvarado's demotion shall not be subject to any offset.

3. Make Armin Coco whole for any loss of pay and other benefits he may have suffered by tendering to him back pay equal to an amount that he would have been paid absent his unlawful suspension on November 9, 1977 through January 23, 1978, this total amount to be offset by Coco's earnings as a result of other employment during this period, and with payment of interest at seven percent per annum of the net amount due;

4. Remove from Armin Coco's and Joe Alvarado's personnel files any and all material relating to the discipline unlawfully imposed upon them;

5. Within five (5) workdays of date of service of this decision, post copies of the Notice attached as an appendix hereto at all work locations at the Baldwin Park Unified School District where notices to employees customarily are placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps should be taken to insure that said Notices are not reduced in size, altered, defaced or covered by any other materials; and,

6. Notify the Los Angeles regional director of the Public Employment Relations Board in writing within 30 workdays from the receipt of this decision, of what steps the District has taken to comply herewith.

The charge that the Baldwin Park Unified School District violated subsection 3543.5(d) is hereby DISMISSED.

This Order shall become effective immediately upon service of a true copy thereof on the Baldwin Park Unified School District.

Irene Tovar, Member

Marty Morgenstern, Member

John W. Jaeger, Member

APPENDIX
NOTICE TO ALL 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-204, Service Employees International Union, Local 660, AFL-CIO v. Baldwin Park Unified School District, in which both parties had the right to participate, it has been found that the Baldwin Park Unified School District violated subsection 3543.5(a) of the Educational Employment Relations Act (EERA) by discriminating against employees Armin Coco and Joe Alvarado because of the exercise of their rights under the EERA.

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

(A) WE WILL CEASE AND DESIST FROM:

(1) Imposing reprisals on, discriminating against, or otherwise interfering with employees because of their exercise of rights under the EERA.

(B) WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Immediately offer to fully reinstate Joe Alvarado to his former position of general maintenance foreman, or an equivalent position, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

2. Make Joe Alvarado whole for any loss of pay and other benefits he may have suffered by tendering to him back pay equal to an amount that he would have been paid absent the District's unlawful discipline on November 9, 1977 until the date of the offer of reinstatement, less any interim earnings as a result of other employment during the period of suspension, augmented by payment of interest at seven percent per annum of the net amount due. The offset shall not apply to wages lost as a result of Alvarado's demotion.

3. Make Armin Coco whole for any loss of pay and other benefits he may have suffered by tendering to him a back pay award equal to the amount that he would have been paid absent the District's unlawful suspension of him on November 9, 1977 through January 23, 1978, less any interim earnings as a result of other employment during this period, augmented by payment of interest at seven percent per annum of the net amount due;

4. Remove from the personnel files of Armin Coco and Joe Alvarado any and all materials relating to the discipline imposed upon them for the alleged slowdown.

BALDWIN PARK UNIFIED SCHOOL DISTRICT

Dated: _____ By: _____
Authorized Representative

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, ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF CALIFORNIA



SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 660, AFL-CIO,

Charging Party,

v.

BALDWIN PARK UNIFIED SCHOOL DISTRICT,

Respondent.

Unfair Practice
Case No. LA-CE-204

PROPOSED DECISION

(10/12/78)

Appearances: Michael P. Posner, Attorney (Geffner & Satzman) for Service Employees International Union, Local 660; John J. Wagner, Attorney (Wagner and Wagner) for Baldwin Park Unified School District.

Proposed Decision by Sharrel J. Wyatt, Hearing Officer.

PROCEDURAL HISTORY

An unfair practice charge alleging that Armin Coco and Joe Alvarado were disciplined for union activity in violation of section 3543.5(a) and (d) ¹ was filed by Local 660, Service Employees International Union, AFL-CIO (hereafter SEIU or Charging Party) on November 28, 1977 against the Baldwin Park Unified School District ² (hereafter District or Respondent). An informal conference was

1

All references are to the Government Code unless otherwise indicated.

2

Baldwin Park Unified School District is a K-12 district located in Los Angeles County and has an enrollment of approximately 12,000 attending school at 20 school sites. 1977 Cal. Public School Directory, State Dept. of Ed. at p. 166.

conducted on January 6, 1978 and a formal hearing on March 16, 1978 was conducted by another hearing officer and the case was reassigned for decision.³

ISSUE

Whether the District violated section 3543.5(a) or (d) by disciplining Armin Coco or Joe Alvarado for alleged "union activity".

FINDINGS OF FACT

At the formal hearing, the parties stipulated that:

SEIU Local 660 is the exclusive representative of classified employees of the District in the operations-support unit.

The District is a public school employer within the meaning of section 3540.1(j).

Armin Coco and Joe Alvarado are classified employees in the operations-support unit.

Armin Coco is a member of SEIU Local 660.

Armin Coco is a shop steward for SEIU Local 660.

Armin Coco and Joe Alvarado were suspended without pay on November 8, 1977.

On November 8, 1977, the District met with Armin Coco and Joe Alvarado and scheduled a hearing on November 17, 1977 before the board of education which the board continued to November 23, 1977. The hearing before the board of education was held on November 23, 1977, January 9, 1978 and January 17, 1978.

There is a negotiated agreement between SEIU and the District containing grievance machinery which is not applicable to disciplinary actions.

On October 14, 1977, both Joe Alvarado and Armin Coco were sent letters from the assistant director for personnel services for the District advising them that letters recommending their dismissal had been prepared for the superintendent's signature and setting forth a time for them to appear and present reasons why these recommendations

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Reassignment was in accordance with Cal. Adm. Code, tit. 8, sec. 32168(b).

should not be made. A copy of the proposed letters recommending dismissal⁴ was attached to these notices.

When Coco, accompanied by two union representatives, met with the assistant director of personnel services, the charges were read to him and he was asked if they were true or false. Though further information about the charges was requested, none was provided by the District. That day, Coco's supervisor had Coco turn in the District's keys.

Alvarado had a similar meeting with the assistant director of personnel services and was not provided with additional information regarding the basis for the recommended dismissal.

Following notice, a hearing on dismissal of Alvarado and Coco was held before the board of education on November 23, 1977, January 9, 1978 and January 17, 1978.

The disciplinary hearing of Joe Alvarado was based on allegations of (1) inefficiency, (2) insubordination, (3) dishonesty, (4) evident unfitness for service, (5) mental condition unfitting him for service, and (6) violation of or refusal to obey rules and regulations of the District - - specifically Article VI (A) and (C)⁵ of the agreement between the District and SEIU, Local 660. The facts charged in

⁴ Contents of the letters recommending dismissal are more fully set forth hereinafter.

⁵ ARTICLE VI WORK STOPPAGE AND/OR CONCERTED ACTIVITIES states:

- A. It is agreed and understood that there will be no strike, work stoppage, slow-down, sick out, or concerted action or refusal or failure to fully and faithfully perform job functions and responsibilities or other interference with the operations of the District by the Union or by its officers, agents, or employees during the term of this Agreement, including compliance with the request of other labor organizations to engage in such activity.

- C. It is understood that any employee violating this Article may be subject to discipline up to and including termination by the District.

support of these allegations in a letter from the District to Alvarado on November 1, 1977 were:

On or about September 20, 1977, and again on or about October 5, 1977, you encouraged one or more district employees in the unit to slow down in the amount of work performed for the district. Said action was detrimental (sic) to the welfare of the district.

In the same letter, the superintendent notified Alvarado that he was recommending Alvarado's dismissal as a classified employee.

A nearly identical letter was sent to Armin Coco on the same date, the only distinction being the factual basis for the recommended dismissal. In Coco's notice it stated:

In September of 1977, in your capacity as a union steward, you encouraged one or more district employees in the unit to slow down in the amount of work performed for the district. Said action was detrimental to the welfare of the district.

At the hearing on dismissal, a custodial employee, Devlin, testified that Alvarado told him to stay within his job description, that he could paint one hour and then he had to stop. This employee also testified that either Coco or Alvarado told him to slow down his pace of work or he would be transferred part time to another school and that Coco told him to watch Jesse, and Jesse would teach him how to slow down and stretch his work of stripping out and waxing floors over the whole summer. This witness also testified that he had time to paint over the graffiti but had not done it because paint was not brought to him. He was told not to paint doors by Coco because that was a painter's job.

Acting head custodian Marks testified that on September 20, 1977, Alvarado asked him how long he had been painting. He said a couple hours, and Alvarado told him not to paint more than one hour

because if he painted over an hour, he would get himself and his principal in trouble, that another guy and his principal got into trouble for painting over an hour, that Marks should get overtime or painter's wages, that someone might snitch to the union and get the principal in trouble, and that Marks should put in a work order for painting. Alvarado offered to have a union steward come and tell Marks what work he could or could not do and Marks declined.

Both Marks and Devlin made inquiry with their principal, according to testimony at the hearing on dismissal regarding the conversations with Coco and Alvarado.

As a result of the testimony of Marks and Devlin the four members of the board of education who participated made the following findings regarding Joe Alvarado:

- 1) On or about September 20, 1977, respondent encouraged a district employee to slow down in the amount of work performed for the District.
- 2) On or about October 5, 1977, respondent encouraged a district employee to slow down in the amount of work performed for the District.
- 3) The action on the part of the superintendent in recommending that respondent be dismissed was for the welfare of the District.
- 4) That respondent in encouraging a slowdown by a fellow worker indicates a lack of leadership.
- 5) That respondent in encouraging a slowdown by a fellow worker indicates a lack of proper representation of the District by a supervisory employee.
- 6) That on or about October 5, 1977, respondent told a district employee that he was not to paint anything requiring more than one (1) hour of work.
- 7) That there is no prohibition preventing a custodian from painting more than one (1) hour in duration.

The board of education upheld all six charges recommended by the superintendent and ordered that Alvarado be demoted from the position of maintenance working foreman to general maintenance/painter effective January 24, 1978 and be suspended without pay from November 9, 1977 through January 23, 1978.

The four members of the board of education who participated in the decision regarding Armin Coco found that:

- 1) During the month of September Respondent encouraged a district employee to slow down in the amount of work performed for the District.
- 2) That the action on the part of the superintendent in recommending that Respondent be dismissed was for the welfare of the District.
- 3) That Respondent in encouraging a slowdown by a fellow worker indicates a lack of leadership.

They upheld all six violations recommended by the superintendent and ordered that he be suspended without pay from November 9, 1977 through January 23, 1978.

To support the allegations in the unfair practice charge, SEIU presented evidence that Armin Coco, a heating and air conditioning maintenance man, had been an employee of the District for six years and had never before been disciplined. Until 1975, the operations-support employees had been represented by CSEA. Coco became active in SEIU in September or October of 1975, and had helped to organize custodians, transportation, grounds maintenance and painting employees by telling them about SEIU Local 660 and requesting that they sign cards. During organizing, his supervisor told him to do what he liked so long as it was not on District time, i.e., it was all right to organize during breaks or lunch.

Coco was an observer at the tally of ballots in the election of an exclusive representative in the operations-support unit and testified that the superintendent came in during the tally of ballots, stayed until SEIU reached 47, the amount needed to win, and Coco thought he shut the door pretty hard when he left. Coco had his back turned to the door and only heard the sound.

The superintendent testified that he stepped into the room for a couple of minutes while ballots were being counted only to see if the facility was adequate and did not slam the door as he left. Since Coco only heard the door shut and did not see the superintendent leave, no inference is drawn from this testimony.

Coco participated in meeting and negotiating during five of seven sessions from May to July of 1977. The District was represented by Brooks, the assistant director of personnel services, who had previously worked for CSEA. Negotiations were not particularly heated and Coco was not singled out by the District in any way.

At the hearing on the unfair practice, Coco testified that he got involved with Devlin as a union representative because he did not want to see Devlin, a new employee get into trouble. Coco denied that he ever told Devlin to slow down. Coco testified that Devlin's predecessor had a very heavy work load and that he could not believe Devlin had it finished, so he told Devlin that he had better take his time and do the job right.

Joe Alvarado was hired by the District in 1968 as a custodian and progressed to maintenance man/painter, leadman painter and general maintenance foreman, the position he held at the time dismissal proceedings were commenced. Prior to that proceeding, he had never been disciplined.

During SEIU's organizing campaign, he voiced the opinion that SEIU was better than CSEA when asked. He has been active in SEIU since late 1975 or early 1976. His supervisor said to keep discussion on SEIU or CSEA to lunch or breaks and not District time.

Alvarado is a substitute union steward, but there is no evidence that the District was aware of this. On one occasion during meeting and negotiating, he substituted for Coco for part of a session. This, and the favorable comments on SEIU in early 1976 form the basis for his belief that he was disciplined for union activity in late 1977.

Alvarado denied he ever told Devlin to slow down. When Devlin requested paint because Devlin wanted to paint all the doors, he testified he told Devlin that he had to get a requisition from the principal and that if all the doors needed to be done, the painters usually go out and paint the doors. Alvarado also denied that he told Marks to engage in a slow-down or work stoppage or that he told Marks that Marks and the principal would get into trouble. Alvarado testified that he told Marks that he was only supposed to paint for one hour on a day when Marks had begun painting at 6:30 or 7:00 a.m. and was still painting at 9:30 a.m. and that Marks should contact a shop steward. Alvarado admitted that he had knowledge that custodians were supposed to keep the graffiti off the walls by painting or washing. Alvarado testified he was a supervisor and a member of SEIU Local 660 and that as a supervisor, he was responsible for seeing that work was performed efficiently for

the District. Judicial notice is taken of representation Case No. LA-R-18. The classification of maintenance working foreman is in the unit and not excluded as supervisory. From this and the description of Alvarado's work, it is concluded that the record would not support a finding that he is a supervisory employee; his work is more in the nature of a leadman or working foreman.

The superintendent testified that he learned of Coco and Alvarado's activity when the principal at Tracy told him he had had a conversation with a custodian in which the custodian said that Coco and Alvarado wanted him to slow down.⁶ Because of this conversation, the superintendent told the assistant director of personnel services to investigate. Based on the investigation the superintendent felt that there had been a direct violation of the negotiated agreement between the District and SEIU Local 660 and recommended termination of Coco and Alvarado. At the time that he recommended termination, the superintendent did not know that Alvarado was a member of SEIU, had voiced views favorable to SEIU to fellow employees during organizing, had participated as a substitute negotiator at one meet and confer session or was a substitute union steward.

When he recommended termination of Coco, the superintendent knew that Coco was a member of SEIU and had been part of SEIU's team for meeting and negotiating. He did not know Coco had participated in organizing for SEIU.

The record reflects that negotiations were not particularly acrimonious and that grievances have been settled informally. There is nothing in the record to indicate union-animus on the part of the District during negotiations or subsequently.

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This testimony supports the finding that the superintendent and the principal had such a conversation only, and not the finding that Coco and Alvarado urged a slow down.

The superintendent testified that he would recommend termination of any employee who did what Alvarado and Coco did, without regard for union membership.

CONCLUSIONS OF LAW

The District is charged with violation of section 3543.5(a) and (d) which read:

It shall be unlawful for a public school employer to:

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

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

The wording of section 3543.5(a) and (d) is similar to the wording of section (8)(a)(1) and (3) of the Labor Management Relations Act, as amended (hereafter LMRA), which reads:

(a) It shall be unfair labor practice for an employer - -

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

.
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;...

State labor legislation which is essentially the same as federal legislation should be interpreted in light of federal precedent.

Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507; 87 LRRM 2453]; Belridge Farms v. Agricultural Labor Relations Board (1978 21 Cal.3d 551, [___ Cal.Rptr___]; 98 LRRM 3102].

The PERB has considered application of section 3543.5(a) and has noted that section 8(a)(1) of the LMRA relates to interference "in the exercise" of rights while the EERA prohibits interference

"because of the exercise" of rights. Thus, the Charging Party has the burden,⁷ at minimum, of showing by a preponderance of the evidence that the District carried out its conduct with the intent to interfere with or that its conduct had the natural and probable consequences of interfering with employees because of the exercise of their rights under the EERA.

In its analysis of section 8(a)(3) of the LMRA, the PERB stated: "However, the use of the words 'discrimination' and 'discouragement'... suggests that motivation is a key factor in any section 8(a)(3) violation." (San Dieguito, supra, at p. 15.)⁸ Like discouragement, the use of "encourage" in section 3543.5(d) suggests motivation as a factor.

Where motivation is a factor, the PERB found that if a valid business reason, unrelated to union activity, can be established for the conduct, no unlawful interference is found. The PERB considered legitimate business motive in that case and found that the motive was inconsistent with intent to violate the EERA.

Under LMRA precedent, it is clear that an employer may take adverse action on an employee's status for good cause, bad cause or no cause, provided the employer is not motivated by unlawful intent, i.e., for reprisals, discrimination, restraint, coercion or interference. (NLRB v. Condensor Corp. of Amer. (3d Cir. 1942) 128 F.2d 67 [10 LRRM 483].):

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Cal. Adm. Code, tit. 8, sec. 32178 provides:

The charging party shall prove the charge by a preponderance of the evidence in order to prevail.

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San Dieguito cites Evansville and Ohio Valley Trans. Co. (1976) 223 NLRB 184 [92 LRRM 1157] Champion Pneumatic Machinery Co. (1965) 152 NLRB 300, 306 [59 LRRM 1089] International Shoe Co. (1959) 123 NLRB 682 [43 LRRM 1520] in support of this analysis.

...the question is not whether [these charges] were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees. (NLRB v. Montgomery Ward & Co. (8th Cir. 1946) 157 F.2d 486 [19 LRRM 2008, at 2011].)⁹

Determining an employer's motive is a delicate task¹⁰ in which it is proper to consider all facts and inferences going to motive.¹¹

In this case, the record supports the finding that Coco was known to the District to be a member of SEIU, a shop steward and on the team for meeting and negotiating. Alvarado was not known to the superintendent to be either a member of SEIU and alternate shop steward or to have substituted on the team for meeting and negotiating at one session. As to Alvarado, while it is true that the District would have to have knowledge of his union activity for a violation to be proven, it is also true that knowledge on the part of the assistant director for personnel services is attributable to the District.¹² This individual investigated and reported to the superintendent. Based on his report, the superintendent made the decision to proceed with the discharge. The assistant director for personnel services knew Alvarado had substituted on the negotiations team because he represented the District in negotiations.

⁹Quoted with approval in Indiana Metal Products Corp. v. NLRB (7th Cir. 1953) 202 F.2d 613 [31 LRRM 2490 at 2493].

¹⁰Toma Meat Packing (1970) 230 NLRB No. 24 [96 LRRM 1148].

¹¹Ethyl Corp. (1977) 231 NLRB No. 40 [97 LRRM 1465].

¹²NLRB v. Whitin Machine Works (1st Cir. 1953) 204 F.2d 883 [32 LRRM 2201].

The record thus reflects that Coco was active in SEIU from September or October of 1975, helped organize for SEIU, was a shop steward and was a regular participant in meeting and negotiating with the District. Alvarado was a member of SEIU, expressed support for SEIU to other employees when asked, and substituted on the team for meeting and negotiating for a portion of one session.

No inference is drawn from the fact that Coco heard a door slam during the tally of ballots in the representation election in which SEIU prevailed because he could not testify as to who slammed the door or why.

No inference is drawn from the fact that the assistant director of personnel services for the District had once been an employee of CSEA. His previous affiliation without a modicum of proof that he in any way attempted to support CSEA over SEIU in the election is not probative evidence.

It is clear from the record that relations between SEIU and the District have not been acrimonious, that meeting and negotiating were relatively smooth, and that there has been no animosity in application of the agreement reached.¹³ Throughout the process, neither Alvarado nor Coco were singled out by the District in any way.

The Charging Party argues that the hearing before the board of education did not provide any basis to support the findings of inefficiency, insubordination, dishonesty, evident unfitness for service, mental condition unfitting them for service or violation of or refusal to obey rules and regulations of the District - -

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Wyman-Gordon Co. v. NLRB (7th Cir. 1946) 153 F.2d 480 [17 LRRM 781]; Valencia Service Co. (1953) 103 NLRB No. 108 [31 LRRM 1607].

specifically Article VI (A) and (C) of the agreement between the District and SEIU.

The District argues that Education Code section 45113¹⁴ prohibits review of the District's action in the hearing or discharge because it states that the determination of the sufficiency of the cause for disciplinary action by the board is conclusive.

While the finding of sufficiency by the board of education is conclusive for purposes of Education Code section 45113 proceedings, nonetheless, it is proper to examine the record on which the findings are based to determine if there was evidence¹⁵ to support the findings when a charge of discrimination under section 3543.5 is in issue. If the record were void of facts on which to base the findings, this would be evidence of unlawful

¹⁴ Ed. Code sec. 45113 reads:

Rules and regulations for classified service in districts not incorporating the merit system. The governing board of a school district shall prescribe written rules and regulations, governing the personnel management of the classified service, which shall be printed and made available to employees in the classified service, the public, and those concerned with the administration of this section, whereby such employees are designated as permanent employees of the district after serving a prescribed period of probation which shall not exceed one year.

Any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive...

¹⁵ The board of education was present to observe demeanor in the dismissal hearing. In determining if there is substantial evidence, the record is examined to see if there are facts to support the findings reached, and not to rule on the veracity of the witnesses or conflicts in testimony.

intent. Were the District permitted to hide behind the shield of Education Code section 45113, it could discriminate with impunity and escape the reach of section 3543.5.

The superintendent was told by a principal that two employees had been encouraged to slow down. He caused an investigation with signed statements from those employees and based on that investigation, sent notice of intent to dismiss. Clearly, he had reasonable cause to bring the dismissal proceedings.

The record of the hearing before the board of education reflects the testimony of Devlin and Marks. Their testimony, summarized in the findings of fact at p. 4, supra, does provide adequate evidence from which the board of education could find that Alvarado encouraged employees to slow down on or about September 20, 1977 and October 5, 1977 and told a district employee not to paint over one hour on October 5, 1977 and that Coco encouraged an employee to slow down in the amount of work performed by the District during September 1977. Therefore, the dismissal hearing was not a mere subterfuge for discrimination. Since there was a reasonable basis for the findings, no inference of illegal motivation is made from this evidence.

The record is devoid of any evidence which reflects that the District treated Alvarado or Coco in a disparate manner from treatment of other employees. Discrimination consists of treating like causes differently.¹⁶ Nor is the timing of the discharge so related to the exercise of rights under the EERA that it could be inferred that the discharge was because of the exercise of rights under the EERA.¹⁷

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Mueller Brass Co. v. NLRB (5th Cir. 1977) 544 F.2d 815 [94 LRRM 2225].

¹⁷

NLRB v. Somerville Buick, Inc. (1st Cir. 1952) 194 F.2d 56 [29 LRRM 2379].

Charging Party urges the finding that the District denied due process when the assistant director for personnel services met with Coco and Alvarado separately to give them the opportunity to show cause why the letter recommending their termination should not be sent because they were not provided with more information on that date as to the basis for dismissal.¹⁸ Failure to provide more information is not evidence of intent on the part of the District because there is no evidence that the District ordinarily provided more but refused to in this case because of union affiliation.

The letter of dismissal to Coco states "in your capacity as a shop steward" rather than intent to discipline him because of acts as an employee. This certainly raises the inference that the District was disciplining Coco for union activity and not for cause as an employee. Under the LMRA, a shop steward would be protected because of conduct incidental to his official duties under section 7 "protected concerted activities," but nevertheless subject to discipline for misconduct outside of their official duties.¹⁹ Section 3543 of the EERA is broad enough to come within the ambit of NLRB decisions in the instance because it protects the right to join and participate in an employee organization. This would include the right to hold office as a shop steward and process grievances.

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See notice in letters at p. 3, supra.

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Texas Textile Mills (1944) 58 NLRB No. 352 [15 LRRM 41]; NLRB v. Eastern Illinois Gas Co. (1971 7th Cir.) 440 F.2d 656 [76 LRRM 2943]; NLRB v. Howell Automatic Machine Co. (6th Cir. 1972) 454 F.2d 1077 [79 LRRM 2474]; NLRB v. Red Top, Inc. (8th Cir. 1972) 455 F.2d 721 [79 LRRM 2497].

However, Coco was disciplined for encouraging an employee to slow down in the amount of work performed for the District. This is not protected as part of his official duties as a shop steward nor as an employee under the EERA.

Alvarado who was not known to the District to be an alternative shop steward was also disciplined, so there is no evidence that the District treated Coco differently because he held office as a shop steward.

Thus the discrimination, if any, relates solely to membership and activity on behalf of the union at a time remote from the discharge. This in and of itself could only raise a suspicion of possible unlawful intent. Mere suspicion will not substitute for proof.²⁰

Union activity combined with discharge or discipline will not, alone, support a finding of discrimination.

The mere fact that a specific employee not only breaks a Company rule but also evinces a pro-union sentiment is alone not sufficient to destroy the just cause for his discharge. Mueller, supra, at p. 2227.

Therefore, it is concluded that the charge of violation of section 3543.5(a) must be dismissed. The record at best supports only the slightest suspicion that Alvarado and Coco were discharged because they exercised rights under the EERA, while revealing legitimate business purposes for the District's action. The

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Lasell Junior College (1977) 230 NLRB No. 166 [95 LRRM 1601];
NLRB v. South Rambler Co. (8th Cir. 1963) 324 F.2d 447 [54 LRRM 2634];
NLRB v. Monroe Auto Equipment (8th Cir. 1966) 368 F.2d 975 [63 LRRM 2522]

District has a legitimate management interest in preventing employees from encouraging fellow employees to slow down or limit the work they are willing to perform in derogation of their obligation to the District to perform their assigned work.

The charge of violation of section 3543.5(d) must also be dismissed. As discussed supra at p. 11, "to encourage membership" requires motive on the part of the District. Not only has the Charging Party failed to show that the District was motivated by the desire to encourage membership in one employee organization in preference to another, but there is no evidence that any employee was so encouraged. The elements of a charge of encouraging or discouraging membership on section 8(a)(3) of the LMRA requires 1) knowledge of the employer of union activity, 2) discrimination by the employer, and 3) that the discharge had²¹ the effect of encouraging or discouraging union membership. Section 3543.5(d) does not limit itself to discrimination to encourage or discourage membership, but prohibits the employer from "in any way encouraging employees to join any organization in preference to another." To prevail, Charging Party would have to show an intentional act or omission of the employer which either encouraged membership or had the natural and probable consequences of encouraging membership in one employee organization in preference to another. The District's action, as indicated above, was not with intent to encourage membership, but for legitimate business purposes. And the record is barren of any evidence that membership was in fact encouraged. Nor can the inference be drawn that discipline for breach of District rules

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NLRB v. Whitin Machine, supra at p. 12.

and regulations of individuals who also happen to be active supporters of an employee organization would have the natural and probable consequences of encouraging membership in one organization in preference to another.

PROPOSED ORDER

It is the Proposed Order, based upon the findings of fact, conclusions of law and the entire record of the case that:

The unfair practice charge filed by Service Employees International Union, Local 660, AFL-CIO alleging violation of section 3543.5(a) and (d) is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 1, 1978 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on Wednesday, November 1, 1978 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 Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: October 12, 1978


Sharrel J. Wyatt
Hearing Officer