

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES'
ASSOCIATION, CHAPTER 41,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-13-H

PERB Decision No. 319-H

June 10, 1983

Appearances: Ernest Haberkern for California State Employees'
Association, Chapter 41.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: The California State Employees'
Association, Chapter 41 (CSEA or Charging Party) has submitted
exceptions to the proposed decision of a hearing officer of the
Public Employment Relations Board (PERB or Board). The hearing
officer concluded that the Regents of the University of
California (University or U.C.) did not violate subsections
3571(a) and (b) of the Higher Education Employer-Employee
Relations Act (HEERA).¹

¹HEERA is codified at Government Code section 3560
et seq. All statutory references are to the Government Code
unless otherwise specified. Subsections 3571(a) and (b)
provide:

It shall be unlawful for the higher
education employer to:

(a) Impose or threaten to impose reprisals
on employees, to discriminate or threaten to

In its charge, CSEA alleged that the University violated HEERA by failing to select University employee John Kasper to fill four job vacancies because of his participation in protected activities. CSEA argues in its exceptions that the hearing officer failed to fully consider and appropriately credit evidence which, according to CSEA, demonstrates that Kasper was not selected for these positions because of the anti-union animus of the selecting officials.

FACTS

John Kasper has been employed by the University graduate division since 1975. At the time of the hearing, Kasper was a senior clerk at the fifth and final step of the senior clerk pay scale.

In an effort to support the allegation that Kasper was unlawfully denied four positions,² testimony was introduced

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.

²Specifically, Kasper applied and was rejected for two principal clerk positions and two truck driver positions.

as to his activity in employee organizations and other protected activity.

During his first year in the graduate division in 1975, he initiated a complaint with the environmental health and safety department concerning improper ventilation in the men's room. There is no evidence as to the outcome of this investigation.

In the summer of 1978, Kasper joined the American Federation of State, County and Municipal Employees, Local 1695 (AFSCME). Approximately a year later, he switched his membership to CSEA. Kasper was an active union member, performing such activities as recruiting new members and passing out leaflets.

In April 1979, Kasper initiated another safety complaint through the health and safety committee of AFSCME. Based on an on-site examination by the campus environmental health and safety department, the alleged hazardous conditions in a storage facility at the Edwards Stadium on campus were confirmed. It was recommended that the area not be used until the safety problems were corrected. This facility was used by Rasper's department for file storage and Kasper told student employees he supervised not to go to the facility because it was unsafe.

Sometime thereafter, Carol Soc, administrative assistant to Virginia Griffin, Rasper's supervisor, ordered Terry Meyer, one of Rasper's student employees, to go to the storage facility.

Meyer refused, saying Kasper had told him not to and that he, Rasper, would take responsibility. Later, in September 1979, Griffin told Kasper that she did not want Meyer to continue working in the department because others, including Soc, were dissatisfied with him.

In the summer of 1979, Kasper asked Griffin about getting an employee organization bulletin board for the department. Since Kasper ordered supplies, she told him to order one. When it came in, Kasper posted organizational materials on it and asked Griffin to have it affixed to the wall. He left the bulletin board at his desk on a Friday afternoon and when he returned to work the following Monday, he found that the board had been locked in Soc's office. Griffin did not return the posted materials to Kasper until a union representative interceded.

Kasper then tried to use a portion of another large bulletin board for employee organization notices. However, Griffin removed the organizational materials placed on this board.

Finally, after a meeting with Kasper and Griffin and the acting dean of the graduate division, an official employee organization bulletin board was put up. On one occasion, Griffin posted an advertisement for student magazine rates over a health and safety notice posted by the union. Kasper removed the magazine notice and Griffin reported him to the dean for

doing so. Kasper was called in for a meeting with the dean that same day and was assured that no memo would be put in his file concerning the incident. However, a memo was placed in Rasper's file indicating only that no memo had been exchanged between the dean and Griffin on the subject. As a result of this meeting, a much larger employee organization bulletin board was ordered and no subsequent problems were experienced.

Two promotional opportunities, which are the focus of the instant case, involve the position of principal clerk in the graduate division.

In early September of 1979, Kasper had a meeting, along with two union representatives, with Griffin and a graduate division personnel advisor to discuss Rasper's career opportunities. All of the promotional opportunities into principal clerk positions in the division were reviewed. At that meeting, Rasper testified, Griffin stated that the only qualification he was lacking for these positions was sufficient typing skill.

About two weeks later, a principal clerk position became available as a result of the death of an employee. Rasper wrote a memo to Griffin on September 13, 1979, indicating he was interested in the job. He mentioned that she told him over a year earlier he would get this job if the incumbent left and that, in the recent meeting, Griffin had again mentioned this position as one of his likely promotional opportunities.

At the time of the opening, this principal clerk position had responsibility for files in the admissions office, a

separate subdivision of the graduate division. However, the decision was made to reorganize the graduate admissions office and to list the open position as an "evaluator" of graduate admission applications.

Karla Goodrich, head of the admissions office, and her assistant, Donna Bretherick, discussed between themselves changing the principal clerk position to an evaluator position. Goodrich contacted Griffin to ask whether it was permissible to change the job description. Griffin said it was. In a meeting with all the evaluators, Goodrich discussed the proposed change. The employees were asked to consider whether they would favor adding another evaluator position since it would require them to assume the clerical duties of the former principal clerk position. All of the evaluators voted for the additional evaluator.

Prior to this time, the office had separate staffs for evaluation of domestic and foreign applications. Two of the three foreign application evaluators had quit, and the office was running behind in evaluating foreign applications. In response to this problem, it was decided that all evaluators would be cross-trained so all could review foreign as well as domestic applications.

As a result of these discussions, although the title "principal clerk" remained the same, the job description for the vacant position was substantially changed to reflect the

shift from file clerk to evaluation duties. By memo dated September 19, 1979, Goodrich so advised the graduate division staff. The job announcement listed a bachelor's degree and knowledge of a foreign language as "very desirable" qualifications. Having college experience was considered helpful in evaluating the significance of courses, grades and other transcript-related matters. Knowledge of a foreign language was considered desirable because approximately 4,500 of the 16,000 applications received each year were from students from a foreign country.

Kasper and 16 others submitted applications for the vacant position in the fall of 1979. Goodrich and her assistant, Bretherick, decided to interview 10 applicants, including Kasper. According to Goodrich, Kasper was interviewed as a matter of courtesy since he was from within the graduate division. The reason for Goodrich's lack of enthusiasm about Kasper was that he did not have a bachelor's degree and, although he listed knowledge of Spanish on his application, at the interview he said he was not very fluent.

Typing skill also was considered necessary because of the many forms evaluators must type. Kasper listed no typing speed on his application nor was there any discussion of it at his interview. Goodrich testified that typing speed was not a determinative factor in Kasper's non-selection. Accuracy, rather than speed, was critical.

The first person selected by Goodrich and Bretherick for the job had a bachelor's degree, was fluent in four languages, and received an excellent recommendation from her former employer. Just prior to beginning the job, however, the first choice candidate declined the position. The second choice, who accepted, had a bachelor's degree and a teaching credential from Berkeley. She was personally familiar with the graduate application procedure, had a reading knowledge of French and German and typed 70 words per minute. She also had a good recommendation from her supervisor.

Goodrich was the selecting official who declined to promote Kasper to this position.³ Other than the question to Griffin concerning the permissibility of changing the job duties of the vacant principal clerk position, Goodrich had no contact with Griffin concerning either the decision to change the duties to those of an evaluator, Rasper's application, or the interview and selection process itself. There was no discussion during the interview of Rasper's union activities. Goodrich, although aware that Rasper was a union member, having read an article in

³pursuant to the University's internal appeal procedure, Rasper contested denial of the first application on November 15, 1979. This protest prompted a factfinder's investigation and report dated March 13, 1980, which concluded that there was no evidence to support the allegation that the promotion to principal clerk was denied because of Rasper's union activities.

the AFSCME newsletter about his involvement in the Edwards Field safety inspection, did not know to which union he belonged or the extent of his involvement. She had no knowledge of his complaints about his job applications to the Richmond Field Station or the Department of Facilities Management, discussed infra.

Sometime earlier, there was a meeting in the graduate division concerning the new collective bargaining law (HEERA). Goodrich did not attend, in part because she did not want to intimidate her employees. Bretherick, however, did attend. After the meeting, Goodrich heard from some of her employees that Kasper and other employees were at the meeting.

The second promotional opportunity to which Rasper's allegations focus occurred in January 1980 as a result of the fact that the new principal clerk hire, who had begun work in October 1979, soon quit. Therefore, the job was again listed. This time about ten applications were received and five persons, including Kasper, were interviewed.

Again, only Goodrich and Bretherick were involved in the interview and hiring process. There was no contact with Griffin. Goodrich felt Kasper showed disinterest in the interview, recalling his stated reasons for wanting the job were more money and something new to do. He did say his typing speed was 45 words per minute.

The person hired had a bachelor's degree from Berkeley and a good reading knowledge of Spanish and German. She had

previously worked as an evaluator in the admissions section and, more recently, at U.C. Extension in an enrollment function.

The instant charge also identifies two truck driver positions for which Kasper applied but was rejected. The first involved a position at the Richmond Field Station in September of 1979.⁴ Don Larson, superintendent of physical plant at the Richmond Field Station conducted the interviews and selected the candidate for the position.

⁴In April 1979, Kasper first applied for a truck driver position at the Richmond Field Station. However, the relevancy of this incident is limited to background evidence of anti-union animus on the part of the University because, as noted in the September 24, 1980 Order of the administrative law judge who processed this case, an unfair practice violation cannot be found on the basis of this incident because it occurred outside the six-month limitation period in subsection 3563.2(a).

Kasper was interviewed for the truck driver position at the Richmond Field Station in April 1979 by John Jencks. Jencks stated he was very impressed with Kasper and that there seemed to be no affirmative action restraints involved in filling the position. He also told Kasper he might need a class II driver's license for the job, but that he could obtain it later.

Jencks also mentioned to Kasper that he, Jencks, was a CSEA member. He went on to promote the advantages of joining CSEA, telling Kasper there had been a Hispanic employee who had not been issued his first paycheck until CSEA stepped in and got it for him. Jencks did not ask Kasper about his union affiliation or activities, nor is there any evidence Jencks had any other knowledge of them.

About a week later, Kasper called Jencks to inquire about the position. This time, Jencks¹ attitude toward him was negative. He said there were, in fact, affirmative action considerations and a black woman would probably get the job before Kasper. Kasper was not hired, and the black woman,

Borrowing from his Navy service experience, Larson created a list of ranking factors by which to judge the applicants for the truck driver position. He assigned a weight to each factor and then went through the applications and ranked each applicant.

Out of 26 candidates, he rejected 11 who did not have class II driver's licenses. At this time, Kasper had acquired this license and thus was not initially rejected. Out of the remaining candidates, Larson selected 6 to interview. Kasper was ranked 11th out of the remaining 15 candidates and did not receive an interview.

Before this application, Larson had not heard of Kasper or about any union involvement. Jencks had no input into the job description or the hiring process. No one at the Field Station, including Jencks, said anything to Larson about Kasper or the interview process in general. Larson talked to no one

Georgina Bledsoe, was hired. Kasper filed an appeal of this decision which, on August 2, 1979, the factfinder rejected. However, because of her unsatisfactory performance and inability to obtain a class II driver's license, Bledsoe was terminated during her probationary period.

Testimony regarding Jencks¹ organizational sentiments was also introduced by Eugene Darling, an AFSCME job steward. Darling testified that, in December of 1978 in a grievance meeting, Jencks became agitated and stated that he thought AFSCME often brought up "frivolous" issues which were a waste of time. Jencks said he based this belief both on that grievance and what he read in the AFSCME newsletter. Jencks also mentioned he was a CSEA member.

from any other department, including the graduate division, about Kasper. Neither was Larson aware of Rasper's previous application for this truck driver position nor his administrative appeal of his rejection.

The person hired by Larson for the truck driver position had been a professional highway driver of large vehicles. He had worked as a truck mechanic for several years and also had been a crash crew crane operator in the Navy. He also had experience operating virtually every piece of equipment used at the field station.

Kasper also contested the failure to hire him for the truck driver position at Facilities Management on November 8, 1979.

When the position became available in October of 1979, 13 or 14 applicants, including Kasper, were interviewed by Frederic Warnke, manager of ground services in the Department of Facilities Management.⁵

⁵In May 1979, Kasper was interviewed for a truck driver position by Warnke. It is beyond the six-month limitation period and is included for background purposes only. At that first interview, Kasper mentioned he had no experience with larger trucks. Out of the eight or nine candidates, a black man was chosen, not only because he had extensive truck driving experience and a thorough knowledge of the campus, but also because his hiring fulfilled an affirmative action goal. Previously, there had been no black drivers in the Department of Facilities Management. Kasper appealed this decision pursuant to University procedures. No response appears in the record.

Kasper called Warnke on May 14, 1979, to inquire about how he had fared in the interview the week before. Warnke told him

There is some difference between Rasper's and Warnke's recollections of the interview. Kasper testified Warnke said he had a preference for outside candidates rather than University employees, and that Warnke also said he "even had to interview a union member," referring to a Teamster truck driver he had interviewed and not to a CSEA or AFSCME member.

During the interview, Rasper asked what his chances were of getting the job. Warnke replied he did not know yet because he had several more people to interview.

The person selected by Warnke had worked with the University intercollegiate athletic department for 22 years as a gardener. As such, he had driven a truck and had also driven trucks on a farm during summers. Rasper appealed this decision through University channels, and his appeal was rejected.

Warnke had no information about Rasper before the first interview and knew nothing about his union affiliation or activities. The subject was not discussed during the first interview.

Shortly after the first interview, Warnke mentioned to one of his fellow carpool riders, who was administrator of Cowell Hospital on the campus, that he had just interviewed someone (Rasper) who had been a driver for the physically handicapped

that, subject to passing a physical examination, he had hired someone else. Rasper testified that, until this time, he was not informed there was a requirement for a physical examination.

at Cowell Hospital. Although the Cowell Hospital administrator did not know Kasper personally, he praised Kasper by saying the job he performed at Cowell Hospital was a difficult one.

Other than this carpool incident, Warnke's testimony was unclear and contradictory as to whether he was aware of Kasper, his grievances or union activities until after he had rejected Kasper on the second interview in October 1979. Warnke was unaware of the administrative appeal Kasper had filed against him in connection with the first interview.

DISCUSSION

In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board determined that, in cases alleging discriminatory conduct, it must be proven that the employee was engaged in protected activity and that the employer's conduct was motivated by that participation. Unlawful motive is accordingly the specific nexus required in the establishment of a prima facie case. Although the standard set forth in Novato concerned alleged violations of the Educational Employment Relations Act, it has been applied by this Board to charges arising under HEERA. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H; The Regents of the University of California (U.C. San Diego) (3/30/83) PERB Decision No. 299-H.) Applying this standard to the instant case, we find that the Charging Party has failed to satisfy its burden.

Citing PERB's decision in Santa Clara Unified School District (9/26/79) PERB Decision No. 104, CSEA argues that Kasper was unlawfully rejected for the two principal clerk positions because Griffin harbored anti-union animus against Kasper for the safety report and bulletin board incidents.

The threshold issue is whether Kasper engaged in any protected activity which could have been the motivation for Griffin's conduct. Rasper's conduct in the summer of 1979 regarding the bulletin board falls within the parameters of protected activity. Section 3568 of HEERA provides:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

Rasper's efforts to have the bulletin board mounted and to post organizational materials were in furtherance of the union's goals of communicating with and representing employees. His conduct was clearly protected activity.

In addition, Rasper's safety-related complaint, pursued with the assistance of AFSCME, concerning the Edwards Field Station also constitutes protected activity.⁶

⁶Based on AFSCME's involvement in the Edwards Field Station complaint, it is unnecessary to consider whether all

Given the existence of this protected activity, CSEA argues that because of that conduct Kasper was not selected for the two principal clerk positions. However, while the record reveals that Griffin had direct knowledge of Rasper's protected activities, there is no support for the conclusion that she was involved in the actual selection decisions. Goodrich and Bretherick interviewed and selected the successful candidates and the record reveals that neither harbored any anti-union sentiments against Kasper. Thus, citing to Santa Clara, supra, CSEA's sole argument is that Griffin's sentiments be imputed to Goodrich and Bretherick.

In Santa Clara, supra, the charge alleged that the employer unlawfully refused to hire Laura Garton as a part-time permanent teacher. There, the Board's review of the totality of evidence compelled the conclusion that, after Garton sought union assistance, the District improperly denied her the teaching position in response to her protected activity. The Board observed the specific chain of events involving two District officials and, from those circumstances, inferred an illegal motive. The Board rejected the hearing officer's analysis which distinguished and separately considered the

safety-related complaints initiated by an individual employee are protected activity under HEERA. See, for example, Alleluia Cushion Co. (1975) 221 NLRB 999 [91 IRRM 1131].

actions of the principal, John Cowden, and the assistant superintendent, Nick Gervase. The Board said:

Both administrators are agents of the District, and therefore their conduct necessarily inheres to the District. Contrary to the hearing officer's analysis, the Board does not view Cowden's and Gervase's refusal to hire Garton as severable actions when considered for purposes of determining the unlawful nature of the District's activity. Rather, the Board will consider facts and incidents compositely and draw inferences reasonably justified therefrom. (Citation omitted.)

Therefore, after review of the totality of evidence presented, the Board finds that the District's conduct, subsequent to the Federation involvement on Garton's behalf, compels the conclusion that the District's consideration of such protected activity improperly infected its decision concerning the filling of the vacancy. In so finding, the Board credits the testimony of Garton which establishes that she was told by Cowden that she had an inside track on the position, that on her behalf [union president] contacted Gervase, and that she in fact accepted Cowden's offer. . . . Her testimony further establishes that Gervase informed Cowden of his displeasure with the Federation's inquiries and that Cowden asked Garton to verify Gervase's report that she had gone to see [union president] and told her to seek his assistance first. Then, for the first time, Cowden announced that, contrary to the District's usual practice, competitive procedures would be used to fill the vacancy. The Board is persuaded that the inferences which emerge from this chain of events compels the conclusion that the District acted because of Garton's contact with the Federation. (Footnote omitted.)

The Santa Clara decision does not compel the conclusion that the University's agents, taken together, acted to

unlawfully deny Kasper the two principal clerk positions. Goodrich was unaware of Rasper's prior protected activity, and there is no evidence that the selection procedure utilized by Goodrich was unusual or improper. The individuals selected possessed qualifications superior to Rasper's. In spite of these facts, CSEA's argument focuses on Griffin's input in Goodrich's decision to change the principal clerk duties to that of evaluator.

Ample evidence supports the finding that the graduate office workload and staffing situation necessitated the change, and that Griffin's concurrence in that decision was not shown to be improperly motivated. CSEA makes much of the fact that Griffin had allegedly "promised" Rasper the job before the duties were altered. It refers to a similar promise made to Laura Garton by the principal in Santa Clara. This argument is without merit. Whatever assurances given by Griffin to Rasper, the subsequent legitimate change in duties justified Goodrich's decision to deny Rasper the position.

CSEA also argues that Goodrich herself altered the principal clerk job duties and added the foreign language requirement in an effort to thwart Rasper's selection. In addition to the fact that the decision to change job duties emerges from the record as a reasonable decision, CSEA points to no conduct by Rasper of which Goodrich was aware that could arguably be Goodrich's motivation to change the duties and

freeze Kasper out of the position. The only knowledge to which CSEA refers is that Goodrich knew that Kasper applied for the principal clerk position before the duties were altered.⁷ This information, without more, fails to support an inference that the job duties were pretextual or that Kasper was competitive with the other applicants.

In conjunction with the truck driver position at the Richmond Field Station, CSEA argues that the hearing officer failed to find that Larson's "otherwise legitimate action" was infected by improper motivation originating with Jencks and Station Manager John Shively. This argument is without merit. Larson's selection technique was carefully drawn and devoid of improper influence. Even assuming that the record supports a finding that Jencks did harbor anti-union animus, Larson's conduct was in no way affected. Larson's discussions with Jencks and Shively concerned the decision to require a class II driver's license. Since Kasper had acquired such a credential, it is difficult to determine in what manner the decision to require the license could have adversely affected Kasper.

With reference to the truck driver position in Facilities Management, CSEA claims that the hearing officer erred in failing to specifically find and consider that Warnke had

⁷At Rasper's direction, Goodrich received a carbon copy of the memo from Kasper to Griffin dated September 13, 1979, in which Kasper indicated that he was "definitely interested" in the vacant position.

knowledge of Rasper's grievance against the Richmond Field Station personnel. While grievance filing is clearly protected conduct (California State University, Sacramento, supra), a reading of the record fails to support CSEA's assertion that Warnke was in fact aware of Rasper's grievance regarding the Richmond truck driver position. As its exceptions state, Warnke was not a credible witness. Since no clear picture emerges as to what Warnke was aware of or when he learned of Rasper's grievance, the hearing officer's conclusion was proper. Moreover, even assuming that Warnke was aware of Rasper's protected activity, there is nothing in the record from which it can be inferred that Warnke's rejection of Rasper was unlawfully motivated.

CONCLUSION

As discussed in Novato, supra, the Charging Party must make a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If this nexus is demonstrated, it is then incumbent on the employer to show that it would have taken the same action regardless of the employee's participation in protected activity. Our findings of fact reveal no evidence of anti-organizational sentiment on the part of the selecting officials, either directly or inferentially. There is no demonstration of suspicious timing, disparate treatment, departure from established procedures or standards, or

inconsistent or contradictory justifications for the employer's action. Thus, while we conclude that Kasper engaged in protected activity and that the employer's agents had knowledge of that conduct, we cannot infer from the record that the required nexus existed between the exercise of that activity and the University's rejection of Kasper for any of the four positions for which he applied.

Thus, based on the foregoing, we conclude that the Charging Party has failed to demonstrate that Kasper was unlawfully discriminated against because of his protected activity. No such discrimination having been found, we conclude that CSEA's rights as an employee organization were not interfered with as a result of the University's conduct.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, the Public Employment Relations Board hereby ORDERS that the charge in Case No. SF-CE-13-H is DISMISSED.

Chairperson Gluck and Member Burt joined in this Decision.