

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATEWIDE UNIVERSITY POLICE
ASSOCIATION,)

Charging Party,)

v.)

CALIFORNIA STATE UNIVERSITY
(SAN FRANCISCO),)

Respondent.)

Case Nos. SF-CE-151-H
SF-CE-166-H
SF-CE-171-H

PERB Decision No. 559-H

January 3, 1986

Appearances; Law Offices of David P. Mastagni by K. William Curtis for Statewide University Police Association; William B. Haughton, Attorney for Board of Trustees of the California State University.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

PORTER, Member: This is an appeal of a proposed decision, attached hereto, by a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ) following a hearing and dismissal of three consolidated cases.¹ The cases before us involve the rejection of three probationary employees alleged to have been rejected during their probationary periods in retaliation for their participation in specific protected activities.

¹The three cases that were consolidated for hearing were Case Nos. SF-CE-151-H, SF-CE-166-H, and SF-CE-171-H. The ALJ dismissed Case No. SF-CE-151-H pursuant to a settlement agreement reached by the parties during the hearing, and it is, therefore, not before us.

The ALJ dismissed charges involving two of the three probationers (Officers James Bryant and David Ceruti) on the basis that the Statewide University Police Association (SUPA or Charging Party) failed to prove a prima facie case of retaliation by failing to establish that the employer's agent responsible for the rejections, Chief John Schorle, had knowledge of any protected activity engaged in by Officers Bryant and Ceruti. As to the third probationer, Sergeant Myra Sheehan, the ALJ found that SUPA did establish a prima facie case of retaliation, but that the California State University (San Francisco) (Respondent or CSUSF) successfully established that the rejection was not due to the employee's exercise of protected rights.

We have reviewed the record and documents filed by the parties and find the ALJ's findings of fact to be free of prejudicial error and adopt them as the findings of the Board itself.² We further adopt the conclusions reached by the ALJ

²The ALJ found two instances of conflicting testimony involving Chief Schorle. In both instances, the ALJ discredits Schorle's testimony. SUPA argues on appeal that the ALJ cannot selectively credit portions of a witness' testimony while discrediting other portions and, therefore, all of Chief Schorle's testimony should be disregarded. However, our reading of the transcript reveals no such conflicts between Chief Schorle's testimony and that of the other witnesses. Therefore, even if we agreed with the arguments raised by SUPA, which we do not, it would have no bearing on the outcome of this case.

concerning Officers Bryant and Ceruti, and summarily affirm the ALJ's dismissal of those portions of the cases. With respect to the charges involving Sergeant Sheehan, we affirm the ALJ's dismissal, but for the reason that Charging Party failed to establish a prima facie case.³

FACTS

The pertinent facts may be summarized as follows. Sergeant Sheehan was hired in August 1981 by Chief Schorle, director of the public safety department at CSUSF, as a supervising public safety officer. Her probationary period was two years.

During her probationary period, Sergeant Sheehan engaged in three activities SUPA asserts are protected. The first occurred in January 1983, when she joined SUPA. Second, in February 1983, she filed a grievance, in which she was represented by SUPA and which was resolved in her favor by Chief Schorle. Finally, in late February 1983, Sergeant Sheehan participated in the formulation, circulation and presentation of a petition to the president of CSUSF. The petition was highly critical of Chief Schorle's hiring and

³While we agree with the ALJ that Respondent established Sergeant Sheehan was rejected for reasons other than her protected activity, Charging Party must first prove its prima facie case before the burden shifts to Respondent. This, Charging Party has failed to do.

⁴Because we agree with the ALJ that SUPA did not demonstrate knowledge by Chief Schorle that Sergeant Sheehan was involved in this petition, we need not decide if this activity was protected under the Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code section 3560 et seq.).

firing practices and requested an administrative review. Sergeant Sheehan was notified of her rejection from probation on March 31, 1983.

DISCUSSION

PERB has previously established the standard a charging party must meet in proving a prima facie case of retaliation.⁵ In Novato Unified School District (1982) PERB Decision No. 210, and California State University, Sacramento (1982) PERB Decision No. 211-H, PERB held that, to carry its burden of proving a prima facie case of retaliation, charging party must initially establish the following by a preponderance of the evidence:

- (1) the exercise of an identified protected right, plus,
- (2) (a) an adverse action taken thereafter
(b) which was unlawfully motivated in retaliation/discrimination for the exercise of the protected right.

Unlawful motivation is the specific nexus between the exercise of a protected right and the adverse action. To establish such motivation through inference, charging party

⁵Retaliation for protected activities is prohibited by HEERA.

Section 3571 provides in pertinent part:

It shall be unlawful for the higher education employer to:

- (a) Impose or threaten to impose reprisals on employees . . . because of their exercise of rights guaranteed by this chapter.

must prove the employer had actual or imputed knowledge of the employee's protected activity. Knowledge, along with other factors, may support the inference of unlawful motive. Novato, supra. Such other factors may include:

- a) the timing of the adverse action in relation to the exercise of the protected right;
- b) the employer's disparate treatment of the employee who engaged in protected activity;
- c) the employer's departure from established procedures or standards;
- d) the employer's inconsistent or contradictory justification for its actions.

Applying the above standard to the evidence involving Sergeant Sheehan, Charging Party demonstrated three instances in which it is claimed Sergeant Sheehan engaged in protected activities. These were membership in SUPA, filing a grievance, and circulation of a petition regarding her supervisor's hiring and firing practices. The adverse action was Sergeant Sheehan's rejection from probation. However, Charging Party has failed to prove that the adverse action was motivated by Sergeant Sheehan's exercise of a protected right.

With respect to Sergeant Sheehan's membership in SUPA, Charging Party did not demonstrate that Chief Schorle knew of this membership. Membership in a union cannot be inferred from Sergeant Sheehan's representation by SUPA in her grievance since, as exclusive representative, SUPA represents members and

nonmembers alike. Chief Schorle, in fact, testified he did not know she was a member of SUPA. Charging Party likewise did not prove Chief Schorle knew of Sergeant Sheehan's involvement in the petition submitted to the CSUSF president. Again, Chief Schorle testified he did not know of this at the time Sergeant Sheehan was rejected and, in fact, Chief Schorle was chastised by his supervisor when he attempted to find out who was involved. Without establishing employer knowledge of the asserted protected activity, Charging Party cannot rely on these two protected activities in claiming retaliation.⁶⁶

However, Charging Party did demonstrate that Chief Schorle knew Sergeant Sheehan had filed a grievance, since he responded to it. Filing of a grievance under a collective bargaining agreement is clearly a protected right. North Sacramento School District (1982) PERB Decision No 264. Knowledge alone, however, does not justify inferring unlawful motivation. We therefore turn to the other factors enunciated in Novato, supra.

Charging Party vigorously argues that the timing of the employer's action demonstrates it was unlawfully motivated. The grievance was resolved in mid-February, and Sergeant

⁶⁶We specifically reject the ALJ's conclusion that "[i]t is not crucial to decide which one or more of the three events [Chief Schorle] knew of." (Proposed Decision, p. 45.). On the contrary, if knowledge of the specific protected activity is not established, it cannot be said that that protected activity was the motivating factor in the adverse action.

Sheehan was notified of her rejection from probation on March 31, 1985. We find that, on this record, in the absence of any other factors, the timing of Sergeant Sheehan's rejection alone is too attenuated from the grievance to show that the rejection was motivated by the grievance. This is especially so, in that Chief Schorle resolved the grievance in Sergeant Sheehan's favor.

None of the other factors was proven by Charging Party. Sergeant Sheehan was certainly not the only probationary employee rejected, since at least five others were likewise rejected within the three years or so preceding the filing of the charges. There was no evidence that the employer departed from established procedures or standards, since, even though Chief Schorle's practices with regard to evaluations did not adhere to those of CSUSF, he applied his own standards consistently. Finally, Chief Schorle's consistent justification for his rejection of Sergeant Sheehan was based upon his assessment that she did not meet the standard required. The basis for his assessment was amply supported in the record, and it is not claimed by Charging Party that the employer has put forth inconsistent or contradictory justifications. Rather, Charging Party disputes the reasonableness of the assessment itself. However, the merit of Sergeant Sheehan's rejection is not the issue before the Board. The issue here is whether the employer was motivated to reject Sergeant Sheehan due to her exercise of a protected

right. We conclude that Charging Party failed to present evidence sufficient to raise any inference of unlawful motivation and, therefore, failed to establish a prima facie case of retaliation.

ORDER

For the foregoing reasons, we hereby DISMISS the charges in Case Nos. SF-CE-151-H, SF-CE-166-H and SF-CE-171-H.

Chairperson Hesse and Member Morgenstern joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



STATEWIDE UNIVERSITY POLICE ASSOCIATION,)	
)	
Charging Party,)	Unfair Practice
)	Case Nos. SF-CE-151-H
v.)	SF-CE-166-H
)	SF-CE-171-H
CALIFORNIA STATE UNIVERSITY, (SAN FRANCISCO),)	
)	PROPOSED DECISION
Respondent.)	(10/22/84)

Appearances: K. William Curtis, Attorney (Law Offices of David P. Mastagni) for Statewide University Police Association; William B. Haughton, Attorney for Board of Trustees of the California State University.

Before: Terry Filliman, Administrative Law Judge.

PROCEDURAL HISTORY

This case involves consolidated charges that three public safety officers at California State University, San Francisco were discharged during their probationary periods in retaliation for their exercise of protected activities.

On January 24, 1983, the statewide University Police Association (hereafter SUPA or Charging Party) filed unfair practice charge SF-CE-151-H. The charge alleged that the Trustees of the California state University (hereafter State University or employer) violated section 3571(a), (b) and (d) of the Higher Education Employer-Employee Relations Act

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

(hereafter HEERA or Act)¹ by taking discriminatory actions against Public Safety Officer James Hall at the San Francisco campus because of his exercise of protected activities. A complaint was issued on February 15, 1983. The charge was subsequently amended. An amended complaint was issued on June 9, 1983. The case was originally scheduled for formal hearing on July 11-13, 1983. The hearing was cancelled based upon a request by the Charging Party to incorporate "additional

¹The HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise specified. Section 3571 states in relevant part that:

It shall be unlawful for the higher education 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.

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

.....

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; provided, however, that subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

charges SF-CE-166-H and SF-CE-171-H and to consider all charges in a single hearing.

On April 15, 1983, SUPA had filed charge SF-CE-166-H alleging that Officer James Bryant was discharged² during probation because of his exercise of protected activities in violation of section 3571(a) and (b). The charge was amended on June 7, 1983. A complaint was issued on June 14. A timely answer was filed.

On June 14, 1983, SUPA had filed unfair practice charge SF-CE-171-H alleging additional violations of section 3571(a) and (b) of HEERA affecting employees of the Office of Public Safety at CSUSF. That charge alleged that Officer David Ceruti and Sergeant Myra Sheehan were discharged during their probationary periods in retaliation for their exercise of protected activities. A complaint was issued by the General Counsel on June 16, 1983. A timely answer was filed.

Informal conferences were conducted in each of the above cases. The conferences did not result in voluntary settlement.

The motion to consolidate the matters for hearing was granted on July 18, 1983. On December 13, 1983, SUPA filed a motion to calendar the consolidated hearing. A formal hearing was conducted by the undersigned in San Francisco on

²The employer's action taken in each instance in this case was a "rejection during probation." The actions are variously referred to as discharge, termination, or rejection for convenience.

January 18-20, 1984. During the hearing the parties reached voluntary settlement on case SF-CE-151-H.³ A transcript was prepared, and following several joint requests for extensions, briefs were submitted on April 30, 1984. The case was submitted for decision on that date.

FINDINGS OF FACT

A. Background

The Trustees of the California State University system is a higher education employer within the meaning of the HEERA. California State University, San Francisco (hereafter CSUSF) is one of the campuses of the employer. SUPA is an employee organization which is the exclusive representative of a systemwide unit of public safety officers.

The Public Safety Department is responsible for providing basic police and traffic safety services at CSUSF and related facilities. Chief John Schorle is the director of the department. The department is organized into two divisions - operations and administrative services. At the time of the alleged terminations Lieutenant Richard Van Slyke supervised the operations division and Lieutenant Malcolm Vaughn supervised administrative services. Lieutenant McDonald supervised operations prior to the appointment of Van Slyke.

³Pursuant to agreement of the parties no testimony was taken regarding that case. Based upon the Charging Party's statement of withdrawal made on the record the complaint will be dismissed by this decision.

The patrol officers work on three shifts in the operations unit. They worked under the direct supervision of Sergeants Bennett, Andrews, Hadley and Sheehan between 1981 and 1983. The administrative services unit maintained responsibility for investigations, parking, records and dispatch.

The three alleged discriminatees - David Ceruti, James Bryant, and Myra Sheehan - were each serving a two-year probationary period. Bryant and Ceruti were employed as officers, while Sheehan was employed as a sergeant.

B. University and Department Personnel Policies and Practices

The State University has adopted various personnel policies governing the evaluation and retention of probationary employees. Each employee serving a two-year probationary period must be evaluated during the tenth and nineteenth month of service. The nineteenth month evaluation form includes standard language requesting whether the hiring department will grant or reject permanent status. The CSUSF president has delegated his authority to grant or reject permanent status to each department head.

Under State University policy a probationary employee may be rejected at any time without cause. A rejection may or may not be based upon a written employee evaluation. Although a final evaluation is not required to be made close to the date of a rejection from probation, the personnel department

considers such action to be a sound practice. Any final evaluation which is issued must indicate a recommendation about retention.

Each department may adopt evaluation policies which are more stringent than the campus policy. The Department of Public Safety policy requires an evaluation every three months for probationary police officers who have completed standard police training. Each of the alleged discriminatees had completed such training. Other evaluations could be required by the director. The final evaluation must include a recommendation about retention. The campus personnel office does not enforce department evaluation policies. That office sends a form requesting a decision from a department which has not filed a final evaluation or where the final evaluation did not indicate a recommendation. The evaluation format used by the safety department does not contain a recommendation for action. In practice, the department has not issued a final evaluation close to the time when employees are completing their probationary period. Chief Schorle testified that he had during the past three years rejected three employees from probation in addition to those in dispute here. Two employees were officers. The third employee was a lieutenant.⁴ Each

⁴The officers were Ted Rowe and Jan Conway. Lieutenant McDonald resigned after being notified he would be rejected.

of the employees had served over one year of the probationary period. In each instance the evaluations given to the employees did not state a recommendation that they be rejected. No testimony was offered regarding the union membership of these employees.

C. Officer David Ceruti

1. Work Performance

David Ceruti was employed as a probationary officer on June 7, 1981. Lieutenant McDonald reviewed the candidate's employment history prior to Ceruti's employment. Ceruti had been rejected during probation in a prior police officer position. The former employer reported that the rejection was based upon immaturity, poor judgment, decision-making problems and poor report writing. McDonald recommended Ceruti's employment on the condition that he be supervised closely. Chief Schorle stated he hired Ceruti under these circumstances because of a shortage of employees.

On December 17, 1981, the department received a citizen's complaint against Ceruti for an alleged improper arrest. The incident arose from Ceruti's arrest of certain witnesses to an investigation because they had made reference to the "pigs arriving." Lieutenant McDonald recommended that Ceruti receive a two-day suspension for losing emotional control, failing to exercise proper judgment, immaturity and lack of decision-making ability. The suspension was approved by

Schorle. Schorle testified that he did not reject Ceruti at that time because of understaffing and because of McDonald's support for the employee's opportunity to improve.

Ceruti received six quarterly evaluations between the date of his employment and November 30, 1982. Two of the evaluations were completed by Sergeant Bennett and four were completed by Sergeant Andrews. Ceruti received an overall rating of satisfactory on the initial evaluation dated October 31, 1981. Of the 14 rating factors, he received "improvement required" in three areas - knowledge, dependability and judgment. Sergeant Andrews indicated that Ceruti needed to develop competence in the areas of judgment, positive attitude, maturity, self-discipline and initiative. Director Schorle reviewed the evaluation. He indicated that the satisfactory evaluation might be taken as too positive given the limited opportunity to observe Ceruti.

In each of the subsequent evaluations Ceruti received an overall rating of "displays qualities below the level necessary for the position." On the January 1982 evaluation he received ten "needs improvement" marks, one "unsatisfactory" mark and two "competent" marks. Sergeant Bennett indicated that Ceruti's continued employment was dependent upon a substantial change in his overall law enforcement demeanor. The areas of knowledge, judgment and decision-making were also found deficient.

On June 29, 1983, Ceruti received a performance evaluation for the spring 1982. Eleven of the fourteen rated areas were listed as "improvement needed" again. Sergeant Andrews wrote that Ceruti needed more supervision than should be necessary. The evaluation also included a warning that Ceruti should understand he must improve his performance during the probationary period to meet the minimum standards of the department.

Ceruti received an overall evaluation of "below standard" on the evaluation for the period ending August 31, 1982. Sergeant Bennett indicated that the candidate was at that time reaching levels of competence which should have been reached six months prior.

On January 13, 1983, Sergeant Andrews performed an evaluation for the period of August - November 30, 1982. This was the final evaluation received by Ceruti. The overall evaluation was "improvement needed."

Schorle made a decision during April 1983 to terminate Ceruti. He scheduled a meeting for May 20 with the personnel department to discuss the matter. The personnel director cancelled because of a conflict. Schorle sent a memo on May 23 directing the termination be implemented. Ceruti was notified by Schorle on June 1 that he was rejected for permanent employment effective that date. Ceruti's two-year probationary period would have ended June 7.

Schorle testified about the reasons for his decision to

reject Ceruti. He considered Ceruti a "measured risk" upon hiring based upon his prior police employment rejection. Schorle considered Ceruti's actions in the December 1981 "pig" incident to reflect immaturity. Ceruti had considerable trouble in preparing police reports. He was not proficient in stating the basic elements of crimes. Residence hall staff had questioned Ceruti's presence in that area while on duty. They believed he was making social visits. Schorle also considered the fact that department staffing was close to strength and personnel needs were going to be reduced during the upcoming summer.

Schorle testified that he had received significant information from the lieutenants about Ceruti's conduct. He also indicated that Sergeant Bennett recommended Ceruti for rejection. Sergeant Bennett testified that Schorle informed him that Ceruti would receive permanent status about two weeks prior to the date of his termination. Bennett indicated that he did not recommend Ceruti for termination.⁵ Based upon their demeanor I find Bennett to be the more credible witness on this subject. Sergeant Andrews also testified that he did not make a recommendation to terminate Ceruti. Andrews had informed Schorle several weeks prior to Ceruti's

⁵During his testimony Bennett also stated that Schorle had given a stern lecture during his spring 1983 commencement talk about loyalty in the department. Bennett believed that

termination that he felt Ceruti was improving and could make probation.

2. Knowledge of Union Activities

Ceruti was a SUPA member during his employment. He did not participate in "any particular activities" of the organization. He "imagined" that Chief Schorle and Lieutenant Van Slyke knew of his membership. Schorle testified that he did not know of Ceruti's union membership at any time during his employment. Van Slyke did not testify about any knowledge of Ceruti's membership.

Approximately two weeks prior to his termination (May 21), Ceruti was assigned to take Harry Hazelrigg on a duty "ride-a-long". Hazelrigg was a new job applicant. Ceruti told Hazelrigg that he should consider employment elsewhere because of low morale and unprofessional staff at the department. He also indicated that Hazelrigg should join SUPA in order to be represented. Hazelrigg did not recall Ceruti talking about being a member of the union. He denied that Ceruti suggested he join the organization.⁶⁶

On May 29 Hazelrigg stopped for drinks after a college commencement exercise with Chief Shorle, Lieutenant Vaughn and Sergeant Kim Wibel. Hazelrigg testified that during this

Schorle had referred to his awareness of labor unions during the talk.

⁶⁶This and other credibility disputes are discussed together at p. 37.

meeting he did not discuss his conversation with Ceruti during the ride-a-long or make any reference to SUPA. Each of the other participants also testified that Hazelrigg never mentioned Ceruti during the evening or at any other time. No testimony was offered to contradict these denials.

D. Officer James Bryant

1. Work Performance Evaluations

James Bryant was hired in May 1981. The department conducts a background investigation of potential officer employees as a standard procedure. The investigation of Bryant revealed that he had served as a probationary police officer for the City of Glendale. Bryant had been notified of his intended rejection during probation in that position. The grounds included his nervousness, tension and immaturity. The former employer also recognized that Bryant had demonstrated a high level of dedication and motivation. Bryant resigned and gained employment as a stockbroker. Lieutenant McDonald recommended Bryant for employment conditioned upon close supervision. Director Schorle testified that he hired Bryant because the department was grossly understaffed and Bryant had already received the required peace officer training hours. The director's concern about Bryant's background and the supervision requirement was discussed with him.

During his probationary period Bryant received overall evaluations of "satisfactory." The first evaluation was completed by Malcolm Vaughn, then a sergeant, and Lieutenant

McDonald. Bryant received an equal number of individual ratings of "needs improvement" and "competent." The written comments reflected an overall positive reaction to Bryant's enthusiasm and indicated improvement in report writing, judgment, and self confidence from his pre-employment reputation.

The next evaluation was completed by Sergeant Bennett on June 30, 1982. Bryant received consistent individual ratings of "competent." The written comments were uniformly positive including acknowledgment that Bryant had scored high in a department promotional exam.

Bryant's final written evaluation was performed by Sergeant Bennett on January 18, 1983. The evaluation reflected work performed between June and December 1982. The individual ratings included four satisfactory marks and an above average mark for work habits. The written comments reflected that Bryant had served competently while undergoing unexpected family illnesses. Bryant was cautioned about his conduct which gave the perception of being "nervous" or "shaky." The report finally noted that Bryant had received two letters of commendation during the evaluation period.

Chief Schorle signed each of the evaluations indicating his agreement with the comments noted. Despite the overall rating of satisfactory on Bryant's last evaluation, Chief Schorle testified that he considered the evaluation to be

unsatisfactory because one subcategory, "written expression," was checked as weak.⁷ Schorle indicated that he chose not to make any comments on the evaluation contrary to the satisfactory rating when he signed it. Yet from his perspective, Bryant's overall performance, including actions not covered by the evaluation, were unsatisfactory. He did not believe that he had a duty to inform either Bryant or the personnel department of his views until he made a final decision about permanent employment.

2. Bryant's Involvement in Promotional Exams

Approximately nine months prior to Bryant's dismissal, the department had offered a written promotional examination for the position of sergeant - operations division. A memo was posted indicating the rankings of the competitors. The memo indicated that the final selection would result from combining the scores of the written exam and an oral interview to be scheduled. Bryant ranked first on the written exam.

Director Schorle was absent from the campus during the summer 1982. Lieutenant Van Slyke was appointed to chair the interview committee. Following the interviews, Officer Hadley received the highest combined score and was promoted. Van Slyke then communicated with each of the candidates notifying them of their overall ranking. The communication

⁷Of 25 subcategories rated on the form, Bryant received 6 marks of "strong," 18 marked "standard" and 1 marked "weak."

led the employees to believe that the exam had established an eligibility list for future promotions.

On December 6, 1982, Sergeant Vaughn was promoted to lieutenant in charge of the administrative division. Vaughn had been the only sergeant in the division. His former duties included supervising the investigations section. Vaughn determined that the investigations unit needed immediate supervision until a permanent sergeant was chosen. Vaughn recommended Kim Wibel, an investigator in the unit, for his replacement. On December 10, Wibel was appointed to work out of class as an acting sergeant. Wibel had not taken the May 1982 sergeant promotional examination. Wibel served as an acting sergeant for 22 workdays. At that time the State University imposed a hiring freeze on all positions including promotions.

On December 10 a notice of Wibel's appointment to the acting position was posted. Bryant was surprised and upset by the appointment because he believed that any future appointments would be made from the "eligibility list." Officers Bryant and Murray asked Lieutenant Van Slyke about the relationship of the eligibility list to the vacant position. Van Slyke contacted Chief Schorle and was informed that the May 1982 written exam or testing had no ongoing status. Each vacant position would require new testing. Van Slyke advised the officers accordingly.

On December 12 Bryant discussed Wibel's appointment with Van Slyke again. Bryant testified that he told Van Slyke he was upset that procedures had not been followed in making the appointment. He was going to "pursue whatever remedies he had through the union and so forth." Van Slyke testified that he did not consider Bryant's remarks to constitute a grievance. He did not report the conversation to Schorle "because there was nothing of significance to report." Nor did he discuss the conversation with Vaughn. Both Vaughn and Schorle testified that they were unaware of any complaint made by Bryant to Van Slyke.

On December 30 Vaughn expressed a concern to Schorle that Wibel had been appointed to the acting position without posting the vacancy and providing an opportunity for other candidates to compete. Both State University policy and the collective bargaining agreement required posting of such vacancies. The position was then posted. Bryant and Murray filed applications. After the filing period ended Schorle posted a notice indicating that because of the hiring freeze the acting position could not be filled until a freeze exemption was obtained.

On February 4, 1983, Schorle drafted a memo noting that a freeze exemption had been received. The memo scheduled interviews for Wibel, Murray and Bryant. Schorle did not issue the memo. He testified that someone stole the memo from the

Public Safety office. On the same day Schorle decided to reject Bryant during probation. Schorle had previously placed Lieutenant Vaughn in charge of conducting the interview panel for the sergeant promotional examination. Schorle informed Vaughn that Bryant would be rejected from probation in the near future.⁸

Vaughn engaged in several discussions with campus personnel staff about whether Bryant was required to be interviewed for the promotion in light of his termination. Personnel advised Vaughn during the week of February 7 that it was not necessary to interview all applicants. On February 11 Vaughn advised Wibel and Murray of their interview appointments. Bryant was not notified of the interviews.

Wibel and Murray were interviewed on February 18. On the same date Wibel was selected and reappointed to the acting sergeant position.

⁸Lieutenant Vaughn testified that he did not interview Bryant because Schorle had informed him that Bryant was going to be terminated. The personnel department advised him that not every candidate had to be interviewed. Schorle testified that he contacted Vaughn to verify the accuracy of his February 4 draft memo scheduling the interviews. Vaughn told him that Bryant should not be included in the memo because he was not going to be interviewed. In this area I find Schorle's testimony to be at odds with any logical reading of the facts. It is highly unlikely that Vaughn made the decision not to interview Bryant and then influenced Schorle in light of Schorle's role in the department. I find that Vaughn's testimony is an accurate recitation of the true facts.

On February 20 Bryant filed an oral Level I grievance contesting, among other claims, the failure of the department to interview him for the acting sergeant position. The grievance was denied. He subsequently filed a written grievance.

3. Grounds for Rejection During Probation

Schorle notified Bryant on February 8 that he was to be rejected on probation effective March 7.

Bryant received no final evaluation for the period immediately preceding his termination. Schorle received a memo from campus personnel requesting information on whether Bryant should be granted permanent status sometime after February 8. Schorle signed the form on February 15 indicating that he did not recommend permanent status. Schorle wrote:

Officer James Bryant was last evaluated on 11-30-82. At that time his performance was below a satisfactory level. Currently a successful completion of probation is not anticipated. Therefore, tenure is not recommended until a follow-up evaluation can be conducted.

Schorle testified that his comments meant that he did not want the personnel department to issue a rejection statement because he gave Bryant 30 days to seek other employment and submit a resignation.

Schorle further testified that his reasons for rejecting Bryant were:

. . . poor judgment, inability to complete written reports in an adequate fashion, inability to exhibit promise for development

and growth in terms of the exercise of common sense and good judgment in the field, immaturity, and a clear indication of hyperactivity and easily unsettled nature.

Schorle did not discuss his decision to reject Bryant with any of the supervising sergeants prior to taking the action.

The record contains reference to several incidents involving Officer Bryant during his probationary period. While these incidents were not mentioned on Bryant's evaluations, Schorle stated that they were considered as a basis for his decision. The incidents were offered to demonstrate Bryant's lack of judgment, competence and calm.

On June 28, 1982, Bryant observed a woman wearing a handgun. Bryant unholstered his weapon and ordered the woman to put her hands over her head. When she raised her hands Bryant observed that she was carrying handcuffs. He inquired as to whether she was a police officer. He was informed that she was a sheriff's deputy and was carrying identification. Despite her response Bryant required the woman to remain in the arrest position for a minute or so until a backup officer arrived. The woman was a deputy sheriff. The deputy filed a citizen's complaint. An investigation failed to confirm allegations of unprofessional conduct against Bryant. Bryant was counseled because Schorle believed that Bryant's "police procedures, while legal, were certainly not desirable or of the nature we would hope our officers would exercise in the field." The

deputy sheriff subsequently filed a monetary claim against the University. The status of the claim was unknown at the date of hearing.

In another instance Bryant drew his gun on a campus custodian. No specifics of this incident were offered.

Sergeant Hadley testified that on one occasion Bryant made a car stop and brought the driver to the station in handcuffs because the driver refused to identify himself. The driver provided his name and address at the station and was immediately released.

On January 20, 1983, Bryant made out a drunk driving arrest report. Lieutenant Van Slyke admonished Bryant's supervisor, Sergeant Sheehan, for accepting the report because it contained numerous spelling errors and other substantive errors. The report indicated that Bryant had incorrectly advised the suspect regarding the criminal law. The error could have resulted in the arrest being thrown out.

The record also indicates that Bryant received more than 10 written letters of commendation from supervisors, campus officers and others during his employment with the department. As an example, the San Francisco Police Department issued a letter of commendation to Bryant and Sergeant Sheehan on January 6, 1983, for their actions leading to the apprehension of a homicide suspect. Bryant was also commended by the campus vice president on February 1, 1982, for thorough police work.

4. Union Activity

Bryant joined SUPA in 1981 soon after commencing his employment. He believed that everyone in the department knew of his union membership. He gave no evidence of participation in any specific SUPA activities. Bryant testified that all officers received a memo from Chief Schorle's secretary at one point requesting an updated list of those employees who were members of the union. No date was offered. The memo was intended to assist the department in supplying written materials. Bryant's union dues were deducted from his paycheck. Schorle denied having any knowledge of Bryant's union membership or activities.

E. Sergeant Myra Sheehan

1. Work Performance Evaluations

Myra Sheehan was hired as a supervising public safety officer by Chief Schorle in August 1981. Her probationary period was two years. She had previously been employed as a patrol officer and investigator at California Polytechnical University San Luis Obispo since 1977.

Sheehan's first performance evaluation covered the period of August through December 1, 1981. All of the ratings on the report including the overall evaluation were listed as "competent." The evaluator, Lieutenant Van Slyke, noted that Sheehan had transferred from patrol supervision to investigation supervision after three months. The transfer was

made because of the need to reorganize the investigation unit, not based upon problems with Sheehan. Sheehan was commended for giving strong direction and supervision to a staff which was undertrained. She was described as a "valuable asset to the division, department and University." Schorle approved the evaluation.

Lieutenant Van Slyke rated Sheehan somewhat lower during the next evaluation period. The evaluation covered December 1981 through May 31, 1982. She received a satisfactory overall score, but three rating factors were checked as "improvement needed." Sheehan's duties during this period involved supervising two investigators involved in crime prevention, criminal investigation and administrative duties. Van Slyke believed that while Sheehan had performed daily supervision duties adequately, she had not shown the motivation to organize a crime prevention program to the expected standards.

Sheehan received six letters of commendation during the period. Van Slyke did not prepare the evaluation until late August. Sheehan submitted a reply to the evaluation. She noted that the investigations unit had been described as "in a state of disarray" upon her assignment in her first evaluation. She described her efforts to develop a crime prevention program including four major projects she had initiated. Sheehan pointed out that staff time had been reduced by approximately 50 percent due to sending the investigators to peace officer

(POST) training. Finally, she noted that no one had expressed any concern about her performance or the investigative unit during the evaluation period. Schorle then reviewed the evaluation and responded. He considered the evaluation too positive and drafted a memo on September 21 stating his position (see below).

Both Van Slyke and Sheehan were transferred back to the operations unit effective August 1, 1982. Lieutenant Vaughn resumed direct supervision of the investigators on that date. Vaughn testified that upon reviewing the operations of the unit he found that the investigators had been operating without adequate supervision. He also determined that Sheehan had not developed a comprehensive crime prevention program as expected. Chief Schorle indicated that he transferred Sheehan because he was thoroughly convinced that she did not have the skills or desire to be a supervisor. He put her back in patrol with the understanding that she was to be supervised closely and that her progress was to be monitored carefully to determine whether she would make probation.

On September 14 Schorle explained his continuing concerns about Sheehan to one of the campus deans, Nancy McDermott. McDermott served as an informal liaison between the campus and the department.

On September 21 Schorle sent memos to both Sheehan and Van Slyke about her probationary status. The memo to Sheehan stated in part:

Looking back over the past year, you have failed to perform at satisfactory levels. If you are to raise your level of performance to acceptable levels, several things must occur. The management staff and I are eager and willing to support and assist you. It is our desire that you succeed. . . . I have directed Lieutenant Richard Van Slyke and Acting Lieutenant Malcom Vaughn to meet with you and define a course of action. . . .

The memo to Van Slyke specifically outlined areas of work performed by Sheehan which were to be reviewed. The direction included "formal evaluation of her every two months - additional if needed." The report ordered Sheehan to be assigned to "relief" watch for two months. After that time she was to be assigned to Watch III (days) or II (evenings) if needed. At the hearing Schorle described the memo as a "shape up or ship out" notice.

Lieutenants Van Slyke and Vaughn held a counseling meeting with Sheehan to implement the directive. She requested some direction and notice from the supervisors of any errors they observed. She was advised that all of her written reports and review work would be scrutinized. Sheehan requested a written description of criteria she was being reviewed upon.

On October 8 Van Slyke issued a memo to Sheehan listing the criteria upon which she would be evaluated. The criteria included measuring the effectiveness of officers on her shift, reviewing the written work prepared by the shift, and attention to detail.

Sheehan received no written evaluations of her overall performance between May 31, 1982, and the date of her termination (March 30, 1983). She also did not receive any formal evaluations every two months pursuant to Schorle's memo of September 21, 1982. Van Slyke testified that he was negligent in not preparing the written evaluations. Both Van Slyke and Schorle testified that they had instead sent written memos to Sheehan critiquing her work.

Schorle testified about his review of a police report filed on November 10, 1982, by two officers and Sheehan. The report involved three potential felony arrests for burglary. Schorle found that the report failed to provide adequate information to legally sustain a search for stolen property. One officer wrote in the report that he had conducted an illegal search. Schorle stated that the report "exemplified a very sloppy piece of police work with little or no supervision." He held Sheehan responsible for condoning the officer's conduct and the inadequate report.

Also in November 1982 Schorle noted that Sheehan had failed to carry out an instruction to place traffic barricades at the site of a simulated emergency relief exercise conducted by campus departments and the San Francisco Fire Department. The inaction required additional work to clear parked vehicles.

On January 20, 1983, Sheehan reviewed and submitted a police report written by Officer Bryant. The report was

severely criticized by Lieutenant Van Slyke as being poorly written with many misspellings. Sheehan responded by admitting that the report was poor, but both of them had been tired after a long shift.

According to Sheehan, she did not receive any feedback between September 1982 and January 1983 about police reports she had approved. She also did not receive any feedback on her review of time logs prepared by her shift officers. She initiated several conversations with Van Slyke about procedures, but received little input initiated by him. She believed that she received less direct supervision after September 1982 because she was assigned to Shift I (graveyard). No administrators above sergeant work the graveyard shift. On February 1 she was assigned to supervise Watch II. The lieutenants and Chief Schorle worked on Watch III.

Around February 18, 1983, Schorle requested Van Slyke to determine why Sheehan was writing traffic citations in a campus parking garage in her performance of duties as a sergeant. Van Slyke reported that Sheehan wanted to have first-hand knowledge of the various campus parking situations since she was assigned to day shift. Certain citations issued by Sheehan had been rescinded by the coordinator of parking because the parking spaces cited had been accepted as legal parking "by practice" although they were not so marked. Van Slyke decided

that the citations were an inappropriate use of supervisory time on the basis that other sergeants issue citations only to set examples rather than on a routine basis. Schorle replied to Van Slyke's report by indicating "we are calling it
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inappropriate - just one more example."⁹ The parking spaces were officially designated as valid following the incident.

On February 23, 1983, Schorle directed Van Slyke to join him in reviewing log reports from Sheehan's shift for the months of January and February. Schorle testified that he was curious how Sheehan was spending her time in light of the parking ticket incident. He was also concerned that daily field activity reports were not being filled out correctly. He testified that his concerns were not limited solely to Sheehan, but decided to start the review process with her.

On March 6, 1983, Van Slyke assigned Sheehan to interview the victim of a possible rape. Sheehan conducted the interview and filed a written report. Van Slyke was highly critical of the report. He testified that he would expect more from a first-year line officer. Sheehan testified that she had

⁹I do not use this incident to support good cause for action against Sheehan. SUPA Exhibit 23 reveals ambiguous statements and inconsistent logic by both Van Slyke and Schorle regarding the incident. Van Slyke's comments admit that other sergeants make "similar checks and issue citations." Schorle's written comments relate to whether the specific citations were valid rather than to whether supervisory time was appropriately used. The witness' testimony did not bolster a legitimate rationale to consider the incident as poor judgment.

requested advice from Van Slyke in advance about which Penal Code section the accusation should be written under. She had relied upon his advice. Sheehan still rewrote the report according to Van Slyke's revised view after she received his memo.

On March 7, 1983, Schorle issued a memo to all supervisors including Sheehan reminding them that transmittal of all personnel related correspondence was confidential. The memo started by indicating "obviously the affect of unionization is beginning to show in various ways." Schorle testified that he sent the memo because confidential memos were being stolen and were being used to show that the management was acting inappropriately.

On March 23 the department investigation unit received a request from the San Francisco Police Department for a copy of an incident report. The incident had occurred on March 1. On that date a department officer had assisted the San Francisco Police Department in an arrest. Lieutenant Vaughn found that no report of the arrest had been made although the daily log indicated that an officer had responded. Vaughn directed a memo to Lieutenant Van Slyke to review the situation. In Vaughn's opinion it appeared that the supervisor had not monitored the incident or required a follow-up report to be made correctly. Sergeant Sheehan was the supervisor involved. The record does not indicate whether Van Slyke reviewed the

matter or determined any improper actions by Sheehan. No evidence was offered to show that Van Slyke communicated the episode to Schorle or the Schorle considered it in his decision to reject Sheehan. The incident is not considered. Evidence that Van Slyke reprimanded Sheehan for failure to conduct a briefing session correctly on March 30, the day prior to her termination, is not considered for the same reason.

Sheehan was rejected from probation on March 31. Schorle called Sheehan to his office that day. He gave her the notice of rejection without explanation. In response to her inquiry, he stated that "the document speaks for itself." He further stated that the termination was effective the same day. Van Slyke indicated that Schorle had informed him of Sheehan's impending termination in advance. Van Slyke had mixed feelings about Sheehan's performance as a supervisor. Sergeants Bennett and Andrews testified that they were surprised at Sheehan's termination. They expressed support for her professional competence.

2. Union Activities

Sheehan was interviewed by Schorle prior to being employed. Schorle asked Sheehan about her opinion of unions during the interview. At the time Sheehan told him she had never belonged to a union and did not see any reason for them.

The unit represented by SUPA was modified to include the position of sergeant in later 1982. (See page 44.) Sheehan

joined SUPA in January 1983. Sergeant Nick Bennett joined the organization at the same time. The record implies that other sergeants were not members at that time.

On February 16, 1983, Sheehan was represented by Robert Jones, SUPA staff member, in a grievance with the department. Jones filed a lengthy written grievance for Sheehan contesting a letter of reprimand she had received from Schorle. The grievance was approved on March 1 by Schorle. The reprimand was expunged.

In late February, Officer Bryant had approached Sheehan regarding his dismissal. He inquired whether she or the other sergeants had recommended the action. Sheehan expressed surprise at the termination. The incident caused Sheehan and other sergeants to discuss Schorle's firing practices and morale problems in the department. They decided to request an administrative review of Schorle's practices. They circulated a petition to that effect among department staff in late February or early March. Sheehan and Bennett took the petition to the office of the CSUSF president. They met with the president's secretary Norma Siani. Siani later informed them that the president advised them to pursue the matter through their union steward. Siani testified that Schorle later called her and requested the names of the two employees who presented the petition. She did not divulge the names. Later Schorle was criticized by the president and vice president for his

attempt to obtain the names. Schorle testified that the vice president had originally called the matter to his attention prior to his call to the president's office.

Schorle testified that he did not know Sheehan was a member of SUPA or of any participation by her in protected activities. He did not know she was one of the employees who went to see the president until he read the allegations in the unfair practice charge after Sheehan's rejection. Lieutenant Vaughn indicated that he knew Sheehan had filed a grievance in February 1983 and was represented by SUPA sometime prior to her termination. Van Slyke also stated that he knew Sheehan was represented by SUPA as of the time the grievance was filed. Neither stated that they knew she was a union member or about the petition taken to the president.

ISSUE

Were the employees at issue rejected from probation in violation of section 3571(a) of the Act?

DISCUSSION

A. Legal Principles

Section 3565 of HEERA grants employees the right to form, join and participate in the activities of employee organizations for the purpose of representation on all matters of employer-employee relations. Subsection 3571(a) expressly prohibits the employer from discriminating against employees because of their exercise of rights guaranteed by HEERA.

PERB adopted standards for determining whether a violation of section 3571(a) has occurred in California State University, Sacramento (4/30/82) PERB Decision No. 211-H.

. . . A party alleging a violation of subsection 3571(a) has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct.

The PERB test is identical to its previous interpretation of section 3543.5(a) of the Educational Employment Relations Act which prohibits discriminatory treatment by public school employers. Novato Unified School District (4/30/82) PERB Decision No. 210.

Under both Novato and California State University the party alleging discrimination has the burden to raise an inference that the protected conduct was a "motivating factor" in the employer's decision to engage in the conduct complained of. The Board recognized that direct proof of motivation is rarely possible since motivation is a state of mind. Unlawful motive may be established by circumstantial evidence and inferred from the record as a whole. Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. To justify such an inference, the Charging Party must prove that the employer had actual or imputed knowledge of the employee's activity. Moreland

Elementary School District (7/27/82) PERB Decision No. 227.

Once the employer's knowledge is shown, the Charging Party must still produce some evidence creating a nexus between the employee's conduct and the employer's action. PERB cited several factors in Novato which may create such a nexus:

The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of the employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive.

If the Charging Party presents evidence sufficient to infer improper motive, the burden shifts to the employer to show that the protected activity was not a motivating factor in the employer's decision to act. Alternatively, an employer may factually rebut, in its case-in-chief, the Charging Party's efforts to establish the threshold inference of unlawful motivation. California State University, Sacramento, supra, PERB Decision No. 211-H. Under either approach the employer's action should not be deemed an unfair labor practice unless PERB determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. The mere fact that an employee is participating in union activities does not insulate him or her from discharge for misconduct or give the employee immunity from routine employment decisions. Martiori Brothers Distributors v.

Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [75 Cal.Rptr 626].

B. General Elements of Charging Party's Case

Charging Party has not alleged or argued discriminatory treatment of the officers based solely upon their union membership. While the act of joining an employee organization is a protected activity, this case does not reveal evidence of broad discrimination based upon union membership. Officers Ceruti and Bryant had been union members for almost two years. As described below, several probationary employees had been rejected under similar circumstances in recent years.

Instead SUPA asserts that Ceruti, Bryant and Sheehan had each engaged in a specific protected activity shortly before their rejection from probation. Each case is framed as a reprisal by the employer in response to such exercise of a specific right. In addition to the timing of the event, SUPA seeks to bolster its argument against the employer by

- (1) establishing a general anti-union animus by Chief Schorle;
- (2) discrediting Schorle's denial of knowledge about each protected activity;
- (3) demonstrating that standard personnel procedures were not followed; and
- (4) disputing the stated grounds for each rejection.

C. General Animus

Chief Schorle's general animus and overall credibility are central issues in each of the cases. Three incidents were offered to demonstrate Schorle's attitude of animus against

unions. In 1981 he asked Sheehan her opinion of unions during her employment interview. She generally denied any interest in them. Next, in March 1983, Schorle issued a memo to his supervisors about the disappearance of certain confidential personnel memos. The first sentence in his directive read, "obviously the effect of unionization is beginning to show in various ways." Schorle implied that personnel memos were being stolen and later used by SUPA to discredit the department in his explanation of the language given at hearing. Finally, Sergeant Bennett offered vague testimony that Schorle had admonished department employees to remain loyal in 1983 commencement ceremony speech. Bennett indicated that Schorle stated an awareness of the functions of unions based upon his prior employment experiences. No negative references to unions were alleged.

Based upon the entire record it is found that Schorle was aware of the presence of SUPA and that most officers in the department were members of the union. The record covers most major events occurring in the department during the period of 1981-1983. No other instances of remarks or actions by Schorle relating to unions was offered. Without more evidence it cannot be inferred that Schorle held or demonstrated a general anti-union animus beyond a vague concern about an impact on the department's proper functioning.¹⁰ Further, the above

¹⁰Charging Party raised no argument that the "small plant

incidents do not establish that he held knowledge about the specific union membership of any individual employee.¹¹ 11

D. Chief Schorle's Credibility

Chief Schorle's overall credibility is raised as the major issue in the case. Schorle's testimony that other departmental managers or supervisors either instigated or supported his rejection of Ceruti and Bryant was contradicted to a certain extent. Schorle's testimony was not accepted in those limited areas based upon a belief that the testimony by other witnesses more reasonably restated the actual events. Yet Schorle is not found to be a totally unreliable witness based upon these findings. His testimony about his lack of knowledge of union activities by either Ceruti or Bryant was corroborated in several instances. No rebuttal evidence was offered nor was any cross-examination of him undertaken regarding these denials. Moreover, Schorle's explanation of his rationale for the rejections of all three employees was direct and believable irrespective of whether his views were reasonable. There is no basis upon which to discredit Schorle generally as a witness in order to infer a general anti-union motive against him.

doctrine" adopted by the NLRB should be applied to infer employer knowledge. See Coral Gables Convalescent Home, Inc. (1978) 234 NLRB 1198 [297 LRRM 1435], Hadley Manufacturing Corp. (1954) 108 NLRB 1641 [34 LRRM 1246]

¹¹Bryant's testimony that he received a memo from Schorle's secretary about union dues deductions was never linked to Schorle.

E. Officers Ceruti and Bryant

1. Protected Activity

Officers Ceruti and Bryant each engaged in a single isolated exercise of protected activity prior to their rejection from probation. Although amounts of protected activity are not quantified, PERB does consider the degree of union activity, among other factors, in determining whether to infer knowledge or improper motivation to an employer. San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261; Coast Community College District (10/15/82) PERB Decision No. 251.

SUPA offers no direct evidence to show that the rejection of Ceruti and Bryant from probation by Schorle was motivated by anti-union animus. Thus, the Charging Party must raise facts sufficient to raise such an inference.¹² As described below, the Charging Party has failed to provide facts sufficient to draw an inference of knowledge, animus, disparate treatment or other elements sufficient to state a prima facie case.

¹²An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established. Evidence Code section 600 B. It is possible to draw a reasonable inference from circumstantial evidence in the face of direct evidence where no contradictory testimony was offered. California Bank v. Clay (1962) 207 CA2d 25 [24 Cal.Rptr. 185]. On the other hand, an inference is more than a surmise, possibility or conjecture; it is a reasonable deduction from facts proven and must be logical. Woehr Estate (1958) 166 CA2d 4 [332 P.2d 818].

2. Lack of Knowledge about Protected Acts of Ceruti and Bryant

Charging Party offered a conversation between Ceruti and a potential employee, Harry Hazelrigg, as the protected activity which triggered Ceruti's dismissal. Assuming the conversation occurred, the solicitation of union membership would be a protected activity. Yet the Charging Party has failed to show that Chief Schorle or any of the department managers had knowledge of the conversation. SUPA alleged that Hazelrigg must have communicated about his conversation with Ceruti to Schorle at a cocktail hour on May 29, 1983. No testimony supported the speculation. To the contrary, Hazelrigg and each of several participants at the cocktail party denied any discussion of Ceruti. Moreover, Hazelrigg denied that Ceruti solicited his membership in the union. Even assuming the truth of Ceruti's testimony there's no reason to reject the testimony of all other witnesses to the effect that Schorle had no knowledge of the conversation.

More importantly, Schorle sent a memo to campus personnel on May 23 indicating his intent to dismiss Ceruti. The memo was sent on the same day as the initial conversation between Ceruti and Hazelrigg allegedly occurred. Thus, Schorle's decision was made several days prior to the date he allegedly learned of Ceruti's activities from Hazelrigg.

Officer Bryant also engaged in minimal protected activity beyond his membership in SUPA. Bryant surmised that everyone

in the department knew of his union membership. Schorle denied having any knowledge of Bryant's union membership or activities. Again, no evidence was offered to support an inference that Schorle was aware of Bryant's union affiliations short of a total discrediting of Schorle's overall testimony. Schorle was not cross-examined on this subject.

Officer Bryant contacted Lieutenant Van Slyke on December 10, 1983, challenging the procedures used to promote Kim Wiebel. Bryant told Van Slyke that he was upset that proper procedures had not been followed. He was going to pursue whatever remedies he had including going through the union. It is argued that this informal protest lead directly to Bryant's rejection from employment approximately two months later. Van Slyke gave unbutted testimony that he did not consider Bryant's comments to constitute a grievance, so he did not report the conversation to anyone. Both Lieutenant Vaughn and Chief Schorle indicated that they were unaware that the conversation had occurred. SUPA offered no valid reason to discredit the unrebutted testimony of the three managers. Bryant did not file an actual grievance over the issues until several days after he'd been notified of his rejection. Again, the facts do not call for an inference that Schorle had knowledge of Bryant's specific exercise of a protected activity on December 10, 1983.

3. Nexus to Improper Motivation

The fact that Bryant and Ceruti were rejected from probation close in time to their minimal exercise of protected activity does not in itself create a nexus to anti-union motivation.

The mere coincidence in time between the employee's union activities and his discharge does not raise an inference of knowledge on the part of the employer without some direct or persuasive circumstantial evidence in the record. California State University, Sacramento (4/30/82) PERB Decision No. 211-H citing Amyx Industries, Inc. v. NLRB (8th Cir. 1972) 457 F.2d 904 [79 LRRM 2930].

Charging Party's main arguments towards inputting an improper motive to both officer's rejections relate to the reasonableness of Chief Schorle's personnel decisions and procedures. It must be noted that an employee at the State University may be rejected for less than "good cause" prior to the completion of his or her probationary period. University and campus regulations require periodic evaluations of probationary employees. A final evaluation during probation must indicate a recommendation for retention or rejection. Yet a rejection need not be based upon prior evaluations or specific deficiencies stated in an evaluation. Campus departments may adopt procedures more stringent than these general policies. The Public Safety Department rules provided for a two-year probation period at the time of this case.

Employees were required to receive numerous evaluations during the probationary period. The evaluations were performed by supervising sergeants and were reviewed by Chief Schorle. The record indicates that the department commonly did not perform the required number of evaluations for each probationary employee. Employees normally did not receive a final evaluation covering the last months of their probation period. None of the evaluations contained a recommendation for retention or rejection by the supervisor. At the request of the campus personnel department, Schorle merely sent a memo wherein he checked a box rejecting an employee from probation. A campus personnel officer testified that that office did not enforce compliance by departments with their own personnel policies.

SUPA contends that Chief Schorle's departure from department written procedures and his failure to consider input from sergeants who directly supervised Ceruti and Bryant demonstrate an improper motive. From a viewpoint of standard personnel practices and employee morale, the personnel actions of Chief Schorle described in the record are highly suspect. The chief admitted with candor that he hired both Ceruti and Bryant despite their spotted police background because of staffing deficiencies existing at the time. At least Bryant was led to believe by his direct supervisor that he was successfully completing his long probationary period. Ceruti

was given no indication to the contrary. Bryant's periodic evaluations were rated "average" overall despite specific marks below average. Neither received an evaluation during the final months of probation. Schorle had indorsed the written evaluations performed as accurate appraisals of the employees' competence. Schorle indicated that he felt no need to inform either of the affected employees or their supervisors that he believed their performances to be unsatisfactory. His belief was based upon incidents he described which were never listed in the employees' evaluations. Contrary to the stated evaluations and the general feelings of his supervisory staff, Schorle relied upon his ultimate authority delegated from the campus president to reject employees within his department during probation. His decision was based more upon his personal feelings about the employees' qualifications than upon any documented factors. In part, his decision was affected by a less severe shortage of staff at the time of the rejection than had existed at the time the employees were initially hired. Schorle gave a listing of reasons why he believed Ceruti and Bryant did not meet permanent employment standards. The reasons were based in part upon several incidents where they allegedly performed in an inappropriate manner. The incidents are described at length in the factual findings. SUPA did not contend that the incidents cited by Schorle did not occur. The organization merely gave a differing subjective

view of each event. I have reviewed each incident. While Schorle's view of the seriousness of each officer's conduct may be disputed, anti-union animus may not be attributed to him for that reason alone. PERB has held that an employer may discharge an employee for many improper reasons which do not in themselves demonstrate anti-union animus. Moreland Elementary School District (7/27/82) PERB Decision No. 227.

Additionally, the Charging Party has failed to show any disparate treatment resulting from Schorle's harsh personnel practices. In fact, the record demonstrates that Schorle had consistently given the same treatment to probationary employees and probationary supervisors in the past. No evidence showed that this treatment was administered differently to union or nonunion members. Schorle described the history of his appointment as chief of the department including his direction to elevate the professional standards including his views towards probationary employees. He had either rejected or forced resignations from two probationary officers and one probationary supervisor in addition to those affected in this case during the past two years. Schorle had a history of not giving rejected employees a final evaluation. The consistency of Schorle's practices does not imply a motive related to protected activity.

In sum, it is found that the exercise of a protected activity by Officer Ceruti in late May 1983 was not a

motivating factor in Schorle's decision to reject him. The conversation between Officer Bryant and Lieutenant Van Slyke in December 1982 was not a motivating factor in Chief Schorle's decision to reject him from probation in March 1983. These cases should be dismissed.

F. Sergeant Sheehan

Myra Sheehan served as a probationary sergeant prior to her rejection from employment. PERB has found that supervising public safety officers (sergeants) in the State University system "are not supervisors" excluded from protections under HEERA. They are included within the safety officer unit and are entitled to all protections afforded rank and file employees. See California State University and Statewide University Police Association (10/20/83) PERB Decision No. 351-H.

In this case the Charging Party has presented sufficient evidence to establish a prima facie case. In February 1983 Sheehan was represented by the SUPA staff representative in a grievance over a reprimand. Chief Schorle had issued the reprimand. He personally reviewed the written grievance and approved it. The right to pursue a grievance through a representative without discrimination is a protected activity.

In early March 1983 Sheehan participated in an attempt to petition the campus president seeking a review of Chief Schorle's personnel practices. Sheehan was upset about

Schorle's rejection of Officer Bryant. Sheehan and Sergeant Bennett circulated a petition among other sergeants and officers seeking their signatures. They carried the petition to the president's office but never met with him.

At the hearing, Chief Schorle denied any knowledge that Sheehan was a member of the union or of any participation by her in any protected activity. He specifically denied that he knew Sheehan was one of the two employees who took the petition to the president's office. Schorle testified that he had sought the names of the employees from the president's office but was denied that information on the basis it was confidential. He further indicated that both the campus president and vice president admonished him for his inquiry.

In Sheehan's case the act of joining the union must be considered a more substantial protected activity because of the proximity of time to her dismissal. Thus, she engaged in three protected acts within a 60-day period prior to being rejected. From the entire record it is found that Schorle had some knowledge or reasonable belief that Sheehan was engaging in protected activities. It is not crucial to decide which one or more of the three events he knew of. Schorle certainly was aware of the grievance because he directly participated in it.¹³

¹³It is also surmised without so deciding that Schorle would have known which members of his supervising team were

A reasonable inference of improper motive arises because of Schorle's knowledge or reasonable belief of Sheehan's union activities, the timing of the personnel decision, and one other significant factor. Sergeants continued to play a key role in the support of management directing personnel on administrative matters at CSUSF following their inclusion in the bargaining unit. Only two sergeants became members of the organization. Schorle clearly implied that he was aware of the potential conflict between the sergeants' allegiance to the union and to management by his March 7, 1983 memo. He acknowledged the presence of the union and reminded the sergeants of their obligation to keep management matters confidential. His express concern about the union taken together with these other factors require the employer to carry the burden of showing a justification for the action.

Sheehan was evaluated regularly during her first year of probation. The employer offered her evaluations and several examples of alleged subpar conduct to demonstrate that she was rejected for legitimate business reasons. Sheehan had

members of the union because of the dual role that sergeants were performing. This is particularly true because of his concern about a loss of confidentiality among his supervisors. It may also be reasonably speculated, without deciding, that Schorle would have determined who circulated the petition and carried it to the president's office. The record clearly demonstrates his interest in the matter and his close working relationship with other sergeants who were contacted by Sheehan to sign the petition.

not been hired on a "risk" basis as had Ceruti and Bryant. She came to CSUSF from another campus with high recommendations regarding her investigative skills. After an initial positive evaluation, Sheehan began receiving ratings which indicated that she was not living up to the expectations of Schorle or Van Slyke. Her second evaluation covering the period of December 1981 through May 1982 indicated concerns about her motivation. Chief Schorle added comments to the evaluation indicating that he considered the satisfactory rating to be too positive.

The record reveals a continuing pattern of concern expressed by Schorle through the fall of 1982 about Sheehan's performance. In August he directed that Van Slyke monitor Sheehan more closely because she did not seem to have the skills or desire to be a supervisor. In September he issued a memo directing counseling of Sheehan and requiring numerous close evaluations of her work. At the same time, he wrote to Sheehan indicating that she had failed to perform at an acceptable level during the past year. During November 1982 Schorle became upset over Sheehan's performance in two separate incidents.

In February 1983 Schorle started to personally review Sheehan's daily supervising logs retroactive to January. He testified as to four incidents involving Sheehan which occurred in February and March. He considered these incidents to reflect inappropriate judgment by Sheehan.

The record, viewed from the employer's evidence, reveals a concern by Schorle about Sheehan's supervisory skills over a significant period of time prior to her rejection. The concern was expressed to Sheehan during the fall 1982 long before her initial exercise of protected activity.

SUPA offers several examples of poor personnel practice and alleged harsh treatment of Sheehan in an attempt to discredit the business motives raised by the employer.¹⁴ It is noted that Sheehan received less supervision rather than more after Schorle's September 1982 memo. She was assigned on the graveyard shift for a period where no managers worked. She also received no written evaluations although Schorle had directed that she be evaluated bi-monthly. She also was given no notice or explanation of her rejection from probation. Finally Sheehan was not offered the opportunity to revert to an officer position although Bryant's rejection had created a vacancy.

I have considered these facts as well as each of the employer's examples of grounds for Schorle's decision. I find numerous instances of poor personnel relations and personnel practices, but insufficient evidence to discredit the

¹⁴In Baldwin Park Unified School District (6/30/82) PERB Decision No. 221, PERB considered the irregularity of the employer's procedure and the harshness of the punishment in discrediting an uncontroverted explanation for disciplinary action against employees.

employer's stated motive for the actions. The record does not show any treatment inconsistent with Schorle's past practice or of disparate treatment. Department management believed that Sheehan did not develop an adequate crime prevention program. Schorle later determined that her supervision skills in the operations unit were not up to his standards. The incidents supporting these beliefs may have two versions. Yet nothing in the record causes me to believe that Schorle did not in fact find Sheehan's performance to be unacceptable for reasons separate from her participation in protected activity. It is more likely that Sheehan joined SUPA in part in response to the mounting pressure on her from Schorle rather than viewing the rejection as a response to her union affiliation. The employer has demonstrated that Sheehan would have been rejected notwithstanding her union activity.

In addition, the record again shows no disparate treatment. Although Ceruti and Bryant were dismissed at the end of their probations, Rowe, Conway and Lieutenant McDonald were notified by Schorle at least several months prior to the completion of their trial status.

The charge is dismissed.

CONCLUSIONS OF LAW

The employer is found not to have discriminated against David Ceruti, James Bryant or Myra Sheehan in violation of section 3571(a) of HEERA by its decision to reject those employees during probationary employment.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusion of law and the entire record in unfair practice cases SF-CE-151-H, SF-CE-166-H and SF-CE-171-H, the complaints against the California State University (San Francisco) are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 13, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 13, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of

service shall be filed with **the Board itself**. See California Administrative Code, title 8, **part III, section 32300 and 32305,**

Dated: October 22, 1984

Terry Tilliman
Administrative Law Judge