

unlawfully disciplined Officer John Moseley (Moseley) for his exercise of protected activities. Specifically, the ALJ found that CSU violated HEERA when it issued: (1) a letter of reprimand; (2) a five-day suspension; and (3) a three-month suspension.

We have carefully reviewed the entire record, including the proposed decision, transcript, exhibits, exceptions and responses, and affirm the ALJ's conclusion that CSU violated section 3571(a) and (b) of HEERA, in accordance with the discussion below.²

FACTUAL SUMMARY

Background

Moseley was hired as a police officer at the Fresno campus of the CSU system on March 3, 1979. At this time, Moseley was sent to a psychiatrist, Doctor Edward E. Shev (Shev), for an examination to determine his maturity and stability. Shev determined that Moseley was in the "low to moderate risk

guaranteed by this chapter.

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

²CSU filed numerous exceptions to the ALJ's factual findings and legal conclusions, including exceptions to the ALJ's characterization of certain facts and conclusory statements. Except as noted in this decision, these facts and statements are not prejudicial and do not affect the Board's finding of unlawful conduct by CSU. In its brief in support of exceptions, CSU reasserts the same arguments contained in its post-hearing brief. Although the ALJ considered the parties' post-hearing briefs, he did not specifically address CSU's arguments in the proposed decision. However, the Board finds that the ALJ properly rejected CSU's arguments.

category." Shortly after 1979, the CSU police officers began to organize for representational purposes under HEERA. Initially, Moseley was elected to lead the Fresno branch of the statewide organization. However, he was voted out of office and Officer Richard Snow (Snow) was selected to replace him. Eighteen months later, Statewide University Police Association (SUPA) began to gain strength and Moseley was reelected the leader of the Fresno chapter. During this period, a great deal of animosity was generated between Moseley and Snow. Throughout 1982 to the present, there have been two separate and distinct factions in the Fresno State Police Department. Moseley, David Jensen (Jensen), and Raymond Mendoza (Mendoza) are the officers identified with one faction, while Snow, Maria Silva (Silva), and her husband, Sergio Silva, are the officers identified with the other faction.

During the 1982-83 school year, SUPA was negotiating with CSU for a new collective bargaining agreement. During this period, SUPA filed an unfair practice charge regarding harassment of Moseley. In regard to this unfair practice charge, Sergeant Sergio Silva wrote to the chairman of SUPA complaining about the actions of Moseley and a paid representative of SUPA, Robert Jones. The chairman responded that the investigation of Moseley by Sergio Silva, as an agent of the chief of the Fresno State Police Department, was an attempt to retaliate against Moseley for the exercise of his rights as a SUPA director, and stated that the settlement agreement in the unfair practice case

required that Sergio Silva's entire investigation be removed from Moseley's file and be destroyed. Finally, the chairman stated that if Sergio Silva was unhappy with SUPA and its representatives, then Sergio Silva should give consideration to his withdrawal from SUPA. In response to a letter by Moseley to Robert Jones, wherein he stated that "Sergio Silva and his wife, Maria, have been disclosed to be hatchet men who are hostile to fellow officers," Silva wrote to Moseley with a list of complaints about him.

Also, during the 1982-83 negotiations, Moseley was removed from his position as a police officer on an "undue force" charge. As part of this investigation, Moseley was sent to a Sacramento psychiatrist, Doctor Robert S. Treat (Treat). In his report, Treat stated that Moseley did not have any mental illness, disease or defect that would interfere with his functioning as a police officer, and that he was sufficiently stable to adequately perform his duties and presented a low risk for stress-induced problems. As a result of the investigation by both CSU and the Fresno County District Attorney's Office, all charges against Moseley were dropped and Moseley was restored to full duty with all pay and allowances.

Letter of Reprimand and Five-Day Suspension

On July 7, 1987, Moseley received a letter of reprimand regarding his "performance deficiencies." On July 16, 1987, Moseley received a notice of suspension for five days commencing

July 28, 1987. Both of these actions were allegedly based on events occurring on July 2 and 3, 1987.

On July 2, 1987, a Level 1 grievance meeting was scheduled before Lieutenant Steven R. King (King) regarding a denial of Jensen's request for vacation days. Moseley was Jensen's representative at this meeting. As Moseley and Jensen walked into King's office, they saw Silva seated there. Because Silva was not Jensen's immediate supervisor, was not involved in the subject matter of the grievance, and was a member of the bargaining unit, Moseley inquired as to why Silva was present. King stated that Silva was there merely as a witness. At this point, Moseley insisted that Silva's presence implied a lack of trust and that he would record the meeting on his tape recorder. King refused to permit the meeting to be recorded, and the meeting ended.³

Immediately after or within a few minutes following the Jensen grievance meeting, King came out into the work area and ordered Moseley back into his office. Moseley asked King if this was to be a disciplinary meeting and, if so, he wanted a representative present. He also stated that he would need time to make arrangements for such representation. King refused to respond as to whether or not the meeting was to be disciplinary.

³There is a dispute in the facts as to who actually ended the meeting. Moseley believes that he stated "in that case there will be no grievance hearing." Following this statement, Moseley states that he and Jensen walked out of the office. Silva states, in her report, that King said "the meeting is over." This factual dispute is irrelevant as the end effect was that the Level 1 grievance meeting did not take place.

Rather, King ordered Moseley into his office. Moseley refused to go into King's office. King then told Moseley that he was insubordinate and ordered him back to the field. Moseley returned to his regular duties. King, in his testimony, stated that he and Moseley had previously scheduled a meeting regarding a two-week vacation in August, and that he was attempting to get Moseley into the office for this meeting. However, the ALJ did not credit King's testimony due to the fact that there was: (1) no reference to this previously scheduled meeting in any of the documentation; (2) no witnesses heard King refer to such a meeting; (3) no witnesses remembered any break between the Jensen grievance meeting and King ordering Moseley back into his office; and (4) no witnesses remembered the exchange between the two men as having taken place in or near the squad room, but, instead, recalled it as having taken place in the clerical area just outside of King's office.

Based on this incident, King sent a two-page request for discipline of Moseley to Chief William A. Anderson (Anderson), Fresno State Police Department. King stated that Moseley violated section 1.2 of the Department Policy Manual regarding "Unbecoming Conduct," and section 1.41 of the manual regarding "Insubordination" by his willful failure to obey a lawful order in the presence of members of the public.⁴ In this report, King

⁴Section 1.2 "Unbecoming Conduct" states:

Employees shall conduct themselves at all times, both on and off duty in such a manner as to reflect favorably on the department.

recommended a minimum three-day suspension without pay.

The third incident on which the letter of reprimand and five-day suspension was based occurred on July 3, 1987. On this date, Jensen received a notice regarding a departmental investigation that concerned a report he had written on a shooting incident. Because this meeting might be disciplinary in nature, Jensen selected Moseley as his representative. Moseley and Jensen met with Snow. Silva was also present at this meeting. At the start of the meeting, Moseley and Snow discussed whether this meeting was part of an official internal affairs investigation. While Snow insisted that it was not an internal affairs investigation, Moseley stated that it had all the characteristics of an internal affairs investigation and, therefore, was such an investigation. At this point, Snow asked his questions and Jensen answered them. During Snow's questions, Moseley interjected statements to protect Jensen's rights. At various times, when Moseley tried to speak, Snow told him to "shut up" and to quit interfering. Finally, Snow told Moseley he

Conduct unbecoming an employee shall include that which brings the department into disrepute or reflects discredit upon the employee as a member of the department, or that which impairs the operation or efficiency of the department or employee.

Section 1.41 "Insubordination" states:

Willful failure or deliberate refusal of any officer or civilian to obey any lawful order given by a superior officer shall be insubordination. Ridiculing a superior officer or his orders, whether in or out of his presence, is also insubordination.

was going to ignore him. During this period, Jensen continued to answer Snow's questions. After Moseley had interjected comments, Snow finally ordered Moseley to quit interfering and told him he was being insubordinate. Jensen eventually answered Snow's questions, and Snow concluded the investigatory meeting. In the hearing, Snow testified that he had additional questions and that he was forced to stop his questioning of Jensen because of the repeated interruptions by Moseley. However, in his written report about the meeting, Snow did not state that Moseley prevented him from completing his investigatory meeting. Based on this inconsistency, the ALJ did not credit Snow. Moseley, in his testimony, admitted that he interfered with Snow's questioning because Snow was trying to elicit untruthful responses.

Three-Month Suspension

1. Sexual harassment complaint.

On or about July 9, 1987, Silva went to Doctor Arthur Wint (Wint), director of affirmative action and assistant to the president at Fresno State University, with a series of complaints regarding Moseley. Wint met with Silva over a period of two months and assisted Silva in preparing a letter to Moseley setting forth her complaints.⁵ In her letter, Silva accused Moseley of attempting to discredit her candidacy for promotion to

⁵Wint also advised Silva to wait until the proposed decision in PERB Case No. S-CE-25-H issued. On September 21, 1987, the decision issued. On September 27, 1987, Moseley received the letter signed by Silva setting forth her complaints.

sergeant and demanded that Moseley cease his ongoing, continued harassment. Shortly after Silva sent Moseley this letter, she filed a formal complaint with Wint in the Office of Affirmative Action Services alleging sexual harassment against her by Moseley.

Wint investigated the complaint and issued his report and recommendations on January 22, 1988. In his conclusion, Wint stated "the evidence preponderates in favor of a finding of reasonable cause to believe that the complainant, Sgt. Maria Silva, has been the victim of sexual harassment by Officer Moseley." Wint's report contained various incidents which he concluded support a finding of sexual harassment. The first incident involved SUPA's letter to the president of CSU Fresno in 1986 regarding the examination process for the position of sergeant. In this examination process, Silva was promoted to sergeant. Silva stated that the focus of the letter was not on the promotion process, but, rather, on her selection as sergeant. She specifically pointed to the transcript of a grievance hearing in which the SUPA representative asked questions which raised the issue of her moral character and implied that she received the promotion for nonmeritorious reasons.

Wint also examined the issue of Silva's competence. One witness stated he did not believe Silva was being harassed, and further stated that Silva was "weak in officer safety" and potentially could cause someone to get hurt. Another officer stated that, although Silva was a good person, she was

unqualified to fill the position of sergeant, because all her experience came from a university setting and she lacked any "street experience." Another witness stated there had been a number of complaints about Silva's competence, and that he had lodged a complaint against her five years ago. These three witnesses all felt the complaint filed by Silva was an attempt to attack Moseley's position as union head and to eventually get rid of him. On the other hand, another witness stated that, in his experience, male and female officers make the same mistakes and that men forget their own mistakes and tend to focus on the mistakes made by women. This witness also stated that most of the references to Silva's competence dealt with incidents which occurred five to seven years ago, and that her performance improved remarkably after she attended safety school. Another witness stated he had worked with Silva and was never in a situation where he felt that his life was in danger. Another witness stated she had worked with Silva for six months and, although she was led to believe Silva's competency would be an issue, she was never put in a life-threatening situation by Silva. Anderson stated the allegations about Silva's competence were unfounded and he hired Silva because she was the top candidate.

Finally, a witness stated she had worked with both Silva and Moseley and it was apparent Silva was getting "a lot of unnecessary heat from Moseley and the men around him." This witness also stated that during the time she has worked in the

department, Moseley had engaged in a pattern of sexual harassment which included dirty jokes, talking about his sex life, talking about other people's sex life, asking dispatchers about their sex life, and grabbing a dispatcher at a party and trying to kiss her.⁶ Another witness also stated Moseley engaged in a pattern of making sexual jokes and comments. Based on this report, Wint found reasonable cause to believe Silva had been the victim of sexual harassment by Moseley and recommended appropriate disciplinary action "up to and including termination."

In the testimony at the hearing, numerous witnesses testified they had never seen Moseley engage in sexual harassment with Silva or other female officers. Numerous witnesses also testified that almost all of the officers engaged in sexual jokes and comments. With regard to the letter filed by SUPA in relation to the examination process for the sergeant position, witnesses testified that this letter was aimed at the examination process itself, and not at Silva personally. The letter to the president of CSU Fresno requested an immediate, unbiased and

⁶This last alleged incident occurred at a Christmas party at Moseley's home. Dispatcher Deborah Stamp (Stamp) alleges that her blouse was torn when Moseley allegedly attempted to throw her on the couch and give her a kiss as she was putting her hand out to say goodbye. However, in the hearing, Officer Margie Hernandez (Hernandez) testified that she and Stamp went to the Moseley Christmas party together. When they were driving home, Stamp mentioned the incident regarding the torn blouse. She told Hernandez at that time that it occurred when Moseley sat on the couch next to her. Apparently, he was sitting on the tail of her blouse and it ripped when she tried to get up. Hernandez stated that Stamp did not appear to be mad or upset about the incident. Finally, Mrs. Moseley, who was also present at this Christmas party, gave Stamp a check for \$15 to cover the cost of the torn blouse.

independent review of the selection promotion process. The letter stated there were conflicting statements on how tests and oral interviews were scored and how rankings were determined. There was no specific mention of Silva's name. Rather, the letter referred to the last two promotions and alleged that they have been held in "clouded secrecy and plagued with contradicting statements and procedures."

With regard to the veracity of Wint's report, Wint admitted that he did not include all of his comments from witnesses in his final report because he was not investigating a union matter and did not have to put everything into the findings. Wint also stated, in the fall of 1987, he determined that racial harassment was not provable and would not be part of his investigation. However, there was nothing in his report to exonerate Moseley of the charge of racial harassment. Rather, Wint testified the racial harassment charge was taken care of by omission. In his final report, Wint recommended that appropriate disciplinary action be taken against Moseley "up to and including termination." However, in two earlier drafts of his report, Wint recommended "suspension without pay for five days" and "minimum, five day suspension without pay." In response to a question by SUPA's attorney regarding whether anyone suggested that he alter his recommendation, Wint replied:

I have a notation here that I had some discussions with the recommendation, I had recommended that for atmospheric, I'm going to stop saying that, based upon the conclusion that I had drawn that discipline up to and including termination would be

appropriate and was brought to my attention that that is what I was saying and that I should say that because my original recommendation stated that discipline and action should be taken and keeping with relevant provisions of the union agreement and so since my recommendation was that disciplinary action up to and including termination could occur under these circumstances that I should say that, and that's, fine, I will revise recommendations, I never change conclusions.
(Vol. I, p. 41.)

2. Sexual affair rumor.

On July 28, 1987, shortly after 8 p.m., Officer Daniel Horsford (Horsford) saw Anderson in the immediate vicinity of Stamp's home. Horsford told Moseley about the incident because he was afraid punitive action could develop because he had been off his beat. Moseley, who was about to serve his five-day suspension, told Jensen, the alternate SUPA representative, about the incident. There is no testimony or statement that Moseley told Jensen he suspected an affair between Anderson and Stamp. On August 4, 1987, CSU Fresno Assistant President Lynn Hemink (Hemink) asked Chief Phil Ogden (Ogden), chief of the police department at CSU Stanislaus, to investigate the rumor of alleged sexual misconduct between Anderson and Stamp. Before he started his investigation, Ogden received letters from both Anderson and Stamp regarding the alleged rumor. In both of these letters, the writers quoted Moseley as having made statements that Anderson and Stamp were having an affair. Stamp stated that Moseley made certain statements to Horsford and Jensen and that Jensen, in turn, repeated the statements to Mendoza. Anderson quoted Jensen

as telling Mendoza that Moseley had told him that Anderson and Stamp were having an affair. Prior to writing his report, Ogden interviewed 18 employees of the Fresno State Police Department, including Anderson, Stamp, Horsford, Hernandez, Mendoza, Jensen, and Gilbert A. Washington (Washington). While Moseley appeared with his attorney for an interview with Ogden, no interview was conducted due to Ogden's refusal to provide Moseley with all statements that had already been taken and all "memos or letters of complaint" in Ogden's possession concerning the alleged rumor. In his report, Ogden concluded that there was no evidence to substantiate the alleged rumor. Based on the letters prepared by Anderson and Stamp that each had talked with individuals in the department who traced the remark to Moseley, Ogden concluded that swift punitive action should follow. In his recommendation, Ogden recommended that a formal letter of reprimand for Moseley be issued citing a violation of the Police Department Procedural Manual section 1.2, "Unbecoming Conduct." However, Hemink testified that he did not issue Moseley a letter of reprimand as a result of this report by Ogden.

Insubordination.

1. Service of administrative leave.

On the morning of February 5, 1988, King asked Moseley to step into his office. When Moseley asked if it was a disciplinary matter, King stated that it was not a disciplinary matter. Once Moseley was in his office, King served him with the notice of administrative leave, with pay, and ordered him to

immediately clean out his locker. At this point, King and Sergeant James Myers (Myers)⁷ accompanied Moseley to the squad room. King reached inside Moseley's locker and removed a weapon. He unloaded the weapon and gave it to Myers. Moseley became upset because the removed weapon was his personal weapon. When Moseley demanded the return of his personal weapon, King refused. Moseley then returned to his locker, pulled out the department-issued weapon, unloaded it and held the barrel in his hand with the butt end pointed toward King and said, "This is your weapon. I want mine back." Even though Moseley did not receive his personal weapon, Moseley gave the department-issued weapon to King, who then gave it to Myers. Moseley was upset, and admitted in his testimony that he called King a "liar" and "thief." At one point, Moseley said he was going to call his representative. King responded that Moseley was insubordinate. After Moseley called his representative, he returned to the squad room and cleaned out his locker. Although King claimed that Moseley called him a "creep" and "mental problem," Moseley denied making such statements. On February 5, 1988, after this incident, King wrote a report to Anderson, wherein he recommended that Moseley be terminated from his position as a public safety

⁷CSU's exception that this notice was served by King and Myers has merit. The ALJ apparently misstated when he stated King and Snow served this notice upon Moseley.

officer for gross and continuing insubordination and conduct unbecoming an officer.⁸

2. Sick leave restriction.

On August 4, 1987, Moseley was placed on sick leave restriction, which required him to obtain a doctor's report justifying the use of any sick leave. Moseley filed a grievance on August 6, 1987, regarding the sick leave restriction due to: (1) the discrepancy between the alleged use of sick leave and the supporting documentation; and (2) the fact that the sick leave usage was job related, preapproved, or used according to the collective bargaining agreement. Moseley continued to have problems with sick leave usage after the restriction was placed on him. On November 20, 1987, King gave Moseley a suggested format for verifying sick leave. After Moseley used this format, the sick leave verification issue was solved. On September 9, 1987, Moseley received an annual employee evaluation, which reflected an "improvement needed" appraisal for sick leave

⁸CSU excepted to the ALJ's finding and conclusion that, based upon the fact that CSU reinstated Moseley for a period of five days before the three-month suspension became effective, there was no evidence as to why CSU determined that it was necessary to temporarily suspend Moseley pending formal notice of disciplinary action. CSU excepted to this finding and conclusion on the basis that the administrative leave expired either upon the furnishing of formal notice of disciplinary action or, unless extended, 30 days after its commencement, whichever first occurs. CSU's exception has merit. As the administrative leave was not extended and no formal notice of disciplinary action had been served, the administrative notice expired and Moseley was reinstated.

usage.⁹ Within four months, Moseley received a second annual employee performance evaluation which again downgraded his performance based on the use of sick leave. Moseley protested the evaluation. Despite these evaluations, King testified that he was pleased with the cooperation he was getting from Moseley, and that Moseley was rapidly working towards removal from the sick leave restriction.

3. SUPA meetings during work time.

On October 13, 1987, Moseley received a memo from King regarding a SUPA meeting scheduled for October 18. The memo told Moseley that SUPA was not permitted to conduct meetings during work time. On October 14, 1987, Moseley received a memo from King entitled "Letter of Warning," which again advised Moseley that he was to conduct no SUPA business on work time until prior clearance had been obtained directly from King. This letter was placed in Moseley's permanent personnel file. Moseley grieved the October 14 letter. On October 21 and 26, 1987, Moseley met with King and Snow regarding the issue of conducting SUPA business on work time. During these meetings, Moseley refused to continue the meeting without either a representative present or his tape recorder on. King told Moseley that his actions were insubordinate. The disagreement regarding SUPA business on work time involved King and Moseley's interpretations of the contract. King believed that the contract contained an absolute prohibition

⁹All of Moseley's performance evaluations prior to September 1987, contained ratings with a minimum level of "meets expected standards."

against SUPA activity during work time. Moseley insisted that the prohibition only dealt with SUPA meetings and not grievance or negotiation activities. King insisted that, if Moseley had SUPA duties, he should get permission from his supervisor before conducting his SUPA duties. Moseley insisted that such approval was only necessary if he was going to be out of service and unavailable to take his regular radio calls.¹⁰

4. New department policies and procedures.

On January 4, 1988, the Fresno State Police Department promulgated a directive to all personnel which restricted student employees from being in patrol vehicles with an officer and restricted officers from taking breaks with students. The new procedures also stated that all reports were to be written in the patrol vehicle while parked in the lot where the officer would be visible. The procedures also stated that, with the exception of the dormitory officers, the officers would remain on patrol in their vehicle until dispatched to a building. Moseley believed that these new policies and procedures were a thinly disguised way to restrict his access to bargaining unit members. Even though he told another sergeant that he believed the procedures were ludicrous and constituted harassment against him and that he did not intend to follow such procedures, there were no instances

¹⁰In a related case at CSU Sacramento, an arbitration decision regarding the conducting of SUPA business during work hours was issued by Arbitrator Phillip Tamoush. Although this arbitration decision involved some of the same charges against Moseley, the arbitration award was not acknowledged by the Fresno State Police Department when it sent its recommendation for Moseley's discipline.

cited in which Moseley failed to follow these new rules.

Although there is evidence that Moseley told Parking Officer Greg Taylor and Librarian Thomas Ebert that he was prohibited from speaking to them, both men testified that this comment was made in the context of Moseley taking breaks and lunches with them.

5. Sergeant Myers⁷ briefing.

On January 24, 1988, Myers was briefing the oncoming shift. Apparently, there was some sort of misunderstanding regarding who Myers was addressing and, allegedly, Moseley and Myers glared at each other for a moment or two. There was no conversation between the two men and there was no written memorialization of this incident. The first notice that Moseley received of this incident was in his three-month notice of suspension, dated March 4, 1988.

Psychiatric Evaluations

On August 16, 1987, Moseley received a letter from Personnel Officer Nita Kobe, ordering him to submit to a medical evaluation by psychologist, Doctor Gregory Cherney (Cherney). Cherney was told that CSU was concerned with Moseley's aggressive impulses; his inability to get along with his peers, co-workers, and the public; and the number of conflicts that the Fresno State Police Department Administration had with him. However, prior to examining Moseley, his testimony indicates that he did not ask for or review psychiatric reports from other psychiatrists or psychologists and that he only examined the documents that CSU provided him. Further, he did not ask for or review Moseley's

personnel file. As a result of this August 7, 1987 evaluation,

Cherney recommended that,

. . . a formal fitness for duty psychological evaluation should only be done if Officer Moseley engages in any one more incident which is deemed inappropriate by administrators and supervisors. This would include any exhibition of unnecessary anger or insubordination. At that point, the Fitness for Duty should immediately be ordered.

On March 11, 1988, seven days after Moseley was served with his three-month notice of suspension, Moseley was directed to submit to a Fitness for Duty psychological evaluation. In his report, Cherney found that Moseley had numerous problems on an interpersonal and labor/management conflict level during his ten-year employment period. Cherney also stated that Moseley directed all external negativity concerning himself toward CSU and the Fresno State Police Department. Additionally, Cherney found that Moseley tended to get very subjective and over involved in various causes, which he defended in a rigid and guarded or suspicious manner. Although Cherney, in his report, stated that Moseley bordered on a loss of control during the interview process and had the capacity to lose control of his impulses if he felt exasperated when one of his causes was being confronted, there was no direct evidence of any instance of Moseley losing control in his relationship with the public in the execution of his police officer duties. Finally, Cherney's recommendation was that Moseley be found unfit for duty based on his psychological profile.

On June 2, 1988, at the request of his attorney, Moseley was examined by Doctor Arthur Lamb (Lamb), a Sacramento psychiatrist. In his testimony, Lamb stated that he took a thorough history from Moseley, reviewed reports submitted by psychiatrists who had examined Moseley in the past, and reviewed Moseley's entire personnel file. Lamb noticed that Moseley's complexion is redder than normal, which he attributed to capillaries that are distended and his skin being thin so that the redness shows through. Lamb noted that the symptoms are often associated with a person becoming agitated and that this redness in Moseley could be triggered by various types of stimulants, such as excitement, apprehension and annoyance. In previous psychological examinations by Shev and Treat, Lamb noted that Moseley fell into the low to moderate risk category with respect to the performance of his duties. In conclusion, Lamb found that the allegations against Moseley had little merit. Lamb stated that there were no incidents of Moseley behaving in a way that was unprofessional in the course of his duties as a police officer. He noted that there had been confrontations with management in his role as a labor representative, but, taking everything into consideration, Lamb found absolutely no evidence that Moseley was impaired with respect to performing as a public safety officer. Lamb found that Moseley, as a labor representative, has been an assertive advocate for his position even though he may have been vehement or vociferous at times.

DISCUSSION

In Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the test for discrimination and retaliation.¹¹ In order to establish a prima facie case, the charging party must prove: (1) the employee engaged in protected activity; (2) the employer had knowledge of such protected activity; and (3) adverse action was taken against the employee as a result of such protected activity. In discrimination and retaliation cases, unlawful motive is the specific nexus required to establish a prima facie case. The Board recognized that direct proof of motivation is rarely possible, and concluded that unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity. The Board has found that the following factors may support an inference of unlawful motivation: (1) disparate treatment of the charging party; (2) proximity of time between the participation in protected activity and the adverse action; (3) inconsistent or contradictory explanations of the employer's actions; and (4) departure from established procedures or standards. (Novato Unified School District, supra, PERB Decision No. 210; Regents of

¹¹Under HEERA, the Board has adopted the test in Novato Unified School District, supra, PERB Decision No. 210 for discrimination and retaliation. (California State University, Sacramento (1982) PERB Decision No. 211-H.)

the University of California (Berkeley). (1985) PERB Decision No. 534-H.)

In the present case, there is no dispute that Moseley engaged in protected activity. He was the chairman of SUPA's Fresno chapter, filed grievances, represented bargaining unit members in their grievances, and conducted SUPA business on work time. CSU, through its Fresno State Police Department, was aware of these protected activities. Moseley kept a high profile and certainly did not hide the fact that he was the chairman of SUPA at CSU Fresno and involved in protecting the rights of the bargaining unit members. The crucial question is whether the adverse actions were motivated by Moseley's participation in protected activity.

In determining whether CSU was unlawfully motivated when it disciplined Moseley, the Board must examine the four factors listed in Novato. With regard to the disparate treatment, the unrebutted testimony shows that almost all of the officers, both male and female, engaged in telling sexual jokes and making sexual comments. On March 12, 1986, Moseley and six other officers sent a letter to the president of CSU Fresno regarding the sergeant examination process. Mendoza, Jensen and Horsford testified that the letter was not aimed at Silva personally. In addition, Wint admitted in his testimony that no one was singled out in the letter regarding the sergeant examination process. Silva was the only person who believed that this letter was a personal attack. Despite the fact that other officers told

sexual jokes and signed the letter regarding the sergeant examination process, only Moseley was singled out in the investigation of the sexual harassment charge. Disparate treatment is also evident in Moseley's report writing. Testimony by Moseley, Ronda Hambrock, Lisa Trevino, Hernandez, Mendoza, Washington and Jensen indicate that Moseley's performance was under close scrutiny due to his position and involvement with SUPA.

Proximity of time between the participation in protected activity and adverse action exists as Moseley's protected activity and discipline occurred during the same period. In fact, the letter of reprimand and five-day suspension directly followed instances of Moseley's protected activity on July 2 and 3, 1987 (i.e., Level 1 grievance meeting and Jensen investigatory interview). Both the letter of reprimand and the suspension notice explicitly state that the discipline was based on Moseley's conduct at the Level 1 grievance meeting, confrontation with King following the Level 1 grievance meeting and the Jensen investigatory interview.

In the area of inconsistent or contradictory explanations, testimony at the hearing demonstrates that the allegations of sexual harassment against Silva are not based on gender, but on nongender concerns. Specifically, the allegation that the March 12, 1986 letter from Moseley and six other officers to the president of CSU Fresno, regarding the 1986 sergeant examination process, was a personal attack on Silva was refuted by testimony

by Mendoza, Jensen, Horsford and Wint. The issue of Silva's competence was based on a specific incident involving another officer, Lisa Trevino, who was injured while on duty with Silva. There is also evidence that complaints had been filed against Silva in the past regarding her performance as a public safety officer. However, other witnesses testified that these incidents occurred five to seven years ago and that Silva's performance had improved. The fact that there were legitimate concerns about Silva's performance in the past and as a sergeant indicates that the concerns about Silva's competence cannot be solely attributed to gender.

Inconsistent or contradictory explanations are also evident regarding the issue of conducting SUPA business during work time. On October 13, 1987, Moseley received a memo from King regarding a SUPA meeting scheduled for October 18, during Moseley's work time. On October 14, 1987, Moseley received a "Letter of Warning," which was placed in Moseley's personnel file. The letter advised Moseley that no SUPA business should be conducted on work time without prior clearance from King. Moseley met with King and Snow on October 21 and 26 to discuss this issue and the parties disagreed on the interpretation of the contract language.

Inadequate investigation is evident in Wint's report as it failed to state any incidents of sexual harassment. In his testimony at the hearing, Wint referred to the terms "pattern of practice" or "atmospheric sexual harassment." Wint testified that he did not include all of the information he obtained from

his interviews because he was not investigating a union matter and did not have to put everything into the report. The information Wint did not include in his report were statements by officers that would rebut the charges of sexual and racial harassment (i.e., Officers Gil Franco and Hernandez). His failure to contact certain employees who might have information that would benefit Moseley also indicates that the investigation was inadequate and the report was conclusory (i.e., Officer Lisa Trevino and CSU police escorts). Wint's testimony and an examination of his report demonstrates that the finding of sexual harassment is not based on any specific facts. Rather, the findings of sexual harassment are based on "atmospheric sexual harassment."

The investigation into the sexual affair rumor also demonstrates a lack of an adequate investigation and is another example of inconsistent explanations used by CSU in its decision to discipline Moseley. Although Ogden's report concludes that the rumor was traced to Moseley, there is no direct evidence to support that conclusion. Rather, Ogden reaches this conclusion based on the written statements by Anderson and Stamp, which contained only hearsay statements that Moseley commented about an affair between Anderson and Stamp. Although Ogden's report recommended that a letter of reprimand be placed in Moseley's file, Anderson testified that after reading the report, he decided he would not follow the recommendation. Until the three-

month suspension notice, Moseley was unaware that the alleged affair rumor would be the basis of any disciplinary action.

Under Novato, the evidence clearly indicates that SUPA has met its burden of proving that CSU had an unlawful motive in its discipline of Moseley.¹² Once SUPA meets its burden, the burden shifts to CSU to prove that its actions would have occurred in the absence of Moseley's protected activities. CSU argues that its conduct with regard to Moseley was based on a legitimate operational purpose: to solving a serious employment relations problem. CSU relies on: (1) the three alleged acts of insubordination on July 2 and 3, 1987; (2) sexual harassment of Silva; (3) investigation of the Anderson/Stamp affair finding Moseley responsible for the rumor; and (4) other acts of insubordination (as discussed in the facts above).

During the hearing, SUPA called numerous witnesses to the stand to testify. Except for a brief cross-examination of Moseley, CSU did not cross-examine any witnesses. In its defense, CSU called three witnesses to testify: Snow; King; and Anderson. CSU also briefly recalled Hemink.

While Snow, King and Anderson testified under direct examination regarding the reasons for disciplining Moseley, their testimony during cross-examination demonstrated inconsistencies

¹²Although the ALJ relied on comments made by officers at CSU Fresno and other CSU campuses to find anti-union animus, we find that these comments are not probative. The testimony regarding these random comments is hearsay. Additionally, there is no evidence that other CSU campuses were involved in the discipline of Moseley. Therefore, comments made by officers at CSU Fresno and other CSU campuses are irrelevant.

in their direct testimony. For example, Snow stated that he was unable to complete the Jensen interview, yet admitted that, in his report, he did not mention that his investigation was incomplete due to Moseley's alleged interference. While King testified that he was trying to work with Moseley, he also testified that, after the grievance meeting on July 2, 1987, he saw no need to respond to Moseley's question regarding the purpose of the meeting when ordering Moseley back into his office. Although he expected Moseley to be upset, King testified that he had the notice of administrative leave the day before he served Moseley at work, but decided, nonetheless, to serve the administrative leave notice at work so that Moseley's locker would be cleaned out and state property returned. King confiscated Moseley's personal weapon from his locker and refused Moseley's demand for its return. These actions are not consistent with his statement that he was trying to work with Moseley. Finally, Anderson, in testifying as to the reasons why he recommended Moseley's termination, admitted that there are two factions at the Fresno State Police Department. During cross-examination, Anderson stated that there were prior problems with Moseley, but "they just weren't documented." However, during 1987 and 1988, the administrators and officers at the Fresno State Police Department documented numerous instances of "insubordination," conducted investigations involving sexual/racial harassment and a sexual affair rumor, and sent

Moseley to a consultation and fitness for duty examination with Cherney.

While CSU may have had a legitimate operational purpose in taking disciplinary action against Moseley, CSU failed to present any credible evidence.¹³ Generally, the testimony of SUPA's witnesses is unrebutted and uncontradicted. In contrast, the direct testimony of Snow, King and Anderson is subject to doubt after the cross-examination. Thus, CSU has failed to present credible evidence that CSU would have taken the disciplinary action against Moseley in the absence of his protected activity.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board finds that the Trustees of the California State University violated section 3571(a) and (b) of the Higher Education Employment Relations Act.

It is hereby ORDERED that California State University and its representatives shall:

¹³While CSU argued in its exceptions that Moseley's obstruction of the grievance process was one of the major aspects of CSU's business necessity defense, CSU failed to raise this argument in its post-hearing brief. Additionally, the disciplinary notices fail to state that Moseley's alleged obstruction of the grievance process was one of the reasons for the disciplinary action. Although there was testimony regarding Moseley's use of the grievance process, the fact that CSU did not base its disciplinary actions on this conduct and failed to include this fact in its post-hearing brief leads to the conclusion that this argument has no merit.

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing employees because of their exercise of rights guaranteed by the Act.

2. Issuing to Officer John Moseley punitive actions based upon activities protected by the Act, including the letter of reprimand dated July 7, 1987, five-day suspension notice dated July 16, 1987, and three-month suspension notice dated March 4, 1988.

3. Denying to the Statewide University Police Association rights guaranteed to it by the Act.

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

1. Rescind and destroy the letter of reprimand dated July 7, 1987, five-day suspension notice dated July 16, 1987, and three-month suspension notice dated March 4, 1988.

2. Delete from Officer John Moseley's personnel file any reference to: (1) the sexual harassment investigation and report by Doctor Arthur Wint; (2) the sexual affair rumor investigation and report by Phil Ogden; (3) any reports or memoranda under the control of CSU which it used to support its letter of reprimand, its five-day suspension, or three-month suspension of Officer John Moseley.

3. Pay to Officer John Moseley the salary that he lost as a result of the unlawful suspensions. Such retroactive salary

award shall include interest at the rate of ten (10) percent per annum.

4. Make Officer John Moseley whole for any other losses, such as benefits, seniority credit(s), leave credit(s), and reasonably expected overtime salary opportunities that he may have suffered as a result of the unlawful conduct by the Trustees of the California State University, its agents and representatives.

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

6. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

Members Shank and Camilli joined in this Decision.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case Nos. S-CE-32-H and S-CE-33-H, State University Police Association v. Trustees of the California State University, in which all parties had the right to participate, it has been found that the California State University violated the Higher Education Employer-Employee Relations Act (Act) section 3571(a) and (b).

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing employees because of their exercise of rights guaranteed by the Act.

2. Issuing to Officer John Moseley (Moseley) punitive actions based upon activities protected by the Act, including the letter of reprimand dated July 7, 1987, five-day suspension notice dated July 16, 1987, and three-month suspension notice dated March 4, 1988.

3. Denying to the Statewide University Police Association rights guaranteed to it by the Act.

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

1. Rescind and destroy the letter of reprimand dated July 7, 1987, five-day suspension notice dated July 16, 1987, and three-month suspension notice dated March 4, 1988.

2. Delete from Officer John Moseley's personnel file any reference to: (1) the sexual harassment investigation and report by Doctor Arthur Wint; (2) the sexual affair rumor investigation and report by Chief Phil Ogden; (3) any reports or memoranda under the control of the Trustees of the California State University which it used to support its letter of reprimand, its five-day suspension, or three-month suspension of Officer John Moseley.

3. Pay to Officer John Moseley the salary that he lost as a result of the unlawful suspensions. Such retroactive salary

award shall include interest at the rate of ten (10) percent per annum.

4. Make Officer John Moseley whole for any other losses, such as benefits, seniority credit(s), leave credit(s), and reasonably expected overtime salary opportunities that he may have suffered as a result of the unlawful conduct by the Trustees of the California State University, its agents and representatives.

Dated: _____ TRUSTEES OF THE CALIFORNIA
STATE UNIVERSITY

By _____
Authorized Agent

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