STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	
Charging Party,	)	Case No. S-CE-238-S
v.	)	Request for Reconsideration PERB Decision No. 551-S
STATE OF CALIFORNIA, DEPARTMENT OF DEVELOPMENTAL SERVICES,	)	PERB Decision No. 551a-S
Respondent.	)	March 3, 1987

Appearances: William L. Williams, Jr., Attorney, Police Officers Research Association of California, for California Union of Safety Employees.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

HESSE, Chairperson: The Public Employment Relations Board (PERB or Board) initially decided this case in 1985, upholding the regional attorney's partial dismissal of the unfair practice charge filed by the California Union of Safety Employees (CAUSE) against the State of California, Department of Developmental Services (DDS).

CAUSE has asked that the Board reconsider the partial dismissal, pursuant to Regulation 32410, based on "newly discovered evidence." CAUSE alleges that at the hearing on the merits of the partial complaint (issued concurrently with the partial dismissal), evidence was presented that DDS administrators harbored anti-union animus toward one employee, a supervisor, which was then "transferred" to the rank-and-file

employees who filed the instant charge. This animosity then allegedly motivated DDS to become predisposed against these rank-and-file employees in disciplinary matters and investigations of possible wrongdoing.[1]

Regulation 32140[2] states, in pertinent part:

> The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

PERB's standard for "newly discovered evidence" was created for the situation where a hearing on the merits has been held. (San Joaquin Delta Community College District (1983) PERB Decision No. 261b.) Several inherent problems inhibit any attempt to adapt the "newly discovered evidence" standard of Regulation 32410 to a prehearing setting. At the prehearing stage of this Board's proceedings, the regional attorney's task is to discern whether allegations in a charge constitute a prima facie violation of the statutes we administer. (Regs. 32615, 32620, 32630.) In connection therewith, the regional attorney performs an investigatory function entailing the

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[1]The dissent indicates that the original decision was deficient when it incorrectly analyzed the interference nature of the charge. As the charging party did not request reconsideration of the interference allegation, we see no need to overturn what we perceive to be a correct disposition of the case.

[2]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

solicitation of facts from the parties for the limited purpose of determining if a prima facie case has been alleged. The regional attorney, however, does not perform an adjudicatory role of making evidentiary determinations with respect to credibility, hearsay, or disputed issues of fact, nor does he otherwise weigh the evidence. The "newly discovered evidence" standard of Regulation 32410 appears to contemplate, however, the proffering of evidence, or more precisely, the failure to proffer evidence despite the exercise of reasonable diligence, within an adjudicatory setting. (San Joaquin Delta Community College District, supra; see also CCP secs. 657(4), 1008.) Thus, we do not consider the "newly discovered evidence" standard to be an appropriate grounds for reconsideration of this case.

Even assuming that we were to entertain a request for reconsideration on the basis of newly discovered evidence within a prehearing context, however, CAUSE'S request must fail in the instant case. This is because CAUSE does not now attempt to introduce material that is "newly discovered," the absence of which was fatal to establishing a prima facie case. CAUSE instead endeavors to introduce evidence in support of a discrimination allegation that we found lacked, and still lacks, the essential element of protected conduct on the part of the rank-and-file employees.

In its request, CAUSE argues that a hospital administrator's (Bamford Frankland) testimony evinced an

animosity toward a supervisor that was related to their divergent views on labor related matters, and that the administrator's testimony also showed anti-union animus transferred to the rank and file. The original charge itself, however, contained essentially the same allegation that hospital administrators orchestrated to rid DDS not only of the supervisor (George Cross), but also the rank-and-file employees. The original charge further alleged that the "ostensible reason" for the Department's desire to rid itself of "these other employees" (emphasis added) was the rank-and-file members' association and cooperation with the supervisor in his union activities. In our original deliberations we affirmed the regional attorney's dismissal of this allegation on the grounds that CAUSE was unable to allege protected conduct on the part of the rank-and-file employees and, therefore, the allegation was deficient under precedent of this Board. (Los Angeles Unified School District (1984) PERB Decision No. 412.) Thus, by its request, CAUSE does not introduce "newly discovered evidence," but rather, in effect, requests the Board to reconsider whether, as a matter of law, protected conduct is an essential prerequisite to finding a discrimination violation under SEERA. We do not choose to change our well-founded precedent, nor do we believe our regulations would permit, on reconsideration, such a change in our case law.[3]

[3]The Board will not grant reconsideration when the sole

A final problem with CAUSE'S request is that the testimony of DDS administrators referenced by CAUSE did not evince animosity toward Cross caused by his union activities, or otherwise show that anti-union animus was transferred to the rank-and-file. Rather, the testimony shows that Frankland was concerned about the supervisor's lack of leadership in failing to attend to numerous departmental problems.

We reject Cause's argument that this concern evinced anti-union animus, nor do we believe it appropriate (or possible) to infer animus from these statements and then to "transfer" that inference to the charging parties here.[4]

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ground for the request is a restatement of a legal argument already raised and rejected. (See Rio Hondo Community College District (1983) PERB Decision No. 279a; Morgan Hill Unified School District (1985) PERB Decision No. 554a; Riverside Unified School District (1986) PERB Decision No. 562a.

[4]The NLRB decisions relied upon by the dissent are inapposite insofar as all entailed examples of egregious conduct on the part of the employer that was strongly suggestive of anti-union animus. Further, none involved individualized decisions to terminate employment for just cause. With respect to Hedison Manufacturing Co. (1980) 249 NLRB 96; Howard Johnson Co. (1974) 209 NLRB 173; and R.E.A. Trucking Co. (1969) 176 NLRB 520, enforced R.E.A. Trucking Co., Inc. v. NLRB (9th Cir. 1971) 439 F.2d 1065, these cases all involved layoffs. Also, both Magnolia Manor Nursing Home, Inc. (1982) 260 NLRB 377, and Karl Kallman dba Love's Barbeque Restaurant, No. 62; Love's Enterprises, Inc. (1979) 245 NLRB 78, enf, sub, nom. Kallman v. NLRB (9th Cir. 1981) 640 F.2d 1094, involved actions taken by successor organizations against former employees of union-organized predecessor companies. Concerning the dissent's reliance on this Board's decision in Cupertino Union Elementary School District (1986) PERB Decision No. 572, in that decision we noted that "The group of employees selected for layoff had engaged in numerous protected activities. . . ." Also, like the NLRB decisions cited by the dissent, Cupertino did not involve individualized decisions to terminate employment for just cause, but instead dealt with a layoff targeted at an entire unit.

ORDER

For the above reasons, the Public Employment Relations Board DENIES the Request for Reconsideration of PERB Decision No. 551.

Member Porter joined in this Decision.

Member Burt's dissent begins on page 7.

BURT, Member, dissenting: Unlike the majority, I would grant the motion for reconsideration and find that CAUSE has stated a prima facie violation of the Act in its allegations relating to the disciplinary action taken against the non-supervisory employees of the Protective Services Department at Stockton Developmental Center (Stockton).

CAUSE alleged that DDS had unlawfully retaliated against the six employees in the Protective Services Department (Protective Services) at Stockton. The employees were George Cross, a Hospital Police Officer II and the supervisor of Protective Services until December 1983, and his five subordinates in that department, Officers Steven Pimentel,[1] Jerry Lee, Bruce Jernigan, James Dull and Maria Rocero, all Hospital Police Officers I (HPO I). All were terminated in part because of alleged dishonesty in filling out time sheets.

Cross and Pimentel had both been active in CAUSE and had helped organize a CAUSE affiliate, the Hospital Police Association of California (H-PAC) in 1980. All the other officers in the Protective Services Department at Stockton had joined H-PAC in October 1980. Cross and Pimentel were officers

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[1]A complaint issued on the allegations concerning Steven Pimentel, and his case went to a full evidentiary hearing in which DDS and Stockton officials and employees testified. Testimony in his case constitutes the "newly discovered evidence" relied on by CAUSE in its request for reconsideration, but Pimentel's case, as such, is not addressed here.

in H-PAC and openly lobbied heavily for CAUSE-sponsored legislation that would have transferred authority over the protective service officers at the hospitals from DDS and the hospital administration chain of command to the State Police. This legislation was strongly, if not always openly, opposed by DDS. Cross and Pimentel had also been involved in efforts to get better training for the officers and in various grievances and disputes with the Stockton administration prior to and during the early 1980s.

The original charge first outlined the union activities of Cross and Pimentel and then alleged animosity towards and harassment of Cross for those activities by DDS and various DDS officials, including Douglas Van Meter and Ray Diaz, Stockton Executive Director and Assistant Hospital Administrator, respectively, and, as their agent, Special Investigator Debbie Neri. The charge contained hearsay allegations that DDS intended to fire the non-supervisory employees for their "association" and "cooperation" with Cross and Pimentel and that DDS "did not have anything on these employees but just wanted to clean house." The non-supervisory employees were said to have "expressed their loyalty" and done "numerous things to accommodate the organizational activities" of Cross and Pimentel. Further, the charge alleged that DDS's discipline of the six employees was in retaliation for their "direct, indirect, and/or peripheral involvement in Union

activities". The regional attorney dismissed the discrimination charge based on DDS' discipline of Cross because the majority of the protected activities he had engaged in had taken place while he was a supervisor and not a member of the bargaining unit, which included only HPO I's.

The regional attorney then indicated that if facts were presented from which it could reasonably be inferred that the discipline of Cross adversely affected the exercise of rights by the non-supervisory employees, a violation of section 3519(b) (interference) could be found. Since no such facts were forthcoming, this allegation was also dismissed. I do not disagree with the dismissal of these charges.

I disagree, however, with the dismissal of discrimination and interference charges based on the discipline of Jernigan, Dull, Lee & Rocero. The regional attorney dismissed these charges on the grounds that CAUSE failed to allege sufficient protected activity by those four non-supervisory employees to state a prima facie case of discriminatory treatment. Further, he stated that CAUSE had presented no evidence showing that the discipline of these employees had interfered with the exercise of rights by the employee organization and therefore dismissed the interference charge.

Charging Party now requests reconsideration of the dismissal of the above charges on the grounds of new evidence discovered in the hearing on Pimentel's case. CAUSE states

that during that hearing Bamford Frankland, a deputy director for DDS, expressed an animosity toward Cross that was related to their differing views on a number of labor relations matters and that, moreover, his testimony indicated that he transferred this animosity from Cross to the rank-and-file employees under Cross' supervision. Charging Party says that this transference of anti-union animus is supported by the testimony of Wayne Heine, a former labor relations officer for DDS.

The transcript of that hearing supports Charging Party's statements that DDS, and particularly the Stockton administration, disliked and distrusted Cross and that these feelings were carried over to his subordinates in the Protective Services Department. That Frankland and Van Meter were out to get Cross and his department is not unlikely. It is certainly arguable that the attitude toward Cross was, at least in part, connected to certain union activity he engaged in, especially lobbying for the CAUSE legislation. Frankland was candid about his negative feelings for Cross and admitted that this carried over to the non-supervisory employees. He admitted that he had discussed his opinions of Cross and his department with Van Meter prior to Van Meter's being hired and had told him to keep a close eye on Cross and his department.

Wayne Heine was a labor relations specialist with DDS who became involved in this matter rather late. He testified that he saw the evidence of timekeeping abuses that formed the basis

of the administration's case against all the Protective Services officers.[2] Heine apparently advised Van Meter and Frankland and they should go after Cross, because he was the supervisor who authorized or condoned the timekeeping procedures, but not land so heavily on the rank-and-filers. He apparently did not think there was a strong case against the latter, and also thought that Stockton should not indulge in a mass firing. He testified that Frankland and Van Meter decided that they had a good enough case against all of the officers and that, even though the officers were subordinates, they had knowingly engaged in the wrongful acts and were thus culpable. Thus, DDS went ahead with all the terminations.

Applicability of "Newly Discovered" Evidence Standard

While it is true that PERB has not previously addressed the specific issue of whether a request for reconsideration of a Board decision which affirmed a refusal to issue a complaint and dismissal of charges prior to a hearing may properly be based on newly discovered evidence, I have no difficulty accepting and considering such evidence in this case. Restricting the use of the newly discovered evidence standard

[2]The audit of the protective service records was not a model of efficiency or accuracy. They had to do the analysis of the time records twice because of flaws in the methodology and the results. About 35% of the charges were withdrawn the second time around. The investigation certainly appeared pretextual.

to post-hearing decisions contravenes the language of Regulation 32410 and the underlying purpose of the standard.

Regulation 32410 authorizes any party to "a decision of the Board itself" to request reconsideration of that decision on the grounds of newly discovered evidence. There can be no question either that PERB Decision No. 551-S is a "decision of the Board" or that the Regulation contains no language limiting reconsideration to post-hearing decisions. Thus, by the plain language of Regulation 32410, newly discovered evidence is a proper ground for reconsideration of PERB Decision No. 551-S.

Logic as well as language supports this reading of Regulation 32410. Whether a case is dismissed before or after a hearing on the merits is irrelevant to the effect of the dismissal; whenever it is ordered, it prevents a party from proceeding with his case. Since the effect is the same, the Board should not base a refusal to allow the introduction of newly discovered evidence on such a superficial distinction as the point during the course of litigation in which a dismissal occurs.

The validity of this conclusion is reinforced when one considers the underlying purpose of the newly discovered evidence standard. Permitting newly discovered evidence to be introduced prevents a meritorious case from being dismissed for lack of evidence that exists but was not previously discovered or presented. On the other hand, restricting the use of newly

discovered evidence prevents the disruption of the orderly course of litigation that results from allowing a previously-resolved case to be reopened, and also precludes a party from unfairly obtaining multiple bites of the apple. If anything, the newly discovered evidence standard should be applied more liberally to a pre-hearing dismissal than to a post-hearing dismissal, both because the disruption of the process will be less if the case is reopened prior to a hearing and also because the party has not even had one complete bite of the apple when charges are dismissed prior to a hearing.

While there is no PERB precedent on this matter, federal law is in accord with my view. Under the National Labor Relations Board (NLRB) Rules and Regulations, newly discovered evidence is properly introduced in a motion to reconsider a decision of the general counsel to affirm on appeal a regional director's refusal to issue a complaint – a situation similar to the one before us. See NLRB Rules and Regulations 102.19. I see no reason to follow a different course in the public sector.

As explained below, I also disagree with the majority that the evidence on which CAUSE bases its request for reconsideration fails to meet the standards set forth in Regulation 32410. Motivation is frequently difficult to ascertain, which is why inferences may be drawn from circumstantial evidence. The original charges certainly

alleged anti-union motivation by DDS, including a reference to Frankland. CAUSE was unable to present facts to support that allegation with direct evidence. However, because the usual discovery procedures used in judicial litigation, such as sworn depositions, are not available in PERB cases, this is not surprising. Nor do I find it fatal to its request for reconsideration.

Application to CAUSE Charges

I am concerned about how the charges were analyzed in the first instance, and the new evidence reinforces my concern. The original charge alleged an attempt by DDS to "clean house" by firing the entire Protective Services Department, all of whom were H-PAC members and who apparently constituted the complete H-PAC unit at Stockton. We originally dismissed the discrimination charges that were based on the discipline of the non-supervisory employees because CAUSE had not alleged sufficient protected activities on the part of those employees; i.e., union membership, cooperation with and accommodation of union activists in their activities were not deemed enough. In the context of an alleged mass firing of union members, however, I think that more than such membership, cooperation and accommodation is not necessary.

The focus of a discrimination complaint is the motivation of the employer. If there is evidence clearly showing that anti-union animus in fact motivated the employer to discipline a

group of employees, the degree of activism of the members of that group is, in my opinion, comparatively unimportant in itself.[3] Under the National Labor Relations Act, such allegations of "cleaning house" are found to be violations of the prohibition of discrimination, even absent identifiable protected activities, sometimes even absent union membership by the discriminatees. See Hedison Mfg. Co. (1980) 249 NLRB 96 [104 LRRM 1506]; Howard Johnson Co. (1974) 209 NLRB 173 [86 LRRM 1148]; R.E.A. Trucking Co. Inc. (1969) 176 NLRB 520 [72 LRRM 1444], enfd R.E.A. Trucking Co., Inc. v. NLRB (9th Cir.1971) 439 F.2d 1065 [76 LRRM 3018]; Magnolia Manor Nursing Home, Inc. (1982) 260 NLRB 377 [109 LRRM 1198]; Karl Kallmann d/b/a Love's Barbeque Restaurant, No. 62; Love's Enterprises, Inc. (1979) 245 NLRB 78 [102 LRRM 1546], enf. sub. nom. Kallman v. NLRB (9th Cir. 1981) 640 F.2d 1094 [107 LRRM 2011]; National Labor Relations Board v. J.G. Boswell Co. (9th Cir. 1943) 136 F.2d 585.[4]

In the case before us, although the original charges contained a general, conclusory statement that anti-union animus motivated the disciplinary action taken against the

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[3]In such a case, the protected activities and the employer's knowledge of them would be relevant primarily as additional circumstantial evidence supporting a finding of anti-union motivation.

[4]These cases involved situations with more clearcut union animus, but were also decided after hearings. The question before us is only whether a prima facie case has been stated sufficient to support issuance of a complaint.

non-supervisory employees, the only facts used to allege such support were hearsay — triple hearsay in one case — and as such were not reliable direct evidence. The newly-discovered evidence, however, fills out that picture. There was direct evidence that DDS and Cross, especially, had long-standing differences of opinion on labor related matters. There was direct evidence that Bamford Frankland disliked and distrusted Cross for reasons arguably related to those differences, and that this attitude was transferred to the non-supervisory employees working under Cross. There is also evidence indicating that the kind of discipline meted out to the non-supervisory employees was unjustified by their sins and also that the investigation was suspect both in results and in the way it was conducted. If Cross had not been a supervisor, a prima facie case of discrimination would have been stated for him, as it was for Pimentel.

Since an attempt to go after the whole department was alleged and there is evidence now that the administration's negative attitude toward Cross was extended to the rest of the department, I think a prima facie case of discrimination has been stated for the rank-and-file employees despite the lack of union activism on their part. This would be consistent with our recent decision in Cupertino Union Elementary School District (1986) PERB Decision No. 572. There, PERB indicated that the gravamen of the charge was that a layoff

discriminatorily targeted a group of employees that included union activists. We said at p.6:

> Where an employer's decision to lay off a group of employees is unlawfully motivated by the union activism of some members of the group, the layoff is unlawful to the entire group.

The analysis of the interference charges is even more troublesome. A prima facie case of interference is established where a party shows the employer's conduct tends to or does result in some harm to employee rights. Thus, potential harm (not actual harm) is sufficient. The regional attorney first refers to CAUSE'S failure to allege sufficient protected activity by the rank and file employees and thus finds no nexus between the discipline and their unionism. He then states: "In the same way, Charging Party has failed to present evidence which would show that the disciplining of these employees has interfered with the rights of the employee organization." (Emphasis added.) This analysis seems to require evidence of actual harm to state a prima facie case. In my view, this is incorrect as a matter of law.[5] CAUSE'S allegations that DDS fired the entire Protective Services Department — who were loyal to and "accommodated" the principal union organizers — because of anti-union animus describes the kind

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[5]The Board may raise an issue sua sponte to avoid a serious error of law. See, e.g., Fresno Unified School District (1982) PERB Decision No. 208.

of conduct which, if proven, tends to harm the employee organization. The chilling effect on union membership that results from a mass firing of union adherents would fit that criteria without more.

Since all that is at issue is whether a prima facie case has been alleged, I find the above sufficient reason to grant reconsideration and reverse the dismissal of both the allegations related to the discipline of the non-supervisory employees.