

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,)	
)	
Charging Party,)	
)	
v.)	
)	Case No. SF-CE-129-77/78
LOS GATOS JOINT UNION HIGH SCHOOL DISTRICT,)	
)	PERB Decision No. 120
)	
Respondent.)	
)	March 21, 1980

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 715; Richard J. Loftus, Jr., Attorney (Paterson & Taggart) for Los Gatos Joint Union High School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter Board) on an appeal by the Los Gatos Joint Union High School District (hereafter District) to the attached hearing officer's proposed decision finding that the District violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA) and to his proposed remedy.¹

¹The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

Section 3543.5 provides:

It shall be unlawful for a public school employer to:

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

The Board has considered the charge and the hearing officer's proposed decision in light of the District's exceptions and the entire record in this case. We affirm the hearing officer's findings of fact, discussion, and conclusions of law, based on the credibility determinations he made, and affirm his holding that the District committed an unfair practice in violation of EERA section 3543.5(a).²

We decline, however, to adopt the hearing officer's proposed remedy.

REMEDY

The hearing officer proposed an order that the District:

Make Jeffrey Grice whole for the salary he would have earned but for the discriminatory refusal to employ him on the summer custodial crew, as well as for amounts he would have earned in subsequent substitute positions for which he was eligible at Saratoga High School, together with interest thereon at the rate of seven percent per annum, less any amounts earned by Mr. Grice in mitigation.

²The hearing officer's decision analyzed the alleged unfair practice in terms of our decision in San Dieguito Unified School District (9/2/77) EERB Decision No. 22, the applicable Board precedent at the time his proposed decision issued. We note that the San Dieguito analysis of section 3543.5(a) violations has been modified, and that the applicable Board precedent for determining whether a section 3543.5(a) violation has been committed is Carlsbad Unified School District (1/30/79) PERB Decision No. 89. Therefore, our affirmance of the hearing officer's proposed decision does not include affirmance of the San Dieguito case, and we indicate that Carlsbad is the controlling precedent.

We agree with this remedy insofar as it pertains to the amounts Mr. Grice would have earned during the summer and fall semester of 1977. (Gov. Code sec. 3541.5(c). See also, e.g., San Francisco Community College District (10/12/79) PERB Decision No. 103 at 26-29; San Mateo County Community College District (6/8/79) PERB Decision No. 94 at 26-27.) The record indicates that Mr. Grice was a satisfactory employee, and that the District attempted to contact him by phone for fall employment. Had Mr. Grice been selected for the summer custodial crew, the District would have had no problem contacting him to offer him fall employment as a substitute. Since it was the District's discriminatory conduct that prevented Mr. Grice from being on-site and readily available to accept a fall substitute slot, we believe the District had an obligation to take more than routine measures to offer reinstatement when a position was available. The dissent suggests that the District's attempt to phone Mr. Grice in its customary manner was reasonable under the circumstances of this case, relying, in part, on Mr. Grice's prior effort to solicit re-employment. Those efforts, however, were always unsuccessful, with no evidence that future employment was forthcoming. Mr. Grice's mere hope of a job should not be held against him, thereby relieving the employer of its continued obligation to remedy its wrongful conduct. As a general rule a victim of discriminatory conduct has no obligation to apply for

reinstatement to protect her or his right to recovery. See Abilities and Goodwill, Inc. (1979) 241 NLRB No. 5 [100 LRRM 1470]; Morristown Knitting Mills (1948) 80 NLRB 731 [23 LRRM 1138].³ In order to be effective, a proper and complete offer of reinstatement must either be received or must have been made in a manner reasonably calculated to give notice; and it must provide a reasonable opportunity for the affected employee to act before the offer is terminated. See, e.g., National Health Enterprises, Inc. (1975) 218 NLRB 259 [89 LRRM 1481]; Fredeman's Calcasieu Locks Shipyard, Inc. (1974) 208 NLRB 839 [85 LRRM 1202]. In this context the District's attempted but unsuccessful phone contact with Mr. Grice is inadequate to immunize the District from its liability to make Mr. Grice whole for the amount he would have earned had the District not by its discrimination prevented him from being readily available to accept full employment.⁴

³Comparable provisions of the federal Labor-Management Relations Act (LMRA), 29 U.S.C. 151, et seq., may be used to guide interpretation of EERA. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. (Prior to July 1, 1978, PERB was known as the Educational Employment Relations Board, or EERB.) Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

⁴We also note that the employee organization did not take exception to the hearing officer's conclusion that Mr. Grice was not unlawfully denied a permanent custodial position, or that reinstatement to a substitute post would not be an appropriate remedy. Absent such exceptions, we affirm the hearing officer's proposed order, except as modified herein.

But we do not find that the District is liable to make Mr. Grice whole indefinitely. There is no evidence in the record to show that Mr. Grice specifically lost other chances at substitute employment after the fall of 1977, nor is there evidence that fall substitutes were automatically or even probably hired for later terms. Accordingly the District's liability to make Mr. Grice whole will not extend beyond the fall semester of 1977. (Phelps Dodge v. NLRB (1941) 313 U.S. 177, 199 n. 7 [8 LRRM 439, 448]; Anaconda Aluminum Company (1966) 160 NLRB 35 [62 LRRM 1370].)

The dissent argues that the District's liability should not extend beyond October 20, 1977, when Mr. Grice failed to appear for an interview as a permanent employee with the District. The dissent reasons that Mr. Grice's failure to appear constituted a rejection of any future work with the employer. This reasoning is incorrect. The District had a duty to reinstate Mr. Grice to his old position, not just to offer him a chance to interview for a new job. Moreover, the interview date was set by the District without any input from Mr. Grice. Mr. Grice had in the meantime obtained other full-time employment. His recovery from the District will be offset from his earnings from that new job. We do not believe that Mr. Grice had to take time off from his new job to interview for a new permanent position with the District in order to protect his right to recover from the District the

money he would have earned had the District not discriminatorily refused to rehire him as a substitute custodian. We do not need to and do not decide whether Grice would have had an obligation to arrange for a mutually convenient interview for a permanent position if he had not already accepted other employment.

The Board also finds it appropriate to require that notice of its order be posted. (Cf. NLRB.v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].) A posting requirement is consistent with the fact that Mr. Grice was an active and open member of the employee organization, including service as an election observer for his union, and other employees should be officially made aware of the District's discriminatory conduct arising out of his union participation, and of PERB's readiness to remedy such discrimination.

As the hearing officer proposed, PERB will retain jurisdiction over this case to resolve any questions arising concerning the amount owed to Mr. Grice pursuant to this Decision and Order.

ORDER

Upon the foregoing Decision and the entire record in this case the Public Employment Relations Board hereby ORDERS as follows:

The Los Gatos Joint Union High School District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing reprisals on, discriminating against, or otherwise interfering with employees because of their exercise of rights under the Educational Employment Relations Act.

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

1. Make Jeffrey Grice whole for the salary he would have earned but for the discriminatory refusal to employ him on the custodial crew, at Saratoga High School during the summer and fall, 1977 terms, together with interest thereon at the rate of 7 percent per annum, this amount to be offset by Grice's earnings as a result of other employment in this period.

2. Afford Mr. Grice equal opportunity to be selected for future substitute custodial openings at Saratoga High School, or for other substitute or permanent positions in the District for which he is qualified, without regard to his organizational membership or activities.

3. Post at all school sites and all other work locations where notices to classified employees are customarily posted copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of thirty (30) consecutive days from receipt thereof. Reasonable steps should be taken to insure that said Notice is not altered, defaced or covered by any other material.

4. Notify the San Francisco regional director of the Public Employment Relations Board, in writing, within thirty (30) days from the date of this Decision, of what steps the District has taken to comply herewith.

BY: Barbara D. Moore, Member

Harry Gluck, Chairperson

Member Raymond J. Gonzales' concurrence and dissent begins on page 10.

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 No. SF-CE-129-77/78, in which all parties had the right to participate, it has been found that the Los Gatos Joint Union High School District violated the Educational Employment Relations Act by discriminatorily refusing to rehire an employee because of his exercise of rights guaranteed by the EERA. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

Cease and desist from discriminating against employees because of their exercise of their right to join or not join an employee organization and to participate in the activities of an employee organization.

WE WILL make whole Jeffrey Grice in the amount he would have earned as a summer and fall, 1977, custodial employee but for our discrimination against him.

LOS GATOS JOINT UNION HIGH SCHOOL DISTRICT

By: Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Raymond J. Gonzales, Member, concurring in part and dissenting in part.¹

I concur in the decision of the majority that the District committed an unfair practice when it refused to reemploy Jeffrey Grice following his return from his two week military encampment. I cannot, however, concur in the remedy ordered by the majority.

I do not agree with the majority on the duty imposed on the District to take extraordinary measures to contact Grice to offer him re-employment, which would operate to limit its back pay liability. The majority believes that "the District had an obligation to take more than routine measures to offer reinstatement when a position was available," but fails to define what constitutes "more than routine measures." I believe that the District should be required only to take reasonable measures to contact Mr. Grice to offer him re-employment as a substitute, and that the District's attempts

¹I point out that the majority has employed the unusual procedure of altering the text of its original signed decision in response to my draft. Thus, it should be noted that my dissent, which I prepared and submitted only after being notified that the most recent majority draft was complete with both majority signatures, is based on a final majority decision which differs from the one being used. In its new version, the majority has included new rationale and case authority.

Since my dissent failed to influence the majority to change its position but only prompted it to "beef up" its arguments, I will allow my own opinion to remain unchanged rather than further delay issuance of this decision.

to contact him by telephone were reasonable under the circumstances. Therefore, I would limit the back-pay order from the date of Grice's termination until the date of the District's first phone call, August 25, offering reemployment, less any income earned by Grice in mitigation.

The facts in this case indicate that Grice believed that he had the possibility of being reemployed by the School District. His conduct speaks for itself. Between June 25 and July 25 Grice spoke with his former supervisor, Mr. Morgan, four times regarding future employment with the District. On July 26 Grice spoke with Operations and Maintenance Supervisor Russell seeking employment. Grice testified that he spoke with the night lead custodian at Los Gatos High School approximately once a week between July and October about being reemployed. Indeed, after June 26 Grice checked with the District approximately once every two weeks to secure reemployment. Grice testified at the hearing in this case that he thought he could "get back with the District since he enjoyed working for them and had no complaints against them."

Thus, while we have found that Grice was not reemployed on June 26 for union-related reasons, Grice evidently believed he could still obtain employment in the District. In other words, he did not behave like an employee who believed it was futile to continue to seek substitute employment because of his union activities. On the contrary, he actively sought employment,

regularly and continuously in the weeks following his June 26th conversation with Morgan. Under these circumstances, it seems manifestly reasonable that the District could attempt to contact Grice through its customary procedure of telephoning employees on the substitute list who have indicated they were seeking substitute employment. Grice had submitted a telephone number to the District where he could be reached, and although he was still requesting employment, did not inform the District of any changes in how he might be contacted.

Testimony by a secretary in the office of operations supervisor Russell indicated that, at the supervisor's direction, she attempted to telephone Grice two or three times during three consecutive weeks in late August to tell him to report for work. These efforts were unsuccessful. This testimony further indicates that this repeated telephoning was not the District's usual practice, but rather was an extra effort to contact Grice. Under the specific facts of this case, therefore, the District's conduct was reasonable; a telephone call, or a series of telephone calls, is sufficient effort to contact Grice and thereby bring an end to the District's back pay liability.

A further indication that Grice had not abandoned the thought of working for the District was that on October 4, 1977, approximately fourteen weeks after returning from summer encampment, he applied for a permanent custodial position with

the District. An employee in the District Personnel Office, on October 18, successfully contacted all applicants for the open position, save only Grice, to interview on October 20. The next day, October 19, the Personnel Office left a message at Grice's home that an interview for the position had been set-up for the following day. Grice testified that he received the message. However, he did not attend the interview; nor did he telephone the district and seek to reschedule the interview. The conclusion is inescapable that Grice consciously chose to remain in the job he had already obtained and not apply for the District job. Also, while evidence in the record indicates that the district had, in the past, recalled some summer substitute custodians for fall employment, there is no indication that all summer substitute custodians or even a majority were offered full-time employment in the fall. Nor was there evidence that Grice, if employed in the summer, would have received fall employment. I especially disagree with the remedy ordered by the majority to the extent it orders back pay for the period after October 19th. The conclusion is inescapable that Grice consciously chose to remain in another job he had already obtained and not interview for the job with the District. Under these circumstances, it seems absurd and inequitable to award Grice back pay for a job he elected not to apply for.

Raymond J. Gonzales, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 715,)	
)	
Charging Party,)	
)	UNFAIR PRACTICE
)	Case No. SF-CE-129-77/78
v.)	
)	PROPOSED DECISION
)	(6-22-78)
LOS GATOS JOINT UNION HIGH SCHOOL)	
DISTRICT,)	
)	
Respondent.)	
)	

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for Service Employees International Union, Local 715; Richard J. Loftus, Jr., Attorney (Paterson and Taggart) for Los Gatos Joint Union High School District.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On July 22, 1977, Service Employees International Union, Local 715 (hereafter SEIU), filed an unfair practice charge against the Los Gatos Joint Union High School District (hereafter District) alleging a violation of Government Code section 3543.5(a)¹ in that the District terminated the employment of

¹Government Code section 3543.5 provides in pertinent part:

It shall be unlawful for a public school employer to:

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

All statutory references are to the Government Code unless otherwise stated.

Jeffrey Grice, a substitute custodian, and refused to reemploy him because of his membership in and activities on behalf of SEIU and because he gave testimony at a Public Employment Relations Board (hereafter PERB)² hearing.

In its answer to the charge, filed August 26, 1977, the District denied that it terminated Mr. Grice's employment or that it discriminated against him in violation of the Educational Employment Relations Act (hereafter EERA).³

The District also filed a motion to dismiss the charge for failure to comply with California Administrative Code, title 8, section 35004, which provides in pertinent part that an unfair practice charge shall be signed by the party or its agent and must include a statement of whether there is an agreement between the parties.

At SEIU's request, no informal conference was held. A formal hearing was held on October 31, 1977 before this hearing officer at the District offices in Los Gatos, California.

At the hearing, the District's motion to dismiss was renewed. SEIU was permitted to amend the charge to add the sentence, "There is not now any agreement between the employer and any employee organization." The motion to dismiss then was denied on the grounds that the District was not prejudiced by the

²Previously Educational Employment Relations Board. Renamed on January 1, 1978.

³Government Code section 3540 et seq.

amendment (Cal. Admin. Code, tit. 8, sec. 35012(b)), and that the original charge filed with the PERB in fact was properly signed.

ISSUE

Did the District unlawfully terminate the employment of Jeffrey Grice and fail to reemploy him because he exercised rights guaranteed to him by the EERA, in violation of Government Code section 3543.5(a)?

FINDINGS OF FACT

At the hearing, by stipulation, the hearing officer took official notice of the transcript, exhibits, and final decision in Los Gatos Joint Union High School District (October 25, 1977) HO-R-36 (Case No. SF-R-23). Thus, the following findings are based upon the records in both the present and previous cases.

Mr. Grice was employed by the District in mid-November 1976 as a substitute custodian at Saratoga High School to replace Dale Myers, who was on leave because of an injury. Mr. Myers was a year-round permanent custodian. At the time of the present hearing Mr. Myers was still on disability leave.

Mr. Grice worked continuously as a substitute custodian between November 1976 and June 1977 with the exception of approximately 20 days missed because of illnesses. Mr. Grice's

work performance during this period was described as "adequate" by Dave Morgan, then the day lead custodian at Saratoga High School, and as "good" by Bill Russell, then the district operations supervisor. Mr. Morgan testified that there was no basis for terminating Mr. Grice because of his work performance, but on cross-examination refused to characterize Mr. Grice's performance as "acceptable."

Mr. Russell was one of the original members of SEIU when it was formed about six years ago. He dropped out after about six months because he was a supervisor and sensed that he was inhibiting others who worked under him from expressing their opinions at SEIU meetings.

Mr. Grice became an SEIU member in February or March of 1977. Among the custodians at Saratoga High School, Mr. Grice was the only one who was a member of SEIU. Most of the others belonged to California School Employees Association (CSEA). The two other substitute custodians were unaffiliated. Mr. Grice was not an organizer or otherwise unusually active in organizational affairs.

David Bowers, a permanent custodian at Saratoga, resigned in early January 1977 to go to college, but no permanent opening was announced for Mr. Bowers' vacated position until the end of May 1977, after the classified representation election in the District. Mr. Morgan had told Mr. Grice that no permanent custodian positions would be filled at Saratoga until after this representation election. During this time, there were some

permanent custodial positions at Saratoga High School which were filled by substitutes. Mr. Morgan testified that he would have liked the positions filled with permanent employees.

This representation election was conducted by the PERB on May 5, 1977 in a unit of approximately 90 classified employees. Mr. Grice voted a ballot which was challenged by the District and CSEA. His ballot affected the outcome of the election and as a result, a hearing was held by the PERB on June 2, 1977 to determine Mr. Grice's eligibility to vote. Mr. Grice testified at the hearing on behalf of SEIU. Mr. Morgan was called as a witness by CSEA. The District was not a very active participant in the hearing. The District did not take a position on Mr. Grice's eligibility to vote, did not present any witnesses and did not file a brief, indicating that the District administration did not have an interest in the outcome.

Meanwhile, Val Hill, another substitute custodian, was selected on June 1 for Mr. Bowers' vacant position. Mr. Hill had been a substitute custodian for two to three years, longer than Mr. Grice.

The regular school term ended with graduation on June 10. Mr. Grice went on a military leave of absence from June 10 through 26, 1977. Mr. Morgan approved this leave in the end of April and informed Mr. Russell.

The maintenance program in the summer is different than in the regular school year. Different functions, such as refinishing floors, are performed. A few days prior to going on leave,

Mr. Grice talked with Mr. Morgan about the work to be done during the summer in Mr. Grice's assigned work area.

When Mr. Grice returned from military duty on June 26, he telephoned his supervisor, Mr. Morgan, who told Mr. Grice that he was passing on word from the District that his services would no longer be needed and that he should seek other employment. Mr. Grice testified and it is found that Mr. Morgan told him that between the two of them, his involvement with SEIU and the election were probably the reason for his non-employment. Mr. Morgan denied saying this to Mr. Grice.

Some custodians are employed on a 12-month basis, others 10 months, and some during the summers only. Both prior to June 9, during the regular school term, and after June 26, during the summer, there were nine and one-half custodian positions at Saratoga High School. However, the summer crew included at least two students and a weekend custodian all who had worked part-time during the regular school year. Employment commitments were made by Mr. Morgan to these individuals between April and early June, prior to Mr. Grice's military leave.

When asked why Mr. Grice was not chosen for the summer school crew, Mr. Morgan replied:

"I really don't know. It wasn't a designed planned thing. I don't, you know, at that time there was no particular reason to document anything so I haven't. You know, sub help is sub help."

Mr. Morgan also testified that:

"It's mostly just having enough bodies to be able to do the job."

As a practical matter, Mr. Morgan himself was responsible for not using Mr. Grice during the summer. Prior to leaving on his vacation, Mr. Russell, the operations supervisor, merely checked with Mr. Morgan to make sure that he had all summer positions filled. Mr. Grice's name was not mentioned in the conversation. Mr. Russell's vacation was from June 11 through July 11, 1977.

In August 1977, Mr. Russell instructed his clerk to telephone Mr. Grice for substitute custodial work in the fall. The clerk called during the day on two occasions but did not reach Mr. Grice.

No evidence was presented as to the makeup or selection of the regular custodial crew at Saratoga High School in the 1977-1978 school term. However, a few weeks prior to this hearing, Mr. Morgan obtained a substitute custodian from Los Gatos High School. When asked why Mr. Grice was not chosen instead, Mr. Morgan testified that he did not have his telephone number.

On October 4, 1977, Mr. Grice filed an application for a permanent custodial position in the District. On October 19 the District personnel department left a telephone message at Mr. Grice's home that an interview was scheduled for 8 a.m. on October 20, the next morning, for the permanent position. Mr. Grice testified that he was unable to keep this appointment because he had recently obtained new employment. He did not call the District to try to reschedule the interview.

At the close of his employment with the District in June 1977, Mr. Grice's salary was \$3.38 per hour. After searching for

employment, he obtained new employment as an apprentice mechanic on October 6, 1977 at a rate of \$3.00 per hour.⁴

Mr. Grice's name remains on a District list of eligible substitute custodians.

DISCUSSION AND CONCLUSIONS OF LAW

To find a violation of section 3543.5(a), the charging party must prove by a preponderance of the evidence that the District's failure to employ Mr. Grice after June 26, 1977, was with the intent to discriminate or impose reprisals against him because of his exercise of rights guaranteed by the EERA, or that the District's actions had this natural and probable consequence. San Dieguito Union High School District (9/22/77) EERB Decision No. 22; California Administrative Code, title 8, section 35027.

The evidence demonstrates that Mr. Morgan himself was responsible for not using Mr. Grice during the summer. He alone determined the makeup of the summer crew. Mr. Russell was on

⁴The District offered evidence of unemployment compensation received by Mr. Grice in mitigation of a possible back pay award. SEIU objected. The hearing officer reserved ruling until argument in the post-hearing briefs. The objection is hereby sustained and the proffered evidence rejected on the basis of the following authorities: Billeter v. Posell (1949) 94 C.A. 2d 858, 211 P.2d 621; NLRB v. Gullett Gin Co. (1951) 340 U.S. 361 [27 LRRM 2230]; Winn-Dixie Stores, Inc. v. NLRB (5th Cir. 1969) 413 F.2d 1008 [71 LRRM 3003.]

vacation when Mr. Grice returned from leave and did not discuss Mr. Grice's continued employment with Mr. Morgan before he left on vacation. Further, the facts that Mr. Russell was an original SEIU member and that the District did not take a position or otherwise actively participate in the challenged ballot hearing, indicate to the hearing officer that no discriminatory motive existed on the part of Mr. Russell or his superiors in the District. Therefore, our inquiry must focus on Mr. Morgan.

Mr. Morgan is an agent of the District for purposes of finding a violation of section 3543.5(a). The District is responsible for Mr. Morgan's actions taken within the scope of his general authority even if the District may have had no actual knowledge of his activities. National Paper Co. (1953) 102 NLRB 1569 [31 LRRM 1469]; Longshoremen's Union (1948) 79 NLRB 1487 [23 LRRM 1001]. Mr. Morgan made the statement admitting discriminatory motive and was entrusted by the District with selecting the summer custodial crew at Saratoga High School. Having delegated this important responsibility to Mr. Morgan, the District must be responsible for his actions in carrying it out, including any unfair practices which he may have committed.

The facts in this case raise an initial suspicion of improper action by Mr. Morgan. Mr. Grice apparently was a satisfactory employee, filling the position of an absent 12-month custodian. But upon return from his two week military reserve commitment, he was told by Mr. Morgan, without prior warning, that his services were no longer needed.

For the reasons which follow, the hearing officer finds Mr. Morgan's testimony to be inconsistent and unreliable in critical areas.

Mr. Morgan testified that he did not know why permanent custodial positions at Saratoga High School had not been filled prior to the representation election, nor did he remember testifying at the challenged ballot hearing that he told Mr. Grice the reason was that the District did not want to influence the outcome of the election. But Peter Gautschi, the SEIU field representative, testified that he was present during Mr. Morgan's prior testimony and Mr. Morgan in fact did so testify.⁵ Mr. Grice also testified that Mr. Morgan told him no permanent positions would be filled until after the election. Moreover, it is unlikely that Mr. Morgan would not know the reason for not filling open permanent positions since he testified that he was interested in filling the positions with permanent rather than substitute employees.

Mr. Morgan also testified that when Mr. Grice left on military leave, there was no reason to know one way or the other whether his employment would continue upon his return. But Mr. Morgan's other testimony on this point is inconsistent. He did testify at first that not all arrangements for the summer were complete when Mr. Grice left on military leave. But Mr. Morgan

⁵For reasons which need not be elaborated here, there is no available transcript of Mr. Morgan's previous testimony in the challenged ballot hearing.

subsequently testified that he had completed arrangements for the summer crew by early June. Mr. Russell confirmed the latter when he testified that he talked to Mr. Morgan before leaving for his vacation on June 11 and Mr. Morgan told him all summer positions were filled.

Thus, although Mr. Morgan denied telling Mr. Grice that his non-employment stemmed from his involvement with SEIU and the election, because his testimony is inconsistent and refuted by others, the hearing officer credits Mr. Grice's version and finds that Mr. Morgan did make the disputed statement.

Mr. Morgan's statement to Mr. Grice is evidence of anti-organizational bias attributable to the District. Under the circumstances, as a practical matter the burden shifts to the District to prove a legitimate and substantial business necessity for Mr. Grice's non-reemployment or to introduce other evidence which would tend to refute the evidence of improper motivation contained in Mr. Morgan's statement.⁶

⁶Given the action by the District affecting Mr. Grice's employment status, and having established that such action was discriminatorily motivated, SEIU has made out a prima facie case for violation of section 3543.5(a) under San Dieguito, supra, (9/2/77) EERB Decision No. 22. Under the Labor Management Relations Act, as amended (29 U.S.C. §151 et seq., hereafter LMRA), pursuant to the Supreme Court's decision in NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465], if anti-union motivation is shown, even if the employer proves a legitimate and substantial business justification for its conduct it will be insufficient to exonerate the employer on the discrimination charge. It need not be decided in this case [footnote continued on next page.]

The only explanation offered by Mr. Morgan, who was responsible for not reemploying Mr. Grice, was that "sub help is sub help" and that "it's mostly just having enough bodies to be able to do the job."

On its face, Mr. Morgan's explanation hardly presents a case of business necessity. Rather, what Mr. Morgan means is that Mr. Grice could have performed adequately but simply just was not chosen. Instead of Mr. Grice who had worked full time during most of the school year, Mr. Morgan hired two persons for the summer crew who had worked only part-time during the school year, and also hired a third, Mr. Bowers, who had previously resigned a permanent position in order to go to college and who presumably would go back to college in the fall. Since Mr. Grice was replacing a twelve-month employee, it would have been expected that he, rather than someone else, continue to replace the absent employee through the summer.

[fn. 6, continuation.]

whether to superimpose the Great Dane standard on the PERB's San Dieguito test because, as discussed hereinafter, the District has not demonstrated a legitimate and substantial business justification for the failure to employ Mr. Grice during the summer.

Therefore, based on Mr. Morgan's admission of discriminatory motive, the lack of a substantial business justification for not reemploying Mr. Grice during the summer, and the discrediting of Mr. Morgan's testimony on the subjects of filling permanent positions and the time of the final arrangements for the summer custodial crew, it is found that Mr. Morgan failed to employ Mr. Grice for the summer custodial crew because of Mr. Grice's SEIU membership and his participation in the representation election and hearing.

With respect to the District's failure to hire Mr. Grice for the permanent position vacated by David Bowers, it is found that discrimination did not play a part. There is no evidence that the person selected, Mr. Hill, was not qualified or that Mr. Grice was better qualified. Mr. Hill had been working for the District longer than Mr. Grice. Moreover, it previously has been found that no discriminatory motive existed on the part of Mr. Russell or his superiors in the District. There is no evidence that Mr. Morgan participated in this hiring decision.

Events occurring in the fall of 1977 also do not evidence prohibited discrimination against Mr. Grice. In August 1977, Mr. Russell attempted to contact Mr. Grice for substitute work in the fall but could not reach him. Mr. Grice was scheduled for an interview for a permanent position in October 1977 but was unable to attend the interview because of the work hours of his newly-obtained job. He did not call the District to try to arrange a different time.

Although of little weight because of the obvious potential for the District to build a defense after the unfair practice charge was filed, these subsequent events nevertheless are consistent with the finding that Mr. Morgan alone, and not any higher District administrators, harbored a discriminatory motive.

SEIU also argues that the District violated California Military & Veterans Code section 395. This section essentially provides that a public employee on temporary military leave is entitled to be reinstated to a like position upon return, if such position exists. The District contends that Mr. Grice's substitute position ended at the close of the school year on June 9, 1977 and therefore he is not entitled to reinstatement under the provision. This question need not be addressed since even if a violation of section 395 occurred, it would not independently constitute an unfair labor practice under section 3543.5. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, at 11. This is not the appropriate forum for litigation of this issue. Discriminatory motivation or effect still has to be demonstrated to prove the existence of an unfair practice.

REMEDY

Section 3541.5(c) provides in pertinent part that in remedying an unfair practice, the PERB has the power:

" . . . to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

This section is similar to section 10(c) of the LMRA.

In this case it has been found that Mr. Grice was discriminatorily denied employment on the summer custodial crew at Saratoga High School. To remedy this violation, a back pay award in the amount he would have earned is appropriate. The evidence in the record shows that Mr. Grice unsuccessfully sought alternative work during this time. Thus, there is no mitigation of damages.

In addition, had Mr. Grice not been discriminatorily denied employment during the summer, it is likely that he would have been called for the substitute opening at Saratoga High School occurring a few weeks before the hearing, as well as any other subsequent openings at Saratoga High School filled by Mr. Morgan during the school year. Therefore, back pay will be awarded in an amount equivalent to the amounts earned by others selected by Mr. Morgan for those positions at Saratoga High School for which Mr. Grice was eligible. Amounts earned by Mr. Grice for the periods in question will be in mitigation of the award. Jurisdiction will be retained in case of a dispute as to the proper amounts owing to Mr. Grice.

As to future selection of substitute custodians for Saratoga High School, or for any other openings in the District, it will be ordered that Mr. Grice be given equal opportunity to receive such appointments without regard to his organizational membership or activities.

With respect to the District's failure to hire Mr. Grice for a permanent position, no discriminatory action has been shown. Thus, no back pay will be ordered in this respect nor is it appropriate to order the District to employ Mr. Grice in a permanent position.

With respect to the matter of interest on the back pay award, under section 10(c) of the LMRA, upon which section 3541.5(c) is patterned, the National Labor Relations Board customarily awards interest in similar circumstances. See, e.g., Isis Plumbing and Heating Co. (1962) 138 NLRB 716 [51 LRRM 1122]; Reserve Supply Corp. v. NLRB (2d Cir. 1963) 317 F.2d 785 [53 LRRM 2374].

Under California law, pursuant to Civil Code section 3287(a),⁷ school districts and other public employers have been ordered to pay interest on back pay awarded to employees. Mass v. Board of Education (1964) 61 C.2d 612, 39 Cal.Rptr. 739; Burgess v. Board of Education (1974) 41 Cal.App. 3d 571, 116 Cal.Rptr. 183; Sanders v. City of Los Angeles (1970) 3 C.3d 252, 90 Cal. Rptr. 169; see also Tripp v. Swoap (1976) 17 C.3d 671, 677-85, 131 Cal. Rptr. 789.

⁷Civil Code section 3287(a) provides:

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

In the Burgess case cited above, for example, the court awarded back pay plus interest to probationary teachers laid off in an administrative proceeding under former Education Code section 13447.⁸

Thus, although section 3541.5(c) does not expressly authorize interest on back pay awards, based on the above NLRB and state precedent, the hearing officer considers it appropriate to add interest at the legal rate to the back pay award.⁹

Lastly, the District will be ordered to post copies of this order. A posting requirement effectuates the purposes of the EERA in that it informs employees of the disposition of the charge and announces the District's readiness to comply with the ordered remedy.¹⁰ In Pandol & Sons v. ALRB (1978) 77 Cal.App.3d 822, 827, ___ Cal. Rptr. ___, the court upheld an unfair labor practice remedy under the Agricultural Labor Relations Act¹¹ which required the employer to post, mail and read a notice to employees.

⁸Reorganized Education Code sec. 44955.

⁹California Constitution, article XV, section 1 prescribes a rate of interest of seven percent per annum. Although the National Labor Relations Board imposes six percent interest (the current adjusted prime rate) on back pay awards (Florida Steel Corp. (1977) 231 NLRB #117 [96 LRRM 1070], the California legal rate is the appropriate one to be applied.

¹⁰Posting has been held to effectuate the purposes of the LMRA, as amended. Pennsylvania Greyhound Lines, Inc. (1935) 1 NLRB 1, [1 LRRM 303], enforced (1938) 393 U.S. 261 [2 LRRM 600]; NLRB v. Empress Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

¹¹Labor Code section 1140 et seq.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of the case, and pursuant to Government Code section 3541.5(c), it is hereby ordered as follows:

The Los Gatos Joint Union High School District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

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

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

1. Make Jeffrey Grice whole for the salary he would have earned but for the discriminatory refusal to employ him on the summer custodial crew, as well as for amounts he would have earned in subsequent substitute positions for which he was eligible at Saratoga High School, together with interest thereon at the rate of seven percent per annum, less any amounts earned by Mr. Grice in mitigation.

2. Afford Mr. Grice equal opportunity to be selected for future substitute custodial openings at Saratoga High School, or for other substitute or permanent positions in the District for which he is qualified, without regard to his organizational membership or activities.

3. Prepare and post a copy of this Proposed Order for twenty (20) calendar days at its headquarters office and in each school at a conspicuous location where notices to classified employees are customarily posted.

4. At the end of the posting period, notify the San Francisco Regional Director of the action it has taken to comply with this Proposed Order.

Jurisdiction is retained to resolve any questions arising as to the proper amounts owing to Mr. Grice pursuant to this Proposed Order.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final on July 17, 1978, unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this Proposed Decision. 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, sections 32300 and 32305 (as amended).

Dated: June 22, 1978

GERALD A. BECKER
Hearing Officer