STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| WILLIAM THOMAS MONSOOR, | ) | |
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| Charging Party, | ) | Case No. LA-CE-7-S |
| | ) | |
| v. | ) | PERB Decision No. 228-S |
| | ) | |
| STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES) | ) | July 28, 1982 |
| | ) | |
| Respondent. | ) | |
| | ) | |

Appearances: William Thomas Monsoor, appearing in pro per and Alfred M. Freitas, Attorney for William Thomas Monsoor; Barbara T. Stuart, Attorney (Department of Personnel Administration) for State of California.

Before Gluck, Chairperson; Jaeger and Jensen, Members.

## DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by Camarillo State Hospital, Department of Developmental Services, State of California (hereafter Respondent or the State) to the proposed decision of the hearing officer, which is incorporated by reference herein. In that proposed decision, the hearing officer found that Respondent violated subsection 3519(a) of the State Employer-Employee Relations Act (hereafter SEERA or

the Act)[1] by rejecting William Thomas Monsoor (hereafter Charging Party or Monsoor) from employment at the conclusion of his probationary period at Camarillo State Hospital (hereafter Camarillo). He dismissed the allegation that the State violated this subsection by evicting Monsoor from State-owned employee housing and retaining his possessions seized in the eviction for a period of time thereafter. Charging Party does not except to the dismissal of the allegations related to his eviction.

The Board has carefully reviewed the record in light of Respondent's exceptions and Charging Party's responses thereto, and affirms the hearing officer's findings of fact and conclusions of law only to the extent they are consistent with this decision.

## DISCUSSION

The only issue remaining for this Board to decide is

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[1]SEERA is codified at Goverment Code section 3512 et seq. All statutory references are to the Government Code unless otherwise specified. Subsection 3519(a) provides as follows:

> 3519. It shall be unlawful for the state to:
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> (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.

whether Respondent violated the Act by rejecting Monsoor from probation. As noted above, Monsoor did not except to the dismissal of his allegations regarding eviction and the related retention of his personal property. This determination requires the resolution of two discrete sub-issues, which will be dealt with in turn.

Protected Activity

The threshold issue is whether Monsoor engaged in any activity which is protected under section 3515. The second is whether Respondent was motivated to reject Monsoor from probation because of Monsoor's protected activity, or whether Respondent would have rejected him regardless of it.

Monsoor alleges that his activities in organizing tenant/employees residing in State-owned housing on the grounds at Camarillo constituted such protected activity. With respect to Monsoor's activity regarding housing issues, the hearing officer's findings of fact at pages 4-8 of the proposed decision are free of prejudicial error, and are adopted as those of the Board.[2]

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[2]We do not find that Monsoor made an effort to "change employment rules relating to new employee orientation and work assignments," (proposed decision, p. 8) by means other than unstructured and individualized complaints, and do not rely on the above-quoted finding by the hearing officer as a basis for our conclusion that Monsoor engaged in protected activity.

Protected activity under SEERA is defined by section 3515, the pertinent part of which sets forth the right of State employees to

> . . . form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

or to refrain from such activities. To find Monsoor's employee-tenant organizing to be protected activity, we must find that the aggregation of employee/tenants, which Monsoor sought to organize and in which he actively participated, constituted an "employee organization" and that it existed for the purpose of representation regarding a matter of employer-employee relations. The term "employee organization" is defined in subsection 3513(a), which provides that

> "Employee organization" means any organization which includes employees of the state and which has as one of its primary purposes representing such employees in their relations with the state.

Defining the nature of protected organizational activity under SEERA is a matter of first impression for this Board. Cases decided in the private sector provide guidance in determining whether the tenant organization involved here constituted a "labor organization," and whether the housing concerns involved were matters of employer-employee

relations.[3]

Camarillo's "Digest of Hospital Rules" provides that

> The Hospital Administrator administers a housing program based on the following criteria: (1) The need for certain employees to reside on the grounds to handle emergencies; (2) As an inducement in recruiting new employees.

The record indicates that the availability of on-grounds housing was held out to Monsoor as an inducement when he was recruited for employment at Camarillo. While employees are not required to live on the grounds (and, in fact, there is insufficient space in employee housing to accommodate them all) only employees may live there.

It is clear from the face of the State's own regulations that employee housing exists, in part, to attract employees to Camarillo. Such housing is an inducement due to its comparatively low cost and its proximity to the workplace (which translates into reduced commute costs). As such, it should be viewed like any other substantial fringe benefit.

Cases decided by the National Labor Relations Board (NLRB) and federal courts have focused on whether employers are privileged to unilaterally change conditions regarding company-provided housing or whether such matters constitute

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[3]It is proper for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters Local 1186 v. City of Vallejo (1974) 12 Cal.App.3d 608 [116 Cal. Rptr. 507].

conditions of employment and hence must be negotiated. It has been consistently held that company housing

> . . . is a subject in which employees have so great an interest in connection with their work that it should be a subject of bargaining between the employer and the representatives of the [employees].

NLRB v. Hart Cotton Mills, Inc. (4th Cir. 1951) 190 F.2d 964, [28 LRRM 2435 at 2441]. Where housing in the area was scarce and the employer provided housing at nominal rates near its plant, the NLRB noted that ". . . the privilege of living in a company-owned dwelling represents an 'emolument of value' . . ." in that it saved the employees transportation costs, and was thus a condition of employment. Lehigh Portland Cement Co. (1952) 101 NLRB 1010 [31 LRRM 1097], enf'd (4th Cir. 1953) Los F.2d 821 [32 LRRM 2463]. See also Granite-Ball-Groves, A Joint Venture (1979) 240 NLRB 1173 [100 LRRM 1442]. We need not decide, for purposes of this case, whether the housing concerns herein are within scope under SEERA.[4] Rather, we need only determine that they were within the much broader ambit of "employer-employee relations." Because on-grounds housing constitutes a substantial benefit

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[4]SEERA section 3516 defines the scope of representation as ". . . wages, hours, and other terms and conditions of employment."

(as evidenced by the State's admission that it is a recruiting inducement) we find that it directly affects the employment relationship and should therefore be properly considered a matter of employer-employee relations as contemplated by section 3515.

This Board has not, to date, been called upon to apply the term "employee organization" as defined in subsection 3513(a). Cases decided by the NLRB provide guidance in determining whether a given aggregation of employees constitutes a labor organization. That board has not required that groups be formally constituted, have formal membership requirements, hold regular meetings, have constitutions or by-laws, or in any other manner conform to the common definition of an "organization." Rather, the central focus has been whether the group has, as a central purpose, the representation of employees on employment-related matters. In Ohio Oil Company (1951) 92 NLRB 1597, [27 LRRM 1288], the NLRB found that two employees acting in concert to present greviances over cutbacks in overtime and attendant loss of job possibilities had constituted themselves a labor organization, because they had come together to represent unit employees concerning working conditions. Similarly, in J. P. Stevens & Co. (1959) 125 NLRB 1354, [45 LRRM 1255], an employee committee in the "doffers" shop that met to discuss actions employees should take

regarding wages and working conditions was found to be a labor organization, even though it lacked a formal structure. In accord is Arkay Packaging Corporation (1975) 221 NLRB 99 [90 LRRM 1728] in which a committee founded by employees to deal with management regarding working hours, overtime, lateness and absenteeism was held a statutory labor organization. As the administrative law judge noted in Arkay, with NLRB approval

> Board and court cases are legion holding that similar employer and shop committees are labor organizations under the [NLRA], even though they collect no dues, have no treasury, no constitution or by-laws, no membership requirements, or other indicia of the conventional labor organization. (Citations omitted.) Arkay, supra, at 105.

In reliance on the above cases and others cited by the hearing officer in the proposed decision, at pages 21-23, we find that it is unnecessary for a group of employees to have a formal structure, seek exclusivity, or be concerned with all aspects of the employment relationship in order to constitute a statutory labor organization.[5] While it was in its formative stages, had no formal structure, and pursued only concerns

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[5]Cases cited by Respondent are factually distinguishable. In Center for United Labor Action (1975) 219 NLRB 873 [85 LRRM 1485] the NLRB found the entity involved therein (CULA) not to be a statutory labor organization because it was not selected by employees to present or resolve their work-related complaints and because it did not exist, even in part, for the purpose of dealing with the employer. Rather,

related to employee housing, the tenant employee group in which Monsoor was active existed for the purpose of furthering the interests of employees by dealing with the employer on a matter of employer-employee relations.

Thus, because Monsoor formed, joined, and participated in the activities of that group, we find that he engaged in protected activity within the meaning of section 3515.

Discharge

We have reviewed the entire record in this case and affirm the hearing officer's findings of fact regarding Monsoor's rejection from probation only to the extent consistent herewith.

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CULA, as one aspect of its activities, merely aided unions in leafleting and picketing to further a stated goal of improving conditions for workers in general. Respondent's reliance on Northeastern University (1978) 235 NLRB 858, [98 LRRM 1347] is similarly misplaced. The ALJ in that case prefaced his discussion of "9to5" the entity involved therein, with the express caveat that the determination to whether it was a statutory labor organization was wholly inessential to the outcome of the case and was undertaken for background purposes only. He noted further that none of the parties contended that 9to5 was a labor organization. Citing CULA, supra, he then gratuitously expresses the dicta that 9to5 is not a statutory labor organization because it exists for the purpose of addressing amorphous, quasi-political issues in society at large, and not to represent particular employees vis-a-vis their particular employer regarding work-related matters.

Neither CULA nor Northeastern University persuade us as to the validity of Respondent's contention that the tenant group herein was not a section 3513(a) employee organization.

The hearing officer stated, at page 4, proposed decision, footnote 2, that

> The record in this matter is replete with conflicts in testimony between witnesses for Monsoor and witnesses for the Department. Unless specifically stated otherwise in this proposed decision, conflicts in testimony are left unresolved since the testimony in question is not, in the hearing officer's opinion, crucial to the decision, and it is therefore not relied upon.

Contrary to his stated intention, we find that the hearing officer failed to resolve conflicts in testimony which were "crucial to the decision." The findings of fact which follow are based upon resolution of crucial credibility conflicts which the Board has made based upon our reading of the transcript and the record as a whole.

Monsoor was employed as a probationary psychiatric technician at Camarillo from September 1, 1978 to February 16, 1979, at which time he was rejected from probation. His duties involved patient care and caretaking of emotionally disturbed adolescent and pre-adolescent male and female children.

His housing-related protected conduct has been summarized, supra. Uncontroverted record testimony indicates clearly that persons at all levels of Respondent's supervisory and administrative heirarchy, from first level supervisors through Executive Director Rust, had knowledge of these activities.

During his six-month probationary period, Monsoor had numerous work-related problems. We find the hearing officer's summary thereof to be free of prejudicial error, and adopt that summary, contained at pp. 8-12 of the proposed decision, as the findings of the Board.

Monsoor testified that, during a telephone conversation initiated by him on or about December 8, 1978, acting Director Mamie Davis threatened that he would not clear probation and would be terminated if he persisted in pressing his housing-related complaints. According to Monsoor, he responded that he would not desist from pursuing those concerns, and that she then hung up on him. He testified, further, that during early January of 1979 he was called to a meeting with John Foster (assistant program manager), Don Burns (program director) and Rocky Galgagno (nursing coordinator). The purpose of this meeting was to discuss with Monsoor the results of an investigation concerning alleged sexual misconduct by Monsoor.

According to Monsoor, he was told by Burns or Foster, during the course of that meeting, that pressure was being brought to bear upon program management by unnamed individuals in higher levels of management to reject Monsoor from probation in retaliation for his tenant activities. He was allegedly told that these lower-level managers did not want to reject him but that there was pressure to do so from "higher up." Also

according to his account, he was discouraged from filing a grievance over the investigative report because it would only "make matters worse." The next day, Monsoor was presented with a written counseling report, referred to at p. 12 of the proposed decision, and transferred to an all-male ward. According to his testimony, Burns again advised him not to file a grievance because it might just make matters worse.

Monsoor received three probationary reports during his tenure at Camarillo. The first covered the period of September and October of 1978. The second covered the period of November and December 1978. The third and final report covered the month of January 1979. The hearing officer's summary of the contents of those reports at pages 12-14 of the proposed decision, is free of prejudicial error and is adopted as the findings of the Board.

The record reflects that Monsoor was rated on his probationary reports by John Magallanes, a second-level supervisory psychiatric technician, who considered input from first-level supervisors and direct observation. Magallanes testified that he came to the decision to reject Monsoor from probation independently. Neither Rust, Burns, Foster, Davis, Personnel Officer JoAnne Newton, or any other person instructed him to recommend that Monsoor be rejected from probation, or attempted to influence him to so recommend. According to Magallanes, he based this decision upon his observation of

Monsoor's job-related problems and the reports of such problems relayed to him by others. After preparing the final probationary report, Magallanes had it reviewed by his program director, Donald Burns, who was the reviewing officer on Monsoor's reports. Then, because he had never rejected an employee before and wanted to be certain that the report was properly prepared and fully documented, he asked Executive Director Rust to review it. Rust did so and told Magallanes that it was sufficient. After double-checking the report with Burns and Rust, Magallanes informed Monsoor that he would be rejected on his final probation report and advised him that he could contact a union representative if he so desired.

Monsoor testified that, when Magallanes informed him that he would be rejected from probation, Magallanes also told him that Rust had instructed him not to reconsider the decision to reject him. He further testified that Magallanes told him that he would write down comments that would be favorable to Monsoor and that Monsoor could then successfully appeal to the State Personnel Board and be reinstated. Magallanes' testimony directly conflicts with Monsoor's in this regard.

Regarding the claim by Monsoor that Mamie Davis, acting director, threatened in early December of 1978 that he would be rejected from probation if he persisted in pressing housing-related complaints, Davis testifed that she was

contacted by Monsoor, and invited him to meet with her again regarding the regulations he wanted changed. Monsoor told her he had met with her once and didn't want to meet with her again. Davis denied that she told Monsoor not to pursue housing complaints, that he should not attempt to get others involved, or that he would be evicted from employee housing or fired if he didn't drop the matter.

Donald Burns, program director for the children's program in which Monsoor was employed, acted as reviewing officer on Monsoor's probationary reports. He was involved in determining what course of action should be taken regarding the allegations of sexual harassment made by a patient against Monsoor. After consultation with Personnel Officer JoAnne Newton, Burns determined that Monsoor should receive a written counseling and be transferred to an all-male ward. Burns met with Monsoor, Foster, and Galgano on January 2 and 3, and informed Monsoor of the written counseling and transfer. Burns testified that at no time during those meetings did he, Foster, or anyone else tell Monsoor that higher administration was pressuring them to reject Monsoor from probation in retaliation for his housing complaints. He further denies that he or anyone else told Monsoor that he should not file a grievance.

On about January 28, 1979, Burns became aware of the special incident report (proposed decision, p. 12) regarding Monsoor's failure to return the medication keys to the next

shift upon leaving the ward. He discussed this report and the earlier sexual misconduct report with Newton, and they jointly concluded that rejecting Monsoor from probation would be an appropriate course of conduct at that time. Either January 29 or 30, Burns reviewed the final probation report prepared by Magallanes, and approved the recommendation that Monsoor be rejected from probation. Burns had not contacted Magallanes regarding his consultation with Newton, nor in any other manner influence Magallanes' recommendation.

The testimony of Foster, assistant program manager, corroborates Burns' testimony to the effect that neither Foster, Burns nor anyone else told Monsoor that higher administration was pressuring them to reject him from probation due to his tenant activity, or that he should not file a grievance.

Newton's testimony corroborates that of Burns' regarding consultations relating to Monsoor's misconduct.

The hearing officer makes reference to a memo bearing the signature of I. H. Perkins to Jack Gallisdorfer, chief of hospital services at the State level, regarding follow-up of the investigation of alleged sexual harassment of a patient by Monsoor. That memo, dated January 23, 1979, indicates to Gallisdorfer that, as a result of his review of the investigation and follow-up, ". . . after intervention by the

Executive Director and myself a decision has been made to terminate Thomas Monsoor from his temporary appointment."

Perkins, the acting medical director, testified that he did not recall writing or signing that memorandum, and that in any event he did not become involved in or intervene with program management in any manner regarding Monsoor's rejection from probation.

Clinton Rust, the executive director of Camarillo, testified that he became aware of Monsoor's employment at Camarillo during the fall of 1978, after seeing his name in an employee newsletter. He was dismayed when he became aware of this because he had prior first-hand experience with Monsoor while he was personnel officer at Napa State Hospital in 1971. According to his testimony, it had been Rust's responsibility at that time to evict Monsoor from employee housing, which Monsoor had apparently obtained under false pretenses, while not employed at Napa. Rust recalled that Monsoor had been rejected by a hiring panel at Napa State Hospital on at least one occasion. Because of his prior adverse experience with Monsoor, Rust decided to engage in his own check of Monsoor's references. According to Rust's testimony, he was told that Monsoor had quit a job at Plainsfield School due to inability to get along with other counselors and that he had resigned from a CETA funded project a month before the project's conclusion. He was told by a contact at Sonoma State Hospital

that Monsoor had been employed there for a time and had left under unspecified "unfavorable circumstances."

Rust felt that Monsoor should have listed his prior employment at Sonoma State Hospital on his application and that his failure to do so reflected adversely on him. In light of all of the above factors, Rust concluded that Monsoor would not be a good State employee at some point during late fall of 1978. However, according to his testimony, he did not intervene or contact program management in an attempt to influence their decision regarding Monsoor. He felt that Monsoor would likely have job-related problems during his probationary period, and that program management would likely reject him on their own. Although his testimony was that he intended to intervene if it was not the decision of program management to reject Monsoor, it was not necessary for him to do so. His first involvement in Monsoor's rejection from probation was his review, at Magallanes' invitation, of Monsoor's probation report, which he approved.

Rust became aware of Monsoor's signature on a petition regarding housing issues during mid-December, following his check of Monsoor's references and after formulating his opinion that Monsoor would not make a good State employee. Upon seeing Monsoor's name, which was near the top of the list, he assumed that Monsoor may have been active in preparing the petition. He took no action in response to the housing petition.

Regarding the memo from Perkins to Gallisdorfer, referenced above, Rust testified that he did not become aware of it until after he reviewed Monsoor's rejection from probation prepared by Magallanes and signed the letter of rejection prepared by the Attorney General.

Monsoor appealed his rejection from probation to the State Personnel Board (SPB), which held a hearing on Monsoor's appeal on May 22, 1979, at which Monsoor testified on his own behalf. At the SPB hearing, Monsoor did not make reference to his tenant activity. He did not testify as to the threat allegedly made by Davis that he would be terminated if he persisted in his housing-related activities. He did not testify as to the alleged statement by Burns or Foster that higher administration had pressured them to terminate him because of his tenant activity. He did not present any evidence or himself testify to any reason why management harbored animus against him for organizing or for any other reason.

The SPB rejected Monsoor's appeal, finding that he was rejected due to his "defective performance."

As noted above, the hearing officer failed to render crucial credibility resolutions. The Board must thus render such resolutions without benefit of observation of the testimonial demeanor of the witnesses. Based upon a close and careful reading of the testimony in the case we find Monsoor's testimony to be internally inconsistent, exaggerated, coached,

and inherently incredible in certain instances.[6] We further note that his testimony is uncorroborated. Where his testimony conflicts with that of Respondent's witnesses in areas referred to below, we credit the internally consistent, inherently credible, and independently corroborated testimony of Respondent's witnesses.[7] Thus, we do not find that Davis

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[6]For example, Monsoor characterized his tenant conduct as "forming a union", "forming an organization", "participating in the activities of forming, you know, an employee organization", parroting statutory language and "buzz words" in a manner which was exaggerated and coached. At one point he testified that he was warned not to file a grievance over being counseled and transferred following the accusation of sexual harassment because it would only intensify higher management's desire to reject him from probation because of his tenant activism, and at another point indicated that the reason he was told not to file a grievance was because it was not a matter which fell within the grievance procedure.

His testimony regarding his conversation with Magallanes informing him of his rejection from probation is inherently incredible. He first stated that Magallanes initially told him that he could tear up the counseling reports which provided part of the documentation supporting the rejection from probation. Then, he stated that Magallanes told him that he should not tear up the counseling sheets. Instead, according to Monsoor, Magallanes told him to write down comments regarding the counseling, and that he (Magallanes) would sign those comments and add comments favorable to Monsoor.

Then, according to Monsoor, Magallanes told him that, with those comments attached, Monsoor would appeal his rejection to the SPB and would win his appeal.

[7]As an additional basis for discrediting Monsoor, we note his failure to raise the alleged expressions of threats or animus before the SPB. We recognize that the issues before the SPB were different, and that it would theoretically be possible for him to be successful in his SPB appeal by simply proving that the allegations of misconduct against him were without merit. Thus, it is possible that he chose not to raise the alleged threats and animus against him before the SPB for

threatened Monsoor with discharge if he persisted in his housing complaints. We further conclude that neither Foster, Burns nor any other management representative told Monsoor that higher administration was pressuring him to terminate Monsoor, or that if he filed a grievance it would make matters worse.

In sum, we find that, as noted above, Monsoor engaged in protected conduct and that the employer had knowledge thereof. We find further, however, that Monsoor engaged in numerous violations of working rules and evidenced poor judgment on numerous occasions during his six-month probationary period. At least two of these transgressions were of such a serious nature that incident reports regarding them reached high-level administrators of the hospital, including Executive Director Rust. One of these involved alleged sexual abuse of a patient, and the other involved failure to pass the medication room keys along to the next shift, resulting in a delay in receipt of necessary medicines by patients.

The hearing officer found that the discharge of Monsoor was not accomplished through ordinary channels. He based this finding solely on his determination that Rust involved himself

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tactical reasons. However, evidence of threats and animus would certainly have been helpful to him before the SPB because, if credited, it would have at least demonstrated bias on the part of the employer's witnesses. We find his failure to raise such evidence before the SPB renders his testimony regarding it, raised for the first time before PERB, somewhat suspect.

in the decision to terminate Monsoor, and that this involvement was in retaliation for Monsoor's housing-related protected conduct.

We conclude, on the contrary, that Magallanes came to an independent decision to reject Monsoor from probation, based entirely upon work-related factors. We find that neither Rust nor any other representative of management intervened in the formulation of this decision. It is quite likely that, had Magallanes not recommended that Monsoor be rejected from probation on or about January 28, 1979, either Burns, Newton, or Rust would have countermanded his decision and attempted to reject Monsoor. However, because Magallanes determined himself that Monsoor should be terminated, it became unnecessary for anyone to intervene.

In Novato Unified School District (4/30/82) PERB Decision No. 210, we clarified the test for violation of subsection 3543.5(a) of the Educational Employment Relations Act (EERA)[8]

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[8]EERA is codified at section 3540 et seq. of the Government Code. Subsection 3543.5(a) provides as follows:

> 3543.5. It shall be unlawful for a public school employer to:
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> (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.

in cases in which it is alleged that the employer has taken reprisals against employees in retaliation for exercise of protected activity. Stated simply, the charging party must demonstrate that the employer would not have so acted but for the employee's participation in protected activity.[9] Recognizing that the charging party can seldom demonstrate this by direct evidence of proscribed motivation, we indicated the manner by which this may be proven.

Under the test of Novato, supra, a party alleging a violation of subsection 3519(a) has the burden of making a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to take adverse personnel action. Such a nexus between protected activity and the personnel action taken may be demonstrated by circumstantially-raised implication. Novato, supra, at p. 6; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If this nexus is demonstrated, the employer has the burden of demonstrating that it would have taken the same action regardless of the employee's participation in protected activity.

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[9]In California State University, Sacramento (4/30/82) PERB Decision No. 211-H, we held that the same test was applicable to such cases arising under subsection 3571(a) of HEERA. We hold that the same test applies to the identical language of subsection 3519(d) of SEERA.

A threshold element of the charging party's burden is the demonstration that the employer had knowledge of the protected activity. NLRB v. South Shore Hospital (1st Cir. 1978) 571 F.2d 677 [97 LRRM 3004]. Here, as noted above, Monsoor has demonstrated that he engaged in protected activity, and that Respondent was aware of it. However, he has not shown sufficient other elements to justify drawing the inference that Respondent was unlawfully motivated in its decision to reject him from probation. Factors such as

> . . . timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive. Novato, supra, at p. 7.

Further, credible evidence of anti-organizational animus would support the drawing of such an inference. Our findings of fact indicate the absence of suspicious timing. There is no evidence that Monsoor engaged in any tenant activity following his eviction from employee housing on December 20, 1978. He was rejected from probation on about January 28, 1979, which was at least six weeks after Rust and others in hospital administration learned of his tenant activity. There was no evidence that Respondent had retained other employees who had committed the same type and number of work-related violations

as did Monsoor. We cannot conclude that the employer departed from established procedures and standards in dealing with Monsoor. The employer did not offer inconsistent or contradictory justifications for its actions. No credible evidence of animus was presented. Thus, we are left with a finding that Monsoor, with the employer's knowledge, engaged in protected activity, but cannot infer that the required nexus existed between the exercise of such activity and the rejection of Monsoor from probation.[10]

Because we find, in light of the credited testimony and the record as a whole, that Monsoor has failed to introduce evidence sufficient to raise the inference that Monsoor's

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[10]The hearing officer held that Rust made the decision to reject Monsoor and that, while it could not be concluded that his decision was based solely on Monsoor's protected conduct, that activity was ". . . inextricably intertwined . . ." in Rust's decision to reject Monsoor from probation. We hold, first, that Magallanes made the operative decision to terminate Monsoor, and thus that Rust's willingness to bring this about was short-circuited. Further, even if we were to find that Rust harbored animus against Monsoor and intervened in his rejection from probation due to that animus, we could not conclude that Rust's animus against Monsoor had as its source Monsoor's protected activity. The evidence indicates that Rust harbored animosity toward Monsoor based upon his prior unpleasant contacts with him and adverse reports from Monsoor's references. This animosity was cemented before Rust learned of Monsoor's tenant-related activity. It would be too great a leap of faith for us to conclude, based upon this record, that animosity Rust felt for Monsoor was motivated by his knowledge of Monsoor's tenant activities.

protected activity was a motivating factor in Respondent's decision to reject him from probation, we conclude that he has failed to meet his burden, and thus find that Respondent did not violate subsection 3519(a).

## ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the charge that Respondent violated subsection 3519(a) of SEERA by rejecting William Thomas Monsoor during probation is DISMISSED.

By: John W. Jaeger, Member

Harry Gluck, Chairperson

Virgil W. Jensen