STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 22, AFL-CIO, Charging Party, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-582 S-CE-615 PERB Decision No. 492 March 6, 1985

Appearances: Van Bourg, Allen, Weinberg & Roger by W. Daniel Boone for Service Employees International Union, Local 22, AFL-CIO; Brown & Conradi by Penn Foote for Sacramento City Unified School District.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION AND ORDER

BURT, Member: The Service Employees International Union, Local 22, AFL-CIO (SEIU) excepts to the dismissal of certain portions of its unfair practice charges against the Sacramento City Unified School District following a formal hearing conducted by an administrative law judge (ALJ) for the Public Employment Relations Board (Board).

The Board has reviewed the entire record, including SEIU's exceptions and the attached proposed decision. Finding no prejudicial error in the ALJ's findings of fact or conclusions of law, the Board ORDERS that said portions of the charge are DISMISSED and adopts the proposed decision and order as its own.

Chairperson Hesse and Member Jaeger joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 22, AFL-CIO, Charging Party, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Respondent.	)	Case Nos. S-CE-582 S-CE-615 PROPOSED DECISION (1/20/84)

Appearances: W. Daniel Boone, Attorney (Van Bourg, Allen, Weinberg and Roger), for Service Employees International Union, Local 22, AFL-CIO; Penn Foote, Attorney (Brown and Conradi) for the Sacramento City Unified School District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

In these consolidated cases an exclusive representative contends that a supervisor threatened reprisals against two employees if they exercised their protected right to union assistance. The union contends further that the threat ultimately was carried out against one employee when he was given a failing score on a promotional exam. The employer denies that any threats were made and argues that, in any event, the employee's exam grade was unrelated to the contested actions of the supervisor.

Charge S-CE-582 originally was filed on February 15, 1983, by the Service Employees International Union, Local 22, AFL-CIO

(hereafter SEIU) against the Sacramento City Unified School District (hereafter District). The charge alleged that the District director of building maintenance threatened a custodian who had sought union assistance. The charge was amended on March 15, 1983, by the addition of more detailed allegations. A complaint was issued on April 29, 1983, by the office of the General Counsel of the Public Employment Relations Board (hereafter PERB) alleging that the supervisor's conduct was in violation of Educational Employment Relations Act subsections 3543.5(a) and (b).[1]

The District answered the charge on May 16, 1983, denying that the supervisor had violated any provision of the EERA and asserting affirmatively that the supervisor's statements were in response to insubordination by the employee.

---

[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

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

The charge was amended on July 1, 1983, to add the allegation that the employee had been denied eligibility for a laborer-gardener position in retaliation for his protected conduct. The complaint was amended on July 7, 1983, to add the new allegation.

Charge S-CE-615 originally was filed against the District on May 4, 1983, by SEIU. The charge alleged that the same supervisor as was involved in the earlier case threatened a clerical employee when she said she was going to call the union for assistance. A complaint was issued on May 25, 1983, by the office of the PERB General Counsel, alleging that the District's conduct was in violation of EERA subsection 3543.5(a). The District answered the complaint on June 8, 1983.

On June 9, 1983, the charge was amended to add the allegation that during a grievance meeting about the alleged threat, the supervisor warned the employee that if she pursued the grievance other things would be brought out that the supervisor did not wish to bring out. On June 24, 1983, the PERB complaint was amended to add the allegations in the June 9 amendment.

On July 5, 1983, charges S-CE-582 and S-CE-615 were consolidated for hearing. The hearing was held in Sacramento on October 18 and 21 and November 28, 1983. The parties filed simultaneous briefs which were received on January 9, 1984. The matter was submitted for decision as of that date.

FINDINGS OF FACT

The Sacramento City Unified School District is a public school employer under the EERA. At all times relevant to this case, SEIU has been the exclusive representative of the District's four classified employee units. Harry Hughes, the complainant in case S-CE-582, is employed in the District's Operations Support Services Unit. Judy Gianatasio, the complainant in case S-CE-615, is employed in the District's Office Technical Unit.

Job History of Harry Hughes.

Harry Hughes first was employed by the District in 1979. Initially, he was a hall monitor and then became a part-time custodian. He served in these temporary positions for about a year and a half when he was appointed to a permanent position as a custodian in an administrative complex at the former Joaquin Miller Junior High School.

In the fall of 1981, Mr. Hughes took an oral examination for the position of laborer-gardener. There were about six to eight applicants of whom five were placed on an eligibilty list. Mr. Hughes was one of the successful candidates and his name was placed on the eligibility list that was issued by the District on November 23, 1981. Although Mr. Hughes' name appears first on the list, the ranking was made alphabetically and his position on the list does not mean that he was found to be the most qualified candidate.

During the summer of 1982, Mr. Hughes learned that an employee who was not on the laborer-gardener promotional list had been hired for a temporary position as laborer-gardener. The position became available when the District temporarily upgraded two laborer-gardeners to the position of roofer for a summer roofing project. When Mr. Hughes learned that he had been passed over for the opportunity to fill in behind the laborer-gardeners, he complained to Maintenance Supervisor Al Artero. He later went to the union for assistance when he determined that Mr. Artero would not help him.

At that time, the SEIU business representative was Kathy Felch. She complained to Thomas McPoil, the District coordinator of maintenance and operations, that the eligibility list for laborer-gardener was not followed when Mr. Hughes was bypassed for the temporary promotion. Mr. McPoil responded that there was no eligibility list. Ms. Felch then went to the District personnel office, obtained a copy of the list and again contacted Mr. McPoil. She told Mr. McPoil that an eligibility list did exist and that Harry Hughes was on it. Ms. Felch testified that Mr. McPoil persisted in his refusal to give Mr. Hughes temporary employment as a laborer-gardener.

Ms. Felch testified that during a subsequent conversation she again demanded that Mr. McPoil employ Mr. Hughes in the temporary laborer-gardener position. At that point, Ms. Felch

testified without contradiction, Mr. McPoil responded that if Mr. Hughes "ended up working on the crew, that he would be reprimanded."

Following the second conversation with Mr. McPoil, Ms. Felch called Roy Johnson, District director of maintenance, operations, security and construction. Ms. Felch testified that although Mr. Johnson at first was annoyed by her call, he ultimately agreed to give Mr. Hughes a temporary position as a laborer-gardener. Mr. Hughes commenced work in that position on August 2, 1982.

The Grievances of Harry Hughes.

When Mr. Hughes received his first paycheck after securing the temporary job as a laborer-gardener, he was surprised to discover that the amount of his check had not increased. Laborer-gardeners are paid at a higher rate than Mr. Hughes' permanent class of custodian. Mr. Hughes complained to Leonard Nielsen, the laborer-gardener foreman, who sent him to the payroll department. Payroll, in turn, advised Mr. Hughes to contact Roy Johnson.

Mr. Hughes testified that he called Mr. Johnson who told him, ". . . don't worry, you'll get paid. Button your lip. You're causing me enough trouble." Mr. Hughes testified that Mr. Johnson did not explain what he meant by the statement, "You're causing me enough trouble." Mr. Hughes testified that he did not press the matter once he learned he would be paid at

the higher rate as he ultimately was. Mr. Johnson did not recall a conversation with Harry Hughes about the pay problem.

On a Friday in November of 1982, Mr. Nielsen was notified that the roofing assignment would terminate that day for the two laborer-gardeners who had temporarily left his crew. Because both employees would be returning to their laborer-gardener duties the following Monday, Mr. Nielsen told Harry Hughes to report to his custodial job the next workday. Mr. Hughes protested that under the contract he was entitled to two weeks notice prior to a change in work schedule.[2] Despite the protest, he was required to return to his custodial position at Joaquin Miller the next workday.

Mr. Hughes once more called Mr. Johnson. He told Mr. Johnson about the District's failure to give him a two-week notice. In his testimony, Mr. Hughes gave three slightly differing versions of the two telephone conversations he had with Mr. Johnson that day. In his first version, Mr. Hughes described the conversation as follows:

---

[2]Article 16.2 of the contract between the parties provides as follows:

> Except in cases deemed an emergency by the district, two (2) weeks, when feasible, advance written notice of a change in work schedule will be given affected employees. When a schedule change will affect a significant number of employees, the union will be notified of the change.

> . . . I called Roy Johnson and requested to sit down at a meeting over this. [I said] that I'd been treated very unfairly and I'd like to know why I was not give (sic) a two-week notice or what. He says, "I think I've been very fair." I says, "I don't think you have. I'd like to talk about it." He says, "You cannot have any (sic.)" I says, "I'd like to." [He says], "Do what you got to do," you know, "forget it." And I said, "Okay, I'll go to the union." I went to Channel 3, first.[3] (Reporter's Transcript, p. 21.)

In his second version, Mr. Hughes recalled the conversation this way:

> . . . [A]fter he said, "Do what you got to do," I called Channel 3 and I called him back and I said, "Yes, I contacted Channel 3." And he says, "You understand, you're on my list Do you understand?" I said, "Yes." I knew who I called. And then the phone was hung up (sic). (Reporter's Transcript, p. 21.)

Moments thereafter, Mr. Hughes described the conversation as follows:

> . . . Well, more or less it was just, you know, "I want to have a meeting," and then I was refused a meeting. . . . I said, "I'm going to go to the union. I'm going to go to Channel 3." He says, "Do what you got to do," and hung up. So, I did. I went to call Channel 3. I called the union and then the next time I called him back, I said, "I took your advice. I am pursuing it." And he said, "You understand you're on my list. Do you understand?" (Reporter's Transcript p. 22.)

---

[3]Sacramento television station KCRA broadcasts on Channel 3. As a public service, the station operates a program to assist viewers in the resolution of problems with government and business.

Mr. Johnson recalled the telephone conversations with Mr. Hughes somewhat differently. Mr. Johnson said that he told Mr. Hughes he was unaware of the two-week notice problem. He suggested that Mr. Hughes call his immediate supervisor, Mr. Artero. Mr. Johnson said there was a second telephone conversation during which Mr. Hughes,

> . . . renewed what had been discussed at the previous conversation on the phone and then threatened to call certain people to turn me in, so to speak. He was rude, very rude.

Mr. Johnson said that he offered no response other than to say,

> . . . you should do what you feel you have to do. With that, Mr. Hughes became insubordinate, progressively so, and I added the comment, I said, "You should watch who you're speaking with."

When asked if he ever said to Mr. Hughes that, "You're on my list," Mr. Johnson responded, "No, absolutely not and I repeat that, absolutely not."

Mr. Johnson testified that Mr. Hughes said in either his first or second telephone call that he was going to go to the union. He said that Mr. Hughes also warned that he would go to Channel 3 and Mr. Johnson ultimately did receive a telephone call from the television station inquiring about Mr. Hughes. Mr. Johnson said that, in general, Mr. Hughes was accusing the department of being "irregular."

> His indication (was) that he was going to kind of get me by, I guess blowing the whistle, so to speak, not me particularly,

> but I think me/the District by calling certain people to make what he felt [were] irregularties known. (Reporter's Transcript, p. 150.)

When Mr. Johnson returned as a witness after a three-day break in the hearing, he was asked on cross-examination about his description of Mr. Hughes as a "whistle blower." His dialogue with counsel for the Charging Party was as follows:

> Q. (By Mr. Boone) Now, you used the term before that Mr. Hughes was talking like being a "whistle blower," am I correct in recalling that?
>
> A. I think your reference is entirely out of line. I've never used that term.
>
> Q. You've never used the word "blowing the whistle?"
>
> A. I don't ever remember using that term.
>
> Q. You don't remember testifying about "whistle blowing" or "blowing a whistle" on Tuesday afternoon?
>
> A. Not to my recollection.
>
> Q. So you wouldn't characterize that Mr. Hughes was saying to you as anything like a whistle blowing?
>
> A. Explain your statement, would you, please?
>
> Q. What's a whistle blower? Does that have any meaning to you?
>
> A. I think a person who may make a lot of general statements on circumstances, good and bad. (Reporter's Transcript, p. 193.)

On December 10, 1982, Ruth O'Hearn, who had replaced Kathy Felch as SEIU business representative for Local 22,

requested Mr. Johnson to meet with her and Harry Hughes. Ms. O'Hearn testified that she and Hughes had come from a meeting with Al Artero. At the meeting with Artero, they had discussed the District's failure to give Mr. Hughes two weeks notice before removing him from the laborer-gardener position. Dissatisfied with the result of the meeting with Mr. Artero, Ms. O'Hearn asked Mr. Johnson's secretary if she could speak with Johnson. Ms. O'Hearn was admitted to Mr. Johnson's office where she told Johnson she wanted to talk about "the way that he had been relating to Harry Hughes and the implied threats and the threats that he had made to him." Ms. O'Hearn testified that Johnson replied that, "Harry Hughes has no concerns and that he would not meet with him." Ms. O'Hearn said the atmosphere was strained at the brief meeting which was marked by the absence of any of the usual business amenities.

Mr. Johnson had not met Ms. O'Hearn prior to the December 10 meeting and when his secretary said she was from the union, he was under the impression that she was a reporter from the Sacramento Union, a newspaper. He said he had been having some trouble with his Union carrier and he went to meet Ms. O'Hearn thinking he was going to deal with a newspaper reporter. He said that when he discovered her actual purpose, the meeting did not get off to a good start and that the two of them, "seemed to have some kind of a heavy veil between us for some reason."

Following the attempt to meet with Mr. Johnson about the problems of Harry Hughes, Ms. O'Hearn wrote a series of letters in an attempt to secure another meeting. She was not successful. A grievance was filed by SEIU about the failure of the District to give Mr. Hughes the two-week notice.

The Second Exam For Laborer-Gardener.

On March 25, 1983, Harry Hughes took the exam for laborer-gardener a second time. The examination was arranged by Thomas McPoil, the District coordinator of maintenance and operations. Conducted on a promotional basis, the exam was open to District employees only. There were some 65 applicants of whom 37 met the minimum qualifications and were permitted to take the oral interview which constituted the exam.

A series of 14 questions pertaining to gardening was prepared for the three-member interview panel to ask of the candidates. The persons who conducted the interviews were Leonard Nielsen, the laborer-gardener foreman and principal author of the questions, Tom Medellin, the plant manager at the District's McClatchy High School, and Richard B. Young, a painter-foreman for the District.

Mr. McPoil instructed the three interviewers that the District's affirmative action goals were to be considered in evaluating the candidates. The interviewers were given a job description for laborer-gardener and the applications of each candidate. Other than that, they were given no specific

instructions on how to grade the candidates. Mr. McPoil introduced each candidate and then left. Thirty-two candidates actually appeared over a two-day period for the interview.

The three interviewers, all witnesses at the hearing, agreed in their descriptions of the process. They said that they took turns asking each candidate the questions on the list. After each interview, the panel members separately gave the candidate a grade. The interviewers did not discuss their individual evaluations of the candidates prior to assigning a grade and they did not discuss their individual grading techniques. The interviewers entered the scores they had assigned to the various candidates on rating sheets provided by the District. Each interviewer testified that he graded the individual candidates on the basis of his impressions of them at the time they completed the interview. None of the panel members could recall at the hearing the basis for the grade of any individual candidate or why any candidate scored higher than any other candidate.

The three interviewers testified that at the time of the exam they did not know about any grievances which Harry Hughes had filed or that Mr. Hughes was a member of SEIU. Mr. Nielsen and Mr. Medellin also testified that they had never had conversations with Mr. Johnson about Harry Hughes prior to their service on the interview panel. Mr. Young was not asked

about any conversations he might have had with Mr. Johnson about Harry Hughes.

Following the interviews, the panel members gave the completed rating sheets to Mr. McPoil who tallied the final scores. All entries on the rating sheets given to Mr. McPoil were made in ink. Mr. McPoil testified that he did not speak to the interviewers about the scores and he prepared the list of successful candidates on the basis of the score sheets. Five persons were placed on the eligibility list effective April 4, 1983. Harry Hughes was ranked sixteenth. The eligibility list will remain in effect for one year.

Ms. O'Hearn testified that one of the five persons placed on the eligibility list is a member of SEIU. No evidence was presented about the union membership of the unsuccessful candidates other than Mr. Hughes.

Job History of Judy Gianatasio.

Judy Gianatasio first was employed by the District in September of 1973 as a substitute secretary. In September of 1974, she was hired as a permanent full-time maintenance and operations clerk. When she assumed the position, she was told that her primary duty was to keep the payroll records for maintenance and operations employees. She also took reports of maintenance problems in District buildings and dispatched employees to the job sites. She operated the maintenance radio. Since July of 1980, her supervisor has been Roy Johnson.

In April of 1983, Roy Johnson requested Ms. Gianatasio to prepare a report which, among other facts, was to describe the promotional patterns for maintenance and operations employees. In order to complete the report, Ms. Gianatasio had to determine the date of hire of each employee and the date of each subsequent change in job classification. Some preliminary work had been completed by Mr. McPoil and what he had developed was given to Ms. Gianatasio at the time she commenced the project. She was not given a specific deadline but was told to complete the project in "a couple of weeks."

From the start, Ms. Gianatasio encountered difficulty in securing the required information. She discovered that the work given to her by Mr. McPoil contained incorrect information. When she called various foremen to ask about employees under their supervision the foremen told her that the information she sought was not available. The District personnel records were incomplete and the personnel office could not answer her inquiries. No District records contained the dates employees had transferred from one position to another.

Several times when Ms. Gianatasio mentioned the problem to Mr. Johnson, he responded, "Judy, you can do it."

The Meeting of April 22, 1983.

On April 22, 1983, about a week and a half after Ms. Gianatasio was given the assignment, she was called into

Mr. Johnson's office. Mr. McPoil was present in addition to Mr. Johnson and Ms. Gianatasio. Mr. Johnson called the meeting because he believed that the project was overdue. Ms. Gianatasio explained that she was having difficulty obtaining the information required for the report. Mr. Johnson offered the opinion that she was spending too much time talking on the telephone. It was not long until the meeting became highly emotional.

Ms. Gianatasio testified that when she tried to explain the reasons why she had not been able to complete the report, Mr. Johnson seemed not to understand. She said he got angry with her and spoke loudly. He told her that she would do it and that it was "a directive." She said she started to cry and became angry, herself. She testified that Mr. Johnson said he was going to call his secretary into the office and that "it was going to go into my file."

When she heard that, Ms. Gianatasio responded that she was "going to call the union and that's when he told me that if I did call the union I'd be sorry." She testified that at one point in the conversation she said to Mr. Johnson,

> . . . that he had talked to me this way before, but he wasn't going to talk to me this way again, that, you know, a person can only take so much and that's it. You have to stand up for your rights.

She said she was standing and when she completed her statement she walked out of his office.

Ms. Gianatasio said that Mr. Johnson's secretary did not enter his office while she was present. After leaving the office, Ms. Gianatasio went to a co-worker, Irene Garcia, who took her to a doctor. She remained off work for seven days after the incident.

Mr. Johnson testified that he told Ms. Gianatasio that the project,

> . . . was her job, that she had [been] given an opportunity to turn in whatever she could and . . . to take it as far as she could, and I said, "that is a directive."

Mr. Johnson testified that the meeting reached an apparent conclusion and Mr. McPoil left the room. Ms. Gianatasio started out with him but then said something,

> . . . which appeared and had the tone of being a derogatory remark. . . . I believe that it was of a, it sounded like a word of retaliation.

After that, Mr. Johnson called her back into the room. He told her that she had engaged in "too much lollygagging" and recited various steps he had taken to curtail her talking at work. Ms. Gianatasio responded that she did not think Mr. Johnson was being fair. Mr. Johnson testified that the conversation continued when at one point Ms. Gianatasio,

> . . . stated that, "You're threatening me. I'm going to the Union." With that, I said, "Don't say another word." I opened the door. I was sitting right by the door. I called my secretary, Rena. I said, "Get Mickey McPoil in here immediately." Mr. McPoil came in. He closed the door. I

> asked him to sit down, and I said, "Mickey, Judy just said I'm threatening her. She wants to go to the Union," or in those general terms. "And I'm saying to you, Judy, that I'm not threatening you, and you have every right to go to the Union." I said, "Now, pay attention to what I'm saying. I said I am not threatening you and you have every right to go to the Union as an employee."

Mr. Johnson testified that shortly thereafter Ms. Gianatasio left his office.

Mr. McPoil confirmed that he had been called back into Mr. Johnson's office on April 22 while Ms. Gianatasio was still there. He recalled that,

> When I went in there Mr. Johnson said, "Mick, Judy says I told her . . . that she could not go to the Union [and] if she did she would be sorry, and at this time I'm telling you, her, and in front of you, she can go to the Union any time she wants to."

Although he said he was unable to recall the exact words spoken, Mr. McPoil was sure that Mr. Johnson did not admit that he had told Ms. Gianatasio she "would be sorry" if she went to the union. Mr. McPoil said that Mr. Johnson was stating only that Ms. Gianatasio had accused him of making the remark.

When specifically asked if he told Ms. Gianatasio that she would be sorry if she called the union, Mr. Johnson replied: "I did not." When asked if he said any words "parallel or similar in meaning to those words," he responded: "Absolutely not. No. Just no."

SEIU subsequently filed a grievance about Mr. Johnson's alleged threat that Ms. Gianatasio would be sorry if she went to the union. Ms. Gianatasio testified that during a grievance meeting, Mr. Johnson stated that if SEIU pursued the grievance "he would have to take further steps and . . . investigate this further . . ." SEIU business representative O'Hearn recalled Johnson as saying that if SEIU pursued the grievance further, "he would be forced to bring out things that he did not wish to bring out." Both Ms. Gianatasio and Ms. O'Hearn said that the remark was made in a threatening manner.

Mr. Johnson did not deny making that statement during the grievance meeting. He explained his comment as follows:

> I meant that there had been several discussions about Judy's performance between Mr. McPoil and myself and that these points would be brought out in more detail to where I preferred not to, to try to keep the harmony in the department.

Credibility Determinations.

Two of the threatening statements attributed to Mr. Johnson by SEIU witnesses are in dispute. He is alleged to have told Mr. Hughes in response to Hughes' appeal to the union, "You understand, you're on my list. Do you understand?" He is alleged to have told Ms. Gianatasio, that if she went to the union, she "would be sorry." Mr. Johnson adamantly denies making both remarks.

Initially, it can be observed that the remarks attributed to Mr. Johnson are consistent with attitudes and statements by

him on other occasions. For example, Ms. Gianatasio testified without contradiction that once when Mr. Johnson observed her with Ms. O'Hearn during a break, he called Ms. Gianatasio into his office and angrily questioned her. Ms. Gianatasio testified that Mr. Johnson insisted upon knowing whether the meeting with Ms. O'Hearn had been prearranged. She quoted him as saying, "I have to know if there's any prearranged meetings going on here." These comments evidence anger toward an employee merely because she was seen with a union representative.

Another example of Mr. Johnson's attitude about employee grievance filing was displayed during a grievance meeting with Ms. Gianatasio and Ms. O'Hearn. Mr. Johnson warned if the grievance were pursued "he would be forced to bring out things he did not wish to bring out." At the hearing, Mr. Johnson did not deny making the statement but sought to pass it off as an attempt to protect the reputation of Ms. Gianatasio. Actually, the comment seems more like an attempt to coerce her into withdrawing a grievance which had the potential for embarrassment to himself.

It is significant to note, also, that on the witness stand Mr. Johnson was forgetful about comments made by him only three days earlier. During testimony on October 18, 1983, Mr. Johnson said that Harry Hughes was out to get him by "blowing the whistle." When asked about that comment during

cross-examination on October 21, 1983, Mr. Johnson denied ever using the expression "blowing the whistle" and told counsel for the Charging Party that his "reference is entirely out of line." Mr. Johnson evidenced the same adamance in denying that he had ever used the expression "blowing the whistle" that he evidenced in denying that he had threatened Mr. Hughes and Ms. Gianatasio.

It is indeed possible that Mr. Johnson did not recall his description of Mr. Hughes' conduct as "blowing the whistle." It similarly is possible that he did not recall making threatening remarks to both Mr. Hughes and Ms. Gianatasio. His failure of memory, however, does not convince the hearing officer that he did not make the alleged remarks. Both of the threatening statements are consistent with attitudes evidenced by Mr. Johnson in other relationships with SEIU. With respect to the comment made to Ms. Gianatasio, Mr. Johnson's own conduct at the time of the incident is consistent with the conclusion that he made the remark attributed to him. If he did not tell Ms. Gianatasio that she would be "sorry" if she went to the union, why would he have felt the need to call Mr. McPoil back into the room and tell Ms. Gianatasio in front of McPoil that she could go to the union? The most likely explanation is that Mr. Johnson made the threat and then attempted to recant it in front of a witness.

On the witness stand, Mr. Johnson displayed flashes of the quick anger which the witnesses attributed to him. In light of his denial of statements made in front of the hearing officer, his adamant denial of earlier statements attributed to him is not convincing. On the witness stand, both Mr. Hughes and Ms. Gianatasio appeared frank and sincere. The testimony of Mr. Hughes and Ms. Gianatasio is credited and it is concluded that Mr. Johnson did say to Mr. Hughes, "You understand you're on my list," and to Ms. Gianatasio, that she would "be sorry" if she went to the union. Mr. Johnson's denial that he made these statements is rejected.

LEGAL ISSUES

1. Did the District, in violation of subsection 3543.5(a) and/or (b) interfere with the protected rights of Harry Hughes and Judy Gianatasio to seek assistance from a union?

2. Did the District, in violation of subsection 3543.5(a), discriminate against Harry Hughes in retaliation for his exercise of the protected right to seek union assistance?

CONCLUSIONS OF LAW

Interference.

Although the complaints in both S-CE-582 and S-CE-615 raise the issue of interference, neither party discusses the question in its brief. Both parties argue these charges solely as discrimination cases. Nevertheless, because the question of interference is apparent in the allegations, the cases will be analyzed accordingly.

Public school employees have the protected right

> . . . 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.[4]

It is an unfair practice under subsection 3543.5(a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.[5]

In an unfair practice case involving an allegation of interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.[6] See also, Novato Unified School District (4/30/82) PERB Decision No. 210

---

[4]Section 3543.

[5]Section 3543.5 is found at footnote no. 1, supra.

[6]The Carlsbad test for interference provides as follows:

> . . . . . .
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the

and Sacramento City Unified School District (4/30/82) PERB Decision No. 214. In an interference case, it is not necessary for the charging party to show that the respondent acted with an unlawful motivation. Regents of the University of California (4/28/83) PERB Decision No. 305-H.

The protected right with which the District allegedly has interfered is the right to seek the assistance of an employee organization. Three separate remarks by Roy Johnson are alleged in the complaints to have been threats in violation of the EERA. Mr. Johnson stated to Mr. Hughes, "You understand you're on my list," after Mr. Hughes sought union assistance. He stated to Ms. Gianatasio that she would "be sorry" if she went to the union. Finally, he stated to both Ms. Gianatasio and Ms. O'Hearn that if SEIU pursued Ms. Gianatasio's grievance any further, "he would be forced to bring out things he did not

---

> employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

wish to bring out." The three Johnson statements will be considered in sequence.

The District offers several alternative explanations for the Johnson statement to Mr. Hughes that, "You understand you're on my list." The District argues that the statement was not a threat of reprisal. The District argues that it could mean "I don't like you," or "I don't like the way you're acting." If construed to be in the nature of a threat, the District continues, the statement is "too indefinite and insubstantial to constitute a threat of reprisal" under the EERA. And even if construed as a threat of reprisal, the District argues alternatively, the threat was motivated by Mr. Hughes' call to the television station and not because he went to the union. Finally, the District argues, the statement was provoked by Mr. Hughes' rudeness and progressive insubordination.

Statements made by an employer are to be viewed in their over-all context to determine if they have a coercive meaning. John Swett Unified School District (12/21/81) PERB Decision No. 188. The Johnson statement to Harry Hughes was made during the third conversation between the two men. During the first conversation, Mr. Johnson told Harry Hughes, "Button your lip. You're causing me enough trouble." Mr. Johnson did not explain the nature of the "trouble" which Mr. Hughes was causing.

However, the conversation followed Mr. Hughes' successful grievance to win temporary appointment to the position of laborer-gardener. The most logical inference is that the "trouble" was Mr. Hughes' grievance.

The second conversation immediately preceded the statement in question. During that conversation, the two disagreed about whether Mr. Hughes had been treated fairly in his removal from the temporary position. Mr. Hughes threatened to go to the union and to Channel 3. Not long thereafter, Mr. Hughes again called Roy Johnson and told him that he had done what he said he would do. Mr. Johnson replied, "You understand you're on my list."

The District would pass off the "on my list" comment almost as if it were a repartee from one friend to another. The evidence does not allow such a benign interpretation. In the context of Mr. Johnson's earlier statement that Mr. Hughes was causing him "enough trouble," the "on my list" statement can be understood most reasonably as a threat. This is especially true in light of the high rank which Mr. Johnson holds and his authoritarian style of management.

The District is likewise unconvincing in its efforts to pass the threat off as a response to Mr. Hughes' call to the television station. In making this assertion, the District relies heavily on Mr. Hughes' second version of the

conversation with Mr. Johnson. In the second version, Mr. Hughes does not specifically state that he told Johnson he had gone to the union. Even Mr. Johnson, however, acknowledges that Mr. Hughes had said that he was going to go to the union. Thus, when Mr. Johnson made the "on my list" comment it was with the full knowledge that Mr. Hughes either had already gone to SEIU for assistance or was planning to do so. Given Mr. Johnson's earlier statement that Mr. Hughes was causing him "enough trouble" after the filing of a grievance, it is not believable that the "on my list" comment was solely in response to the Hughes call to Channel 3.

As a final line of response, the District argues that Mr. Johnson's "on my list" statement was provoked by Mr. Hughes' rudeness and progressive insubordination. There is nothing in the record to establish insubordination or rudeness by Mr. Hughes toward Mr. Johnson or any other supervisor. But even if the District had established that Mr. Hughes was rude in dealing with Mr. Johnson, an employee's rude behavior does not give a supervisor the right to make anti-union threats.

A supervisor's threat that an employee is "on my list" for seeking union assistance would cause at least slight harm to an employee's exercise of protected rights. At minimum, an employee would be more hesitant to seek union assistance if he believed the outcome might be some form of retaliation. The

District's proffered justifications are found unconvincing and it therefore is concluded that Mr. Johnson's "on my list" comment was an unlawful interference with Mr. Hughes' efforts to exercise protected rights.

With respect to the you will "be sorry" statement to Ms. Gianatasio, the District bases its entire argument on the contention that the remark was never made. For the reasons stated in the findings of fact, supra, it is concluded that Mr. Johnson did in fact say to Ms. Gianatasio that she would "be sorry" if she went to the union. A supervisor's statement that an employee would "be sorry" if she went to the union is an unabashed threat. It is the kind of remark which is inherently destructive of protected employee rights. On its face, the statement is an interference in protected rights and a violation of the EERA.

After making the "be sorry" statement, Mr. Johnson called a witness into the office and stated that Ms. Gianatasio could "go to the union any time she wants to." An honestly given retraction can erase the effects of a prior coercive statement. See, e.g., Bartley Co. v. NLRB (6th Cir. 1969) 410 F.2d 517 [71 LRRM 2137] and Redcor Corp. (1967) 166 NLRB 1013 [65 LRRM 1719]. The key question in cases involving the discontinuance of illegal activity is whether the employer's retraction was made in a manner that completely nullified the coercive effects of the earlier statement. In Bartley Co., for

example, the court found it significant that the manager who made the improper statement admitted he had been in error and the employees knew that higher authorities were insistent upon repudiation of the earlier statement.

Here, Mr. Johnson did subsequently state that Ms. Gianatasio could "go to the union any time she wants to." But this retraction, according to Mr. McPoil's version, appears to have been directed more at McPoil than at Ms. Gianatasio. It was preceded, moreover, by the statement that, "Judy says I told her . . . that she could not go to the union [and] if she did she would be sorry. . . . " It would be small comfort to an employee to hear a supposed retraction from an angry supervisor who would not even acknowledge the remark he supposedly was retracting. Indeed, by use of the words, "Judy says I . . ." Mr. Johnson phrased his "go to the union anytime" statement so as to imply that Ms. Gianatasio had made a false accusation against him. Under these circumstances, Mr. Johnson's retraction simply did not erase the coercive effects of his "be sorry" warning.

The final form of unlawful interference alleged against Mr. Johnson is his statement during a grievance meeting that if the grievance were pursued further, he would "be forced to bring out things" he did not wish to bring out. Although Mr. Johnson admitted making the statement, the District argues that the words "were not intended as a threat or reprisal."

The motivation behind the remark, the District argues, was to protect the department from the disharmony which might result from disclosure of certain matters in Ms. Gianatasio's personnel evaluations.

Motivation, of course, is not an issue in an interference case. Thus, Mr. Johnson's subjective intent in making the "bring out things" remark is irrelevant. The question here is whether such a remark would interfere or tend to interfere with an employee's exercise of the protected right to seek assistance from an employee organization and to file a grievance.[7] It is self-evident that warning an employee that "things" would be brought out if she pursued a grievance would have the natural result of inhibiting the employee from continuing to exercise protected rights. Mr. Johnson's professed desire to avoid departmental disharmony is not sufficient to outweigh the inhibiting effect his statement would have on Ms. Gianatasio's right to union assistance in grievance processing.

For these reasons it is concluded that the District, by Mr. Johnson's "on my list," "be sorry" and "bring out things" remarks, violated EERA subsection 3543.5(a). Such threats also

---

[7]Employees have a protected right to file a grievance under contractually negotiated grievance procedures. North Sacramento School District (12/20/82) PERB Decision No. 264. The contract between SEIU and the District contains a negotiated grievance procedure.

concurrently violate subsection 3543.5(b). Santa Monica Unified School District (12/10/80) PERB Decision No. 147.

Discrimination.

SEIU argues that the District engaged in unlawful discrimination when Harry Hughes was not given a passing grade on the March 25, 1983, exam for laborer-gardener. SEIU asserts that Mr. Hughes engaged in protected conduct when he filed grievances and obtained the assistance of the union. The union contends that the District's subsequent failure to give Mr. Hughes a passing grade on the exam was motivated by a desire to retaliate against him for his protected activity. Because the District has failed to demonstrate that Mr. Hughes would have failed the exam despite his participation in protected activity, SEIU contends that the District must be found guilty of an unfair practice.

The District argues that in order to prove its case the union must establish a link between the participation by Mr. Hughes in protected activity and his failure to get on the eligibility list. Since the persons who developed the list had no knowledge of Mr. Hughes' participation in protected activity, the District argues, the union has failed to establish even a prima facie case of discrimination.

The analytical method for resolving charges of discrimination and retaliation was set out by the Board in Novato Unified School District (4/30/82) PERB Decision

No. 210. Under Novato, a party alleging discrimination within the meaning of subsection 3543.5(a) must make a prima facie showing that the employer's action against the employee was motivated by the employee's participation in protected conduct.

Proof that the employer had actual or imputed knowledge of an employee's participation in protected activity is a key element in establishing unlawful motivation by circumstantial evidence. Novato, supra, PERB Decision No. 210; Moreland Elementary School District (7/27/82) PERB Decision No. 227. An employer cannot retaliate against an employee for engaging in protected conduct if the employer does not even know of the existence of that conduct.

Once it is shown that the employer knew of the protected conduct, the charging party then must produce evidence linking that knowledge to the harm which befell the employee. Respondent's knowledge of protected conduct together with some indicia of unlawful intent will establish a prima facie case.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to prove that its action would have been the same despite the protected activity. If the employer then fails to show that it was motivated by "a legitimate operational purpose" and the charging party has met its overall burden of proof, a violation of subsection

3543.5(a) will be found. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221.

It is clear that Harry Hughes engaged in protected activity. He sought and received assistance from SEIU and he filed grievances. The evidence also establishes that Mr. Johnson harbored anti-union attitudes and threatened Mr. Hughes because of his participation in protected conduct. However, a missing key element, as the District observes, is proof that the members of the examination committee had knowledge of Mr. Hughes' protected conduct. Also absent is evidence that the committee members shared or acted upon Mr. Johnson's anti-union attitudes.

All three committee members testified that at the time of the exam they did not know Mr. Hughes had filed grievances. Two of the committee members also testified that they had never had conversations with Mr. Johnson about Harry Hughes prior to their service on the committee. The third member of the committee was not asked if he ever had such conversations with Mr. Johnson. SEIU describes as "patently incredible" the testimony of committee member Leonard Nielsen that he was unaware Mr. Hughes had filed grievances. The hearing officer does not share SEIU's evaluation. Mr. Hughes' grievances were not filed with Mr. Nielsen. Mr. Hughes did not report to Mr. Nielsen. His evaluations were filled out by someone other than Mr. Nielsen and the two had very little contact with each

other. There is no reason why Mr. Nielsen should have known about the Hughes' grievances.

The evidence convincingly establishes that the promotional list for the position of laborer-gardener was developed as a result of grades given by the three-member interview committee. Mr. Johnson had no role in fixing the final grades or order of finish. Mr. McPoil, a close subordinate of Mr. Johnson, limited his role to introducing the candidates to the committee and adding the scores which the committee members had given them. The animus possessed by Mr. Johnson cannot be automatically imputed to the interview committee. See, e.g., Konocti Unified School District (6/29/82) PERB Decision No. 217. Since the members of the interview committee did not even know of the Hughes' grievances or of Mr. Johnson's attitude toward Hughes, they can hardly be accused of acting in Mr. Johnson's stead.

SEIU contends that it was the District's burden to explain the reason that Harry Hughes was not ranked higher on the 1983 exam. Because the District's witnesses could not explain the reasons for the grades they gave Mr. Hughes, SEIU argues that the District loses as a matter of law. However, under Novato, supra, PERB Decision No. 210, it is the responsibility of the charging party to establish a prima face case. It was SEIU's burden to show anti-union motivation in the actual decision to deny Mr. Hughes a position on the laborer-gardener eligibility

list. Here, as the District correctly contends, SEIU failed to establish a prima facie case that Mr. Hughes was the victim of unlawful discrimination. Absent that initial showing by SEIU, the District had no responsibility to show that Mr. Hughes would have failed the test anyway.

Accordingly, the charge that the District violated EERA subsection 3543.5(a) by denying Harry Hughes a position on the laborer-gardener eligibility list must be dismissed.

REMEDY

The appropriate remedy for an interference case is a cease and desist order requiring the District post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. Davis Unified School District (2/22/80) PERB Decision No. 116; see also Placerville Union School District (9/18/78) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Sacramento City Unified School District violated subsections

3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to subsection 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

Interfering with the protected rights of employees to file grievances and seek the assistance of an employee organization by making threats to employees who choose to engage in such activities.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Within seven (7) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(b) Within twenty (20) workdays from service of a final decision in this matter, notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of

this order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

IT IS FURTHER ORDERED that in all other respects, charge S-CE-582 is hereby dismissed together with the July 7, 1983, amendment to the complaint.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on February 9, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on February 9, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of

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

Dated: January 20, 1984

Ronald E. Blubaugh
Hearing Officer

APPENDIX

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

After a hearing in Unfair Practice Case Nos. S-CE-582 and S-CE-615, Service Employees International Union, Local 22, AFL-CIO v. Sacramento City Unified School District, in which all parties had the right to participate, it has been found that the Sacramento City Unified School District violated the Educational Employment Relations Act subsections 3543.5(a) and (b). The District violated these provisions of the law by making threats to unit members Harry Hughes and Judy Gianatasio in retaliation for exercising the protected right to seek assistance from an employee organization. Such threats interfere with employee rights to form, join and participate in the activities of employee organizations of their own choosing in violation of subsection 3543.5(a). Making threats to an employee who seeks union assistance also interferes with the union's protected right to represent its members.

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

CEASE AND DESIST FROM:

Interfering with the right of employees to participate in the protected activities of employee organizations by threatening employees who choose to engage in such activities.

Dated: _____

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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