STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, CHAPTER 41, Charging Party, **v.** REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case Nos. SF-CE-12-H SF-CE-15-H SF-CE-23-H PERB Decision No. 305-H April 28, 1983

Appearances: Ernest Haberkern, Steward, California State Employees' Association, Chapter 41; Milton H. Gordon, Attorney for Regents of the University of California.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees' Association (CSEA) to the hearing officer's dismissal of five of its charges. CSEA charged the Regents of the University of California (University) with 14 violations of subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA) [1] by the University's conduct with respect to employee Peter Warfield.

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[1] HEERA is codified at Government Code section 3560 et seq. All statutory references are to the Government Code

The hearing officer's attached proposed decision dismissed all but one charge. As to that charge, the hearing officer found that the University violated subsections 3571 (a) and (b) of HEERA in July 1980 by denying Peter Warfield a promotional appointment in the school of social welfare for discriminatory reasons related to his exercise of his right to union representation. The University does not except to the hearing officer's proposed decision. We, therefore, affirm that portion of the proposed decision finding a violation of subsections 3571(a) and (b) .

CSEA excepts to the hearing officer's dismissal of the following charges:

1. That history department chairperson, Robert Middlekauff, unlawfully interrogated Warfield and threatened to reprimand him in a March 31, 1980 conversation with Warfield.

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unless otherwise specified.

Section 3571 provides in pertinent part:

> It shall be unlawful for the higher education 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.

2. That personnel officer, Joseph Toby, in a phone call on April 8, 1980, unlawfully threatened Warfield by implying that resolution of a grievance would be easier without union representation.

3. That Toby interfered with Warfield's right to representation in a phone call on January 10, 1981.

4. That the University discriminated against Warfield by issuing a warning letter in May 1980 and discharging Warfield in June 1980 in retaliation for filing grievances and unfair practice charges.

5. That the University discriminated against Warfield by proposing to reinstate him in a manner and with conditions which forced his resignation or "constructive discharge."

The Board has reviewed the record in light of CSEA's exceptions and finds that the hearing officer's findings of fact are free from prejudicial error and adopts them as the findings of the Board itself. For the reasons set forth below, the Board affirms the hearing officer's dismissal of the remaining five charges.

DISCUSSION

March 31, 1980, Conversation with Middlekauff

Warfield and CSEA Steward Ernest Haberkern met with Middlekauff on March 20 to discuss Warfield's adverse performance evaluation. Middlekauff refused to withdraw the evaluation, and a second meeting was set for April 1. Late in

the afternoon of March 31, 1980, Middlekauff stopped by Warfield's office to reassure Warfield that relations in the department were not irreparably harmed and that everything would be worked out amicably.

In its exceptions, CSEA argues that Middlekauff interfered with Warfield's protected rights because the conversation was an anti-union interrogation, denied Warfield's right to representation, and impliedly threatened Warfield with reprimand. In conjunction with this and other exceptions, CSEA argues that the hearing officer misapplied the test announced in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 by requiring some showing of discriminatory motive rather than balancing the interests of the employer and the rights of the employee.

Subsequent to the hearing officer's proposed decision, PERB has clarified the Carlsbad test in Novato Unified School District (4/30/82) PERB Decision No. 210. In claims of interference with protected rights, intent is not necessarily required. To state a prima facie case, the charging party must show that the respondent's conduct tends to or does result in at least slight harm to employee rights. If the respondent proffers a justification based on operational necessity, the Board will balance the competing interests of the parties and resolve the matter accordingly. However, a party alleging

discrimination or retaliation within the meaning of subsection 3543.5(a) has the burden of showing that protected conduct was a motivating factor in the employer's decision to take adverse personnel action. Since direct evidence of motivation is seldom available, motivation may be demonstrated circumstantially and inferred from the record as a whole. Republic Aviation Corp. v. NLRB (1945) 324 US 793 [16 LRRM 620]. if the charging party can raise, by direct or circumstantial evidence, the inference that there is a nexus between the employee's protected activity and the adverse personnel action, the burden shifts to the employer to show that it would have taken such action regardless of the employee's participation in protected activity.

CSEA argues that the Middlekauff conversation interfered with Warfield's rights and, therefore, that no showing of unlawful motive was necessary to sustain a violation. We find that the hearing officer's decision erroneously analyzed this charge in terms of unlawful motive in conjunction with the conversation between Middlekauff and Warfield. Nonetheless, we find that the record is insufficient to support this charge.

CSEA argues that the conversation was an unlawful anti-union interrogation, relying on Mid-Continent Service Co. (1977) 228 NLRB 917 [94 LRRM 1173]. That case concerned the systematic polling of employees regarding an incumbent union's continued majority status at a time when no objective basis for

doubt existed. It is, therefore, inapposite to the analysis of this conversation. Here both parties characterized Middlekauff's comments to Warfield as very brief and one-sided. There is no evidence that Middlekauff asked Warfield any questions whatsoever. Therefore, the conversation did not constitute an unlawful interrogation.

Neither did the conversation amount to an unlawful threat. There was no evidence that Middlekauff 's remarks were anything but idle comments seeking to prevent unnecessary hostility. The hearing officer found Middlekauff 's remarks to be informal and reassuring, merely showing concern that the dispute might cause more hard feeling than was necessary. The hearing officer also credited Middlekauff's denial that he suggested Haberkern was misrepresenting Warfield by saying things Warfield didn't really mean.[2] Middlekauff's comments were, therefore , too innocuous to have any chilling effect on Warfield's exercise of protected rights.

Without citing any authority, CSEA generally argues that the conversation interfered with Warfield's right of representation. However , the right to representation does not apply to every run-of-the-mill shop floor conversation between an employer and an employee, no matter how minor. Robinson v.

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[2]The Board will generally defer to a hearing officer's findings of fact which incorporate credibility determinations. Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

State Personnel Board (1979) 97 Cal.App.3d 994, 1001 [159 Cal.Rptr. 178]. This conversation was not an investigatory interview reasonably believed to lead to disciplinary action so as to bring it within the rule stated in NLRB v. J. Weingarten (1975) 420 U.S. 251. Neither did the conversation constitute a meeting concerning the actual administration of Warfield's grievance nor did CSEA demonstrate that the conversation had any discernible affect thereon. Therefore, CSEA cannot rely on PERB precedent establishing a right to representation in grievance processing. See Mount Diablo Unified School District et al. (12/30/77) EERB Decision No. 44;[3] Rio Hondo Community College District (12/28/82) PERB Decision No. 272. Additionally, Warfield did not request representation and did not ask Middlekauff to refrain from speaking with him in the absence of his union representative.

We find no reason to conclude that Warfield required or had a right to representation during this casual "shop floor" conversation. We, therefore, affirm the hearing officer's dismissal of this charge.

Toby's Phone Call of April 8, 1980

On April 8, Toby called Warfield regarding the University's written response to his grievance of a critical memo written by his immediate supervisor, Libby Sayre, a copy of which she sent to

[3]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

a faculty member. Toby's purpose was to inform Warfield that a cover letter was mistakenly left out of the mailing and would be forthcoming. During the conversation, Toby suggested that he might be able to straighten things out with Warfield's supervisor and was interested in Warfield's side of the story. In this context, Toby mentioned that Warfield was welcome to come and speak with him with or without a union representative, if he thought it would be helpful. Warfield was unresponsive, but did state a preference to have Toby speak with his union representative. Warfield didn't dispute the content of the conversation but claimed Toby implied the matter would be solved more easily without a union representative.

The hearing officer found no implied threat that resolution of Warfield's grievances would be easier if he waived union representation. The fact that Toby refrained from further conversation once he found Warfield unresponsive lends credence to the finding that his conduct did not tend to threaten or coerce Warfield.

Though Warfield had a right to union representation in any formal meeting with Toby concerning the grievance, a right of representation does not accrue by virtue of any informal contact between employer and grievant where the grievance is mentioned. Neither does a mere offer to meet with or without union representation constitute interference with that right. Nor do we find that this conversation constituted an unlawful

interrogation. We, therefore, affirm the hearing officer's dismissal of this charge.

Toby's Phone Call of January 10, 1981

In October 1980, Warfield's internal University grievance of his warning and dismissal was heard by an arbitrator who concluded that dismissal was too severe under the University's internal guidelines, reduced the discipline to a seven-week suspension, and ordered Warfield reinstated to his former classification with back pay.

On January 10, 1981, Toby called Warfield to make sure Warfield had received notice of his reinstatement and to obtain information about unemployment insurance so he could compute the proper amount of back pay due Warfield.

The essence of CSEA's charge is that Toby denied Warfield his right to union representation by contacting him directly. The record indicates that Toby first tried unsuccessfully to contact Haberkern by telephone and sent special delivery notification to both CSEA and Warfield before resorting to calling Warfield directly. Even if Toby's call could be viewed as interfering with Warfield's right to representation on a matter related to a grievance, the harm would have been slight, and was clearly outweighed by the University's legitimate justification for the call. Therefore, the hearing officer's conclusion that no violative interference occurred is affirmed.

Warning Letter and Dismissal

On May 22, 1980, Sayre sent Warfield a letter stating that his typing production of 1.5 pages per hour was unacceptable and warning him that if his production did not increase to 6 pages per hour (barring any peculiar difficulties), he would be terminated. Warfield's appeal of the warning letter was denied by Middlekauff on June 9.

On June 12, Sayre issued a notice of intention to dismiss Warfield, based on the fact that his typing production had shown an improvement to only 1.9 pages per hour. Warfield was terminated effective July 3. On June 30, he filed a grievance challenging the dismissal as specious, pretextual and retaliatory. The grievance was denied by Middlekauff by letter on July 14 which stated as follows:

> In an effort to help you improve your performance, Ms. Sayre assumed responsibility for assignments from faculty members, set all typing deadlines, and arranged all typing priorities. In addition, she made repeated efforts (both in conversation and by memo) to determine the source of any difficulties that might have adversely affected your productivity.
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> . . . . . .
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> The facts of your case are quite clear: (1) your typing productivity was well below any reasonable standard; (2) established procedures have been followed in dismissing you.

At hearing, Middlekauff and Sayre's supervisor, Ramone Domengeaux, testified that Warfield's dismissal was

based chiefly on his unsatisfactory production, though prior faculty and staff complaints were also considered.

The hearing officer properly considered evidence of unlawful motivation in analyzing CSEA's charge that the warning letter and dismissal constituted retaliation for Warfield's protected activity of vigorously asserting his right to representation and to file grievances.

CSEA presented circumstantial evidence of unlawful motivation based primarily on the timing of increasingly severe disciplinary action following the use of union representation and grievance procedures, and general hostility towards Warfield. However, the hearing officer found that the University's showing of business justification was sufficient to rebut the inference of unlawful motive, and that the justification was not pretextual.

Crucial to this finding is the University's proof of inadequate performance by Warfield. CSEA claims that the typing logs maintained by the District were found by the arbitrator not to be scientifically valid measures of performance and, therefore, should not be considered. However, we agree with the hearing officer that the logs are entitled to some weight as evidence of deficiency on Warfield's part. Moreover, the District presented additional evidence of Warfield's inadequate performance through the testimony of his co-workers and complaints by faculty and staff.

In addition, the hearing officer found the testimony of Sayre and Middlekauff sincere, believable and consistent, and credited their denial of unlawful motive. Based on our review of the record as a whole, these conclusions are not clearly erroneous and, therefore, are not disturbed. Santa Clara Unified School District, supra.

CSEA further claims that, even if some disciplinary action was warranted, the University failed to demonstrate operational necessity to justify discharge over lesser discipline. CSEA argues that the arbitrator's finding that dismissal was too severe under the University's own guidelines provides evidence of unlawful motive. Assuming the arbitrator's decision provides circumstantial evidence sufficient to raise an inference of unlawful motive, the University has presented evidence which successfully rebuts that inference.

The issue is not whether the University offered an indisputable reason for the dismissal, but only a reasonable business justification unrelated to Warfield's protected activity.[4] There is no indication that Warfield was treated

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[4]In Moreland Elementary School District (7/27/82) PERB Decision No. 227, we stated at p. 15:

> [L]ack of "just cause" is nevertheless not synonymous with anti—union animus. By itself, it does not permit such a finding. Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy.

differently than other employees because of his protected activity. The record shows that the history department followed normal disciplinary procedures and dismissed Warfield only after repeatedly discussing his problems with him, carefully monitoring his work, giving him numerous opportunities to improve and informing him through evaluations and warnings of the consequences of his failure to improve. The hearing officer properly found that CSEA failed to show that the University's stated reasons for the dismissal were pretextual and not merely reflective of bad judgment or personality conflicts. The hearing officer's dismissal of this charge is, therefore, affirmed.

Constructive Discharge

CSEA contends that Warfield was forced to resign or was "constructively discharged" by the University's conduct in effecting his reinstatement pursuant to the arbitrator's award. CSEA claims that Warfield was forced to resign because the University gave a short recall notice of only three days, changed Warfield's schedule from seven hours a day for three days a week to four hours a day, five days a week, delayed in processing his back pay award for one month, and proposed to reinstate him to the history department rather than another department, allegedly contrary to past practice. Warfield argues that these conditions of reinstatement would have created such stress as to endanger his health and that he, therefore, was forced to resign.

The University presented legitimate business justification for the short recall notice, the change in Warfield's hours, and the delay in processing the back pay award. Toby had informed Haberkern that reinstatement would occur as soon as another job was found for Warfield's replacement. A job was found on Friday, and the department sought to reinstate Warfield the following Monday to avoid interruption of departmental typing. The five-day schedule worked by Warfield's replacement was found to produce a more efficient flow of typing. The slight delay in tendering the back pay award was due to the December holiday recess and Warfield and Haberkern's failure to provide necessary information on unemployment compensation. These facts were not disputed by CSEA.

Nor is there any reason to overturn the hearing officer's credibility finding that Toby and Middlekauff did not threaten to immediately discharge Warfield if he failed to report to work on January 20, 1981. Even if such a demand was made, it would have been consistent with the University's past practice and offered in the midst of frustration over the delay in reinstatement, failing to raise an inference of unlawful motive.

CSEA also excepts to the weight given by the hearing officer to allegedly uncontested testimony. CSEA claims the University failed to refute Haberkern's testimony that there was a past practice of reinstatement in a different

department. However, the record supports the hearing officer's finding that the University credibly denied the existence of such past practice. Toby testified that, in his experience, employees were generally reinstated in a different department because most arbitrators' decisions expressly required reinstatement in another department. Toby otherwise denied any knowledge of such a policy on the part of the University. Since the arbitrator's decision ordered Warfield "immediately restored to his former classification," the question of where Warfield might be reinstated was left open. Furthermore, there was no evidence that Warfield or CSEA ever requested reinstatement in another department. Though Haberkern corresponded with the University twice by letter concerning the reinstatement, neither letter mentioned the issue. Under these circumstances, the hearing officer reasonably gave little weight to the assertion of a past practice of reinstatement in a different department.

Finally, CSEA asserts the hearing officer gave insufficient weight to a stipulation of the parties as to what Warfield's doctor would have testified to had he been called. The stipulation connects Warfield's illness to job stress only by relating Warfield's self-serving statements to his doctor. It does not independently link job-related stress to Warfield's illness and was properly given little weight as evidence that job stress was a factor in forcing Warfield to resign. The

hearing officer's dismissal of this charge is, therefore, affirmed.

REMEDY

No exception was raised to the remedy recommended by the hearing officer. We find the proposed remedy to be an appropriate application of the Board's remedial authority under section 3563.3,[5] and we adopt it as the remedy of the Board.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to section 3563.3, it is hereby ORDERED that the Regents of the University of California, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

a. Restraining, discriminating against, or otherwise interfering with the rights of employees because of the exercise of their right to seek advice and assistance from an employee organization.

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[5]Section 3563.3 provides as follows:

> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and 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.

b. Denying an employee organization the right to represent employees in their employment relations with the employer .

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS NECESSARY TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

a. Immediately offer Peter Warfield employment in the school of social welfare on the Berkeley campus in the position and classification unlawfully withheld or in the next available equivalent position and classification in another department or school, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

b. Make Peter Warfield whole for any loss of pay and other benefits he may have suffered by tendering to him a back pay award equal to an amount that he would have been paid from the date of the unlawful withdrawal of his employment offer in the school of social welfare on July 7, 1980 to the present. The total amount of this award shall be offset by:

(1) the amount Warfield received as back pay in February 1981 pursuant to an arbitrator's award in November 1980 ordering such payment in connection with his prior dismissal from the history department;

(2) the amount Warfield would have received if he had accepted the employer's offer of reinstatement to the history department as a 50 percent, part-time employee effective January 12, 1981; and

(3) the amount of Warfield's earnings as a result of other employment during this period.

c. Pay Peter Warfield 7 percent interest per annum on the net amount of back pay owed pursuant to this Order.

d. Within five (5) workdays after service of this Decision, prepare and post copies of the Notice to Employees attached as an appendix hereto, for at least thirty (30) consecutive workdays at the University's headquarters office and in conspicuous places at the locations where notices to employees are customarily posted in the Berkeley campus history department, school of social welfare and personnel office. The Notice must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

e. Within twenty (20) workdays from service of this Decision, give written notification to the San Francisco regional director of the Public Employment Relations Board of the actions taken to comply with this Order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

3. It is further ORDERED that all other charges filed against respondent herein be DISMISSED in all other respects.

Members Tovar and Jaeger joined in this Decision.

APPENDIX

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

After a hearing in the matter of California State Employees' Association, Chapter 41 v. Regents of the University of California (Case Nos. SF-CE-12-H, SF-CE-15-H and SF-CE-23-H), in which all parties had the right to participate, all charges filed against the University have been dismissed with one exception. As to that exception, it has been found that the University violated Government Code subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act by unlawfully withdrawing an offer of employment to Peter Warfield in the school of social welfare on the Berkeley campus.

As a result of this conduct, the University has been ordered to post this Notice and will abide by the following. The University will:

1. CEASE AND DESIST FROM:

a. Restraining, discriminating against, or otherwise interfering with the rights of employees because of the exercise of their right to seek advice and assistance from an employee organization.

b. Denying an employee organization the right to represent employees in their employment relations with the employer .

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS NECESSARY TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

a. Immediately offer Peter Warfield employment in the school of social welfare on the Berkeley campus in the position and classification unlawfully withheld or in the next available equivalent position and classification in another department or school, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

b. Make Peter Warfield whole for any loss of pay and other benefits he may have suffered by tendering to him a back pay award equal to an amount that he would have been paid from the date of the unlawful withdrawal of his employment offer in the school of social welfare on July 7, 1980 to the present. The total amount of this award shall be offset by:

(1) the amount Warfield received as back pay in February 1981 pursuant to an arbitrator's award in November 1980 ordering such payment in connection with his prior dismissal from the history department;

(2) the amount Warfield would have received if he had accepted the employer's offer of reinstatement to the history department as a 50 percent, part-time employee effective January 12, 1981; and

(3) the amount of Warfield's earnings as a result of other employment during this period.

c. Pay Peter Warfield 7 percent interest per annum on the net amount of back pay owed pursuant to this Order.

Dated:_____ REGENTS OF THE UNIVERSITY OF CALIFORNIA

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, CHAPTER 41, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Unfair Practice Case Nos. SF-CE-12-H SF-CE-15-H SF-CE-23-H PROPOSED DECISION (3/11/82)

Appearances: Ernest Haberkern, Steward, for Charging Party California State Employees Association, Chapter 41; Milton H. Gordon, Attorney, for Respondent Regents of the University of California.

Before; Barry Winograd, Administrative Law Judge.

INTRODUCTION

Peter Warfield, a clerk-typist of superior ability, was dismissed from his job in the University of California's Berkeley campus history department, and later had a promotional opportunity in the school of social welfare withdrawn, allegedly because his assertion of protected employee rights met with official disfavor. Subsequently, it is claimed, the employer also thwarted Warfield's reinstatement after a successful arbitration of his dismissal. In addition, the charging party asserts that respondent interfered with protected rights in several other respects, by denying union

representation at meetings and by threatening to call police to remove a union steward. The charging party's allegations cover a time span of nearly 22 months, from April 1979 to February 1981, and present 14 separate unfair practice claims for resolution.

In defense, it is respondent's position that Warfield's dismissal from the history department was based on inadequate performance, that the hiring professor in the school of social welfare had reason to withdraw the promised job because of questions about Warfield's fitness for the position, and, that a good faith offer was made after an arbitrator's decision directing Warfield's reinstatement. Respondent urges, as well, that the charging party has not satisfied its burden of presenting persuasive evidence of the several other violations charged.

After seven days of hearing, submission of briefs, and review of the testimony and exhibits, it is concluded that all the charges should be dismissed with one exception. That exception involves the appointment that was withdrawn in the school of social welfare. As explained hereafter, an appropriate order for reinstatement and partial back pay should issue.

PROCEDURAL HISTORY

On April 2, 1980 the charging party, California State Employees Association (hereafter CSEA or Association), filed

unfair practice charge No. SF-CE-12-H alleging that the respondent Regents of the University of California (hereafter University) had violated sections 3571(a) and 3571(b) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act).l Two other related unfair practice charges followed: No. SF-CE-15-H, filed April 28, 1980, and, No. SF-CE-23-H, filed June 25, 1980. These charges also alleged violation of sections 3571(a) and 3571(b).

By letter of November 9, 1980 CSEA proposed that the latter two charges be treated as amendments to the initial filing (SF-CE-12-H) to permit the three related charges to be heard together. Another amendment was filed on February 19, 1981. Finally, on April 27, 1981 additional amendments were offered during the pre-trial conference, discussed below. All of the

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[1]HEERA is codified at Government Code section 3560 et seq. Hereafter, all statutory references are to the Government Code unless stated otherwise. Charges arising under the Act are filed with the Public Employment Relations Board (hereafter PERB or Board). Sections 3571(a) and 3571(b) state:

> It shall be unlawful for the higher education 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.

charges and amendments concern a chain of events involving Peter Warfield, his relationship with CSEA and actions taken by the employer.

The University answered the charges, admitting certain particulars, but generally denying that its conduct violated the Act. Various affirmative defenses were also proposed by the respondent. Where relevant, admissions and defenses will be discussed in the body of this decision.

Informal settlement conferences were scheduled for different times during the spring and summer 1980. The disputes were not resolved at that time. The cases were held in abeyance for several months while the University's internal grievance procedure was pursued.

Early in 1981 the cases were reactivated by CSEA and, in March, the Board directed that they be consolidated for formal hearing.

A pre-trial conference was conducted on April 27, 1981. At the conference, CSEA particularized the specific allegations it intended to prove; that is:[2]

1. Peter Warfield received an unfavorable evaluation from

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[2]The allegations stated above paraphrase and distill the comments made on April 27, in light of the charges filed and the record evidence, to provide the reader with an understanding of the claims subject to trial. Two of the 16 matters specified on that date have been merged with other claims premised on the same factual circumstances.

history department supervisors in February and March 1980 for having engaged in protected activity in April 1979 when he protested placement and use of a ditto machine inside his office.

2. The history department relocated Warfield's work station in March 1980 in retaliation for his protected activity in regard to the ditto machine, and for his appeal in March 1980 of the unfavorable evaluation.

3. Warfield's immediate supervisor wrote a critical memo on March 20, and released the memo, containing confidential information, to a history professor, in retaliation against Warfield.

4. The chairman of the history department subjected Warfield to anti-union interrogation and implied threats of reprimand when he spoke to Warfield on March 31, 1980.

5. On April 1, 1980 the history department chairman interfered with Warfield's right to union representation by cancelling a meeting with his CSEA representative that had been called to discuss action taken against Warfield.

6. On April 1, 1980 the history department chairman, in front of employees, threatened to summon police if a CSEA steward remained in the area.

7. The University's personnel department interfered with CSEA's organizational rights by failing to disclaim the April 1 threat, and by failing to reaffirm CSEA representation rights, as requested by CSEA in a letter of April 4, 1980.

8. The University, through a personnel department agent, threatened Warfield on April 8, 1980 by informing him that resolution of his dispute would be easier without union representation.

9. In April 1980 and thereafter, history department supervisors interfered with Warfield's right to representation by denying his requests for such representation in discussions related to his work situation and performance disputes.

10. The history department, in May and June 1980, sent Warfield a warning letter and then discharged Warfield, in retaliation for and discrimination against protected activity involving CSEA, including Warfield's appeal of his unfavorable evaluation and the filing of unfair practice charges with the Board.

11. On January 10, 1981 a University personnel agent interfered with Warfield's right to representation by denying such representation in a discussion concerning the arbitrator's decision in November 1980 overturning Warfield's prior dismissal from the history department.

12. In January 1981 Warfield was forced to resign as a result of the University's bad faith and retaliatory failure to abide by the arbitrator's reinstatement and back pay order.

13. The University, in July 1980, denied Warfield a promotional appointment in the school of social welfare for discriminatory reasons related to Warfield's right to union representation and his dismissal from the history department.

14. The University, since the date of the arbitrator's favorable decision in November 1980, has discriminated against Warfield by failing to promote him, even though the dismissal from the history department could no longer operate as a bar.[3]

A formal hearing was held in Berkeley, California on May 7, 8, 13 and 14, and June 1, 2, and 10, 1981. Briefs were filed by each side and the matter was initially submitted on November 9, 1981. On December 2, 1981, however, in order to clarify questions arising from transcript descriptions, the hearing officer, with the consent and in the presence of the parties, visited the history department premises to observe the location of various offices. No actual testimony was received. The matter was resubmitted on that date.

FINDINGS OF FACT

A. Witnesses.

Before reviewing the extensive factual history of this case, it would be helpful to introduce the principal witnesses:

Peter Warfield. A clerk-typist in the University of California, Berkeley campus history department. Warfield had a college degree from the City University of New York, had worked

[3]Items 13 and 14, above, were offered verbally as amendments on April 27, and were then the subject of a written particularization on May 7, at the start of the formal hearing. In light of this history and the subject matter of the amendments, relevant facts and conclusions of law will be considered out of exact chronological order.

as a writer and computer programmer, and supplemented his work in history with freelance photography.

Libby Sayre. Warfield's immediate office supervisor who had worked in the history department since 1978.

Ramona Domengeaux. Administrative assistant to the history department and also Sayre's supervisor.

Robert Middlekauff. Chairman of the history department during Warfield's employ, with overall administrative and personnel responsibility.

Katherine Klein, Dorothy Shannon and Jane Taylorson. Secretaries and office workers in the history department. Klein was Middlekauff's secretary, Shannon was secretary to faculty with endowed positions, and Taylorson managed accounts and did some typing under Domengeaux's supervision.

Joseph Toby. A staff services analyst in the Berkeley campus personnel department providing advice and liaison to 41 departments, including the history department.

Steven Segal. A faculty member in the school of social welfare.

Ernest Haberkern. A CSEA steward who represented Warfield in connection with history department events.

Eugene Darling. A CSEA steward who assisted Warfield in regard to matters in the school of social welfare during Haberkern's absence.

B. November 1978 through April 1979.

Warfield was hired by the history department in

November 1978 after an excellent performance on a typing examination. When hired, Warfield requested and was allowed to work a three-day part-time schedule adding up to twenty hours. The department would have preferred part-time employment spread over five days, as in the past, but agreed to the condition because of a shortage of qualified candidates and Warfield's apparent abilities. Warfield's basic assignment was to prepare faculty letters, memos and short reviews, and, time permitting, to work on longer book manuscripts and scholarly articles.

The first evaluation of Warfield's work, near the end of his probationary period in April 1979, indicated that he was a superior employee, with great speed and accuracy in his typing, who used initiative in organizing and keeping track of his work. His performance was favorably compared to a predecessor employee.

About the time Warfield was evaluated, friction developed over the placement of a departmental mimeograph (or, ditto) machine in his office. The machine previously had been in the same room as photocopying equipment. When the chairman of the history department, Robert Middlekauff, learned of increasing photocopying costs he decided to strictly regulate access to that room. This resulted in movement of the ditto machine to allow research and teaching assistants, as well as other staff, less restricted use of that machine.

After he was hired, Warfield had been assigned office space

that was large enough to accommodate a faculty member. However, he used the office alone and, because there was no unoccupied space elsewhere, the ditto machine was moved in with him. Warfield objected to the move for several reasons. The machine was noisy, brought increased and disruptive traffic into his office, chemicals that were used gave off unpleasant toxic fumes, discarded wet stencils littered the office, and potential fire hazards were compounded by the absence of an efficient means of exit. These objections were presented to his supervisors, including Middlekauff, and the chairman personally directed measures to correct many of the problems. Controls were placed on times the machine could be used in order to avoid excessive interference with Warfield's work, another trash can was installed, signs were posted, and extra cans of toxic, flammable liquids were removed. Finally, several weeks after it was first installed, the machine was restored to the original location. This occurred once the department procured photocopy auditing devices that tabulated individual usage, thereby eliminating the need for restricted access.

C. Summer 1979 through November 1979.

A number of incidents over the next several months formed the basis, in part, for subsequent disciplinary action against Warfield.

One event occurred in August 1979. Professor McDougall

approached Warfield late one afternoon to request help on completing a four-page response to an unfavorable review of a McDougall publication. Warfield was busy with other work and made a brief but ineffectual attempt, in the absence of his supervisor, Libby Sayre, to find another employee to do the work. McDougall was left on his own to prepare his last-minute letter. His distress at the lack of cooperation from Warfield prompted a complaint to Sayre. Sayre testified that Warfield's only explanation, when later asked, was that he was too busy to help out. More revealing, however, was the testimony of another secretary, Dorothy Shannon, that Warfield told her his rejection of McDougall's request was caused by the professor's impersonal manner in seeking assistance. Sayre instructed Warfield that he should never completely turn down a professor again.[4] A second problem area described by Sayre concerned Warfield's excessive work breaks and lack of punctuality at various times during the summer 1979. Some questions had been asked by faculty about Warfield's presence, alerting Sayre to the issue. At first, Sayre attributed this to the slower

[4]Jane Taylorson, another office worker, was solicited by McDougall to prepare the letter, but because it was out of her area of responsibility and she was occupied with other work, and because she already harbored resentment against Warfield for his having passed on previous jobs that she believed should have been his, she did not type the McDougall letter.

summertime atmosphere. Several months later she concluded that Warfield's conduct was related to his declining motivation to perform his job well. Warfield's comings-and-goings were also observed by Shannon, whose office was almost directly across the hallway from Warfield's. She perceived that Warfield's industriousness had been greatly reduced once his probationary period had ended the previous spring.

A third criticism made of Warfield was that he didn't complete a summer assignment undertaken for Professor Barth. Warfield gave back the project in the final stages, although, arguably, he could have finished it in less time than initially projected. However, he did make an effort and at least part of the problem was Barth's unexpected advancement of the deadline.

Finally, an incident held against Warfield involved a paper to be typed for Professor Berry in November 1979. On the day Warfield was supposed to have prepared the Berry paper he was organizing a staff party.[5] The party lasted most of the afternoon. When it was over, as he was readying to leave, Warfield asked Taylorson to help him complete the Berry assignment. Taylorson on this occasion was able to assist, but

[5]The testimony leaves unresolved whether this incident followed a party initiated by Warfield for Sayre's birthday, or whether it was to celebrate his first year of employment. Taylorson testified that on each occasion Warfield passed on work for her to finish. Other testimony, from Sayre, indicates that the Berry incident occurred on the day of her birthday party.

did so begrudgingly. Afterwards, Taylorson complained to Sayre who, in turn, was distressed by the news. Before Sayre was able to fully discuss the events with Warfield, however, he was hospitalized with a serious illness at the end of the month. Warfield did not return to the department until February 1980.[6]

Warfield claimed at the hearing that his condition was aggravated by work-related stress. No specific medical testimony regarding the stress claim or its connection to Warfield's work was introduced by the charging party.

D. December 1979 and January 1980.

While Warfield was on medical leave Sayre was reminded by Ramona Domengeaux, the department's administrative assistant, that Warfield's evaluation was due for the purpose of determining whether a normal merit increase would be awarded. Sayre, at first, put off the task because she anticipated possible criticism of Warfield and was fearful he would be upset. By mid-December, however, Sayre had decided to prepare a critical evaluation and to recommend that Warfield be denied the customary merit increase, giving him, instead, only a 2-1/2 percent raise.

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[6]Katherine Klein, another secretary, also had developed a resentment toward Warfield arising from his requests in summer 1979 for her help in completing assignments. Klein testified that she willingly aided Warfield until she observed non-productive conduct on his part when he could have been doing the work he asked Klein to carry out.

The evaluation that Sayre eventually prepared gave Warfield an overall "improvement needed" rating. This was the next to lowest category. Although Warfield's typing skills were again rated "superior," he was criticized for confused priorities and for not managing his time effectively. Sayre's summary analysis stated:

> As Peter has settled into his job, he has become increasingly casual about his hours. He often arrives a little late and takes a longish break. He has frequently missed faculty members who arrived during his posted office hours. Perhaps more serious is Peter's tendency to establish priorities according to his personal preferences, accepting longer ms. (which he seems to find more interesting) and postponing the short correspondence which should receive immediate attention. He procrastinates when it comes to the more unpleasant aspects of his job, esp. dictation.
>
> Peter is a superior typist. In my opinion, with a little more application his performance would be superior.

Sayre stated that her future course of action was,

> . . . to work with Peter to establish a standard turn-around time for correspondence and to review with him the priorities for departmental typing.

Sayre testified that her comments were prompted, in part, by her view at that time that Warfield's problems were related to his doing too much editing of faculty writing and to his not being in sufficient control of the more limited typing work that he was assigned to do. With the evaluation prepared, the stage was set for Warfield's return.

E. The February 1980 Evaluation and Addendum, and Warfield's Response.

Sayre delivered her evaluation when Warfield resumed work. On that day and the next, February 4 and 5, Sayre and Warfield had extensive conversations, lasting several hours, discussing the details of Sayre's critical remarks. These conversations were not satisfactory to either party. Warfield believed that Sayre's criticisms were not sufficiently specific and that explanations for his actions should have been acceptable. Sayre felt that Warfield wasn't really listening to her overall comments and impressions, had ignored earlier conversations between the two, and was lost in defensive, self-serving justifications.

By the end of the second day, tensions between the two had increased. Sayre felt further conversations would be fruitless and suggested Warfield pursue his concerns with their superiors. Sayre, however, did promise Warfield that she would try to be helpful and precise in future monitoring of his work, and that if he did rebound to his earlier level of superior performance he would receive an above average 7-1/2 percent merit increase after the next evaluation.

Despite this assurance, Warfield's objection to the evaluation persisted and he met with both Domengeaux and Middlekauff. During his conversation with Domengeaux, she supported Sayre's analysis and added her own comments.

Domengeaux told Warfield that he had not been cooperative in connection with the placement of the ditto machine in his office, as well as with a request the previous November that he share his office, part-time, with a temporary secretary. Warfield asked that Domengeaux's comments be added to his evaluation, although Domengeaux stated then, as she testified at the hearing (along with Sayre), that these issues were not directly work-related, nor did they result in his "improvement needed" evaluation. The addendum, however, dated March 3, was prepared and attached to the initial document. Two days later Warfield sought administrative review in order to have the evaluation (and addendum) withdrawn.

In mid-March Warfield contacted CSEA for assistance. CSEA Steward Ernest Haberkern contacted Middlekauff and arranged a meeting, for March 20, to discuss objections to the evaluation. Warfield was present but not Sayre. At this meeting, in response to CSEA objections, Middlekauff expressed the view that the evaluation wasn't as bad as Warfield thought, and that there was no discipline intended.[7] On March 25 Haberkern followed up his presentation by submitting a letter

[7]Some witnesses testified that this meeting took place on March 25. Other witnesses, as well as documentary evidence, place the discussion on March 20, a more likely date in the context of other events described. Regardless, there is no significant testimonial dispute regarding the substance of the meeting.

that detailed his objections. In essence, Haberkern charged that Warfield performed his main responsibility (typing) in a superior fashion, that Sayre's vague negative remarks were not substantiated by reference to specific errors on Warfield's part, and, that the March 3 addendum was inappropriate because it rated Warfield on irrelevant criteria.

Middlekauff's letter response followed on April 1, denying the requested withdrawal of the evaluation. Middlekauff cited in support of the evaluation the McDougall and Berry incidents, Warfield's occasional tardiness, and also referred to a few other instances of alleged typing delays on Warfield's part. The next day, April 2, unfair practice charge No. SF-CE-12-H was filed.

F. Work-Related Events in March 1980.

While CSEA and Warfield were following through on the request for administrative review during March 1980, other events occurred reflecting the intensified conflict between Warfield and his superiors.

Early in March, for example, Sayre gave Warfield instructions on how he should maintain his typing log. Sayre felt that his record-keeping had fallen below the high standard that preceded Warfield's first evaluation. This was followed by a memo from Sayre on his work scheduling, and by conversations about different projects, priorities, and estimated completion dates. Sayre's actions were consistent

with her promise to Warfield, as he had requested, that she be specific in her comments about his performance.

A series of memos written by Warfield in the last half of March, referring to disputes with Sayre over a number of different assignments and conversations in the previous weeks, underscored the conflicting perceptions each had regarding the distribution of work and deadlines. At least part of the problem from Warfield's point of view was that Sayre criticized his too-willing undertaking of subjective editing determinations for faculty, although, as Sayre conceded, such activity on Warfield's part was partially at the behest of faculty. Another problem identified was that Warfield and Sayre had different recollections of day-to-day conversations involving various assignments and when they would be finished.

For example, a dispute developed over Warfield passing on a typing job (the Feldman paper) to Taylorson for completion. Sayre testified, convincingly, that Warfield had given a commitment to finish the paper himself, and that she had switched other Warfield assignments in order to help him in that regard. Sayre was off the afternoon this incident arose, and was especially displeased when Taylorson complained the next day.

Two other incidents during this period appear to have aggravated Warfield's feelings toward the department. First, on March 20 Sayre wrote a critical memo regarding Warfield's

assignments, including the Feldman paper. A copy of this memo was sent to Professor Hunt, a faculty member whose work was potentially affected by resolution of the conflict between Warfield and Sayre. Sayre testified that Hunt had requested to be kept informed. Hunt was not called as a witness. Warfield, filing a second grievance, claimed that Sayre's memo was factually inaccurate and constituted a letter of reprimand. He also protested release of this so-called confidential information to a faculty member. The next month, without concurring in Warfield's claim, Middlekauff nevertheless directed that the faculty copy of the memo be destroyed.

Second, toward the end of March, Warfield was moved to a different office, one that he had to share with another clerical employee. This move was made to accommodate the arrival of a distinguished visiting professor, who was given Warfield's previous room. The charging party did not dispute that other faculty office space was in short supply, and that, after the visiting professor departed, Warfield's former office continued to be used by faculty personnel.

Sayre and Warfield concur that their relationship declined throughout the month of March. After the evaluation process, Sayre's supervision became closer, causing resentment on Warfield's part, but necessary, from Sayre"s perspective, to meet his demands for specificity. Warfield, in his own words, became more curt and less communicative, and sometimes remained

silent in the face of Sayre criticisms that he felt called for no response.[8]

As the month drew to a close, with grievances and protests still outstanding, CSEA sought another conference on Warfield's behalf. On March 31 Haberkern telephoned Middlekauff to arrange a discussion about alleged harassment by Sayre, as outlined in Warfield's memos the preceding week, and to consider Warfield's objection to Sayre's March 20 memo. Although Middlekauff stated he was hard pressed by the start of a new school term, he agreed to meet with Haberkern the next day at 10:00 a.m.

Before this meeting took place, however, Middlekauff, passing Warfield's office late in the day on March 31,

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[8]Warfield also testified that Sayre's manner and tone of voice was abusive and hostile throughout the post-evaluation period. His office-mate as of the end of March, confirmed this. Another witness offered hearsay testimony that she telephoned Warfield about a job application and overheard, on the other end, a person chastising Warfield for being on the phone. Warfield identified the speaker as Sayre during this conversation. Sayre categorically denied that she was ever nasty or rude in her dealings with Warfield. Other than the phone call incident, no other specific events were described. It is not improbable that Sayre may have acted impatiently or spoken sharply during the course of her dealings with Warfield, given the disputes that evolved over time. Still, based on observations of the witnesses, the hearing officer cannot conclude that Sayre's conduct was, as described by Warfield's office-mate, "cruel and inhuman," or, even, unlawfully intimidating. This finding is related to the context of the tensions that existed, some of which were due, in part, to Warfield's resistance to communication and direction after the evaluation.

initiated what both characterized as a one-sided, very brief conversation. Middlekauff was concerned about the lingering disputes and, since he had once been a union representative, he commented that union involvement would not complicate matters. Middlekauff's remarks were impulsive and were intended,

> . . . to offer him as much reassurance and comfort as I could. This whole business, as I said, is rather unusual in the department and I wanted to say something reassuring to him to let him know that as far as I was concerned there was nothing - no bad feelings were involved and there was nothing soured in his relations to the department. I thought that might be helpful and reassuring to him.

No specific work was discussed by Middlekauff, nor did Warfield request that Middlekauff refrain from making any comments in the absence of a CSEA representative.

G. Confrontations on April 1, 1980.

Haberkern and Warfield arrived several minutes late for their appointment with Middlekauff on April 1. The chairman criticized Haberkern because of this inconvenience. The CSEA steward shrugged and offered a word of apology. Middlekauff, believing that Haberkern was not treating his remarks seriously, repeated his criticism. Haberkern then turned to Warfield to suggest a caucus in light of the continuing tension. As Warfield and Haberkern retreated from Middlekauff's office, Middlekauff started to follow them, apparently uncertain as to their plans. As they approached the doorway all parties essentially concur that Haberkern suddenly

stated, in a loud voice, "Listen, buster, are you cancelling the meeting." Middlekauff, taken aback at the outburst, said that he was. Several employees overheard Haberkern's last remarks and work was interrupted.

Warfield and Haberkern left the history department for about 45 minutes. Warfield made no formal request for release time to consult with his CSEA representative and was therefore absent without permission. When they returned, a note was waiting from Middlekauff for Warfield to contact him. Instead, Haberkern called from Warfield's office to remind the chairman that Warfield had a union representative. Middlekauff asked Haberkern to leave and came down the hallway to meet them. In the hallway, Middlekauff again instructed Haberkern to leave, threatening to bring in the police if Haberkern refused. Haberkern, now on his way out, said, "Bob, don't make more of an ass of yourself than you already have" and departed. The police were not summoned. Several employees overheard or observed the hallway encounter and work was interrupted.

Middlekauff testified that he had called a University vice chancellor after the initial office confrontation and was told that he could request Haberkern to leave in light of the abusive interaction that had taken place. There is, however, a testimonial conflict over whether Haberkern was instructed to leave merely the history department office area, or whether Middlekauff told him to leave the larger building, Dwinelle

Hall, in which the history department was located along with many other departmental offices and classrooms. Regardless, Haberkern testified that he never construed Middlekauff's prohibition as actually preventing him from having access. Indeed, Haberkern stated that he was in Dwinelle Hall on many occasions thereafter, and went back to the history department in order to review personnel records prior to Warfield's grievance hearing the following October.

In the wake of these confrontations, Haberkern wrote a letter to Philip Encinio, head of the labor relations division within the Berkeley campus personnel office, requesting that the University disclaim Middlekauff's conduct on April 1 and that it reaffirm the employee organization's representational rights under the HEERA. Neither Encinio nor any other personnel officer ever responded to Haberkern. Encinio did testify, with uncertainty, that he assumed an investigation of the complaint was made after he spoke with a subordinate, Dennis Marino. Marino was not called as a witness, but the parties stipulated that if he had been called he would have testified that he spoke to Joseph Toby, another personnel office analyst, about the matter. Toby testified that either Encinio or Marino showed Toby a letter, but he could recall no request for an investigation. Toby stated that he did, however, report Middlekauff's telephone comments to Encinio.

H. Events in April 1980.

After the aborted April 1 meeting between Haberkern, Warfield and Middlekauff, a major revision was also implemented in the Warfield-Sayre relationship. That same afternoon Middlekauff met with Warfield to let him know that thereafter all work for Warfield was to be channelled through Sayre instead of being brought to Warfield directly by faculty and research staff. Domengeaux and Sayre were also present at this meeting. No union representative attended, nor was one requested by Warfield. This new procedure was intended, according to Sayre and Middlekauff, as a constructive response to previous assertions by both Warfield and Haberkern that Warfield was being criticized for improperly setting work priorities when this task was not his to perform, but that of his supervisors. Under the revised system, Warfield was generally not given new work until the previous project was completed, thereby hopefully avoiding problems since other work that was backed up was given to different employees. The change was made even though Sayre believed that typists in the department could be expected to organize their own work flow.[9]

About the same time, Toby, the personnel staff service analyst who was liaison to the history department, advised

[9]Sayre's recollection was that the new channelling procedures were adopted after Haberkern's first meeting with

Domengeaux and Sayre that their recent concerns over Warfield's productivity could be better assessed if a typing standard was established. No precise standard existed when Warfield was hired, nor had one been fixed in the interim. Sayre talked to Taylorson, and to other clerical acquaintances, in an effort to arrive at a figure, but could find no scientific measure in her search—only an estimated six-page-per-hour level referred in an April 18 memo she soon sent to Warfield, discussed below.

After speaking with Toby, Sayre took two additional steps. First, early in April, Sayre began keeping her own log of the work assigned to Warfield. Second, by mid-April, Sayre asked other secretaries in the department—Shannon and Klein—to keep logs of the work they undertook. These records ultimately formed the final basis for the history department's decision to issue a disciplinary warning in May and, thereafter, to terminate Warfield.

On April 8, Toby, who was becoming increasingly drawn into the conflict through his advice to the department, telephoned Warfield regarding the University's response to Warfield's second grievance over Sayre's critical memo of March 20, a copy

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Middlekauff on March 20. Other testimony by Warfield and Middlekauff, describing the afternoon meeting as occurring on April 1, seems more accurate. The discrepancy, however, is insignificant in the final analysis since all concur as to the substance of the changes made and that the new procedures followed the earlier disputes in March.

of which had been sent to a faculty member. Toby's purpose was to inform Warfield that a cover letter was mistakenly left out of the mailing and would be forthcoming. During the same conversation, Toby added that Warfield was free to come and speak with Toby, with or without union representation, if Warfield thought it might be helpful. Warfield's testimony was consistent on this point. Toby testified that based on his several years of experience, first as a union steward and then as a personnel representative, he sensed that things were going "downhill" in the history department and thought he might be able to provide a helpful influence. Warfield was not responsive during the conversation, although he did state his preference to have Toby speak to his union representative. Neither Warfield nor CSEA accepted Toby's invitation to talk.

Later in the month Warfield and Sayre had another run-in. On April 17 Sayre tried to discuss Warfield's progress on a faculty project (the Malia paper), but, as Warfield testified, he instead told Sayre to put her complaint in writing or to speak with his union representative. The next day Sayre sent Warfield a memo about the Malia paper asserting that his productivity was inadequate and that a six-page-per-hour standard was expected. Sayre requested that Warfield respond to her communication. Warfield never answered. He claimed at the hearing that he didn't see this

memo until he was cleaning out his desk in July after his termination.[10]

Sayre testified that her conversation with Warfield on April 17 was the only time he specifically proposed referring a matter to his union representative. On other occasions, Sayre said Warfield simply remained silent when she tried to raise work assignment subjects. Domengeaux, who also had work assignment conversations with Warfield during the spring, testified that on two occasions he declined to speak with her and suggested the matter be taken up with his union representative. In each instance, based on advice given to Domengeaux by Toby, the discussion with Warfield ceased. The University never relied on Warfield's refusals to discuss work-related matters as a basis for later discipline.

The parties stipulated that during April Warfield's medical condition deteriorated further. On April 21, Warfield's physician directed that Warfield take two weeks' sick leave.

I. Warning Letter and Dismissal.

Sayre testified that once the new work channelling procedures were implemented she began to gain a clearer sense of Warfield's productivity. Sayre believed that Warfield had "laboratory conditions" but was still insufficiently

[10]It can be presumed, however, that Warfield was informed of the existence of the memo because it was subsequently mentioned in Sayre's warning letter to Warfield the next month.

productive. This was verified, from her standpoint, by the logs she asked other typists to compile in April and May. Sayre admitted that Shannon and Klein did not do exactly the same kind of clerical and secretarial work as Warfield, but maintained that once differences were discounted their logs provided a suitable degree of comparability for the exercise of disciplinary judgment.

To some extent, this conclusion was supported by the testimony of Klein and Shannon about the work they did and their experience in typing short correspondence and memos, as well as longer manuscripts. Shannon's testimony was particularly vivid and credible, as she recounted a test she administered to herself in Latin, in which she claimed to have easily satisfied a six-page-per-hour standard. Although cross-examination did establish variation in respective secretarial assignments, and also differences in possible typing difficulty based on the use of dictation tapes (largely utilized by Warfield), substantial variations in output, shown in the typing logs, can be given some weight as evidence of problems with Warfield's work.

After nearly a month of log maintenance, which showed Warfield producing about 1.5 pages per hour according to Sayre, she issued a warning letter on May 22, 1980. The letter was expressly premised on Sayre's own records of Warfield's work as well as the logs kept by other employees. The six-page-per-hour

standard described in Sayre's April 18 memo was set forth as a benchmark. Warfield was given until June 10 to improve or termination would follow.

Warfield immediately sought review of the warning letter. Middlekauff denied the request on June 9, affirming Sayre's decision based on the logs, and specifically rejecting the allegation that the warning was in reprisal for Warfield's other grievance and unfair practice filings.

On June 12 Sayre issued a notice of intention to dismiss Warfield. The dismissal was tied directly to continuing low levels of productivity. Sayre stated that dismissal was justified on the basis of logs kept from May 22 because Warfield had shown only slight improvement, to 1.9 pages per hour, since the issuance of the warning letter.

Haberkern responded in writing on Warfield's behalf on June 17, charging that the dismissal was based on a standard that was "probably impossible" to determine. Haberkern also claimed that Sayre's log of Warfield's work was itself "largely illegible" and was not a true reflection of the degree of difficulty or the amount of work undertaken by Warfield. Haberkern charged, correctly, that the department failed to produce upon demand any of the other documents relied upon as support for the dismissal decision. Again, CSEA accused the department of asserting low productivity as a pretext for dismissing Warfield.

Haberkern's protests were to no avail. Warfield was notified on June 19 that he was terminated from the history department effective July 3. Middlekauff, as the ultimate administrative personnel authority in the department, approved the dismissal determination. On June 30, a formal grievance was filed challenging the dismissal as specious, pretextual and retaliatory. The grievant's statement included a claim that damage suffered by Warfield might include "denial of other job opportunities within the University . . ." On July 14, Middlekauff formally denied the grievance, summarizing his view of the reasonableness of the department's determination:

> In an effort to help you improve your performance, Ms. Sayre assumed responsibility for assignments from faculty members, set all typing deadlines, and arranged all typing priorities. In addition, she made repeated efforts (both in conversation and by memo) to determine the source of any difficulties that might have adversely affected your productivity.

Middlekauff concluded:

> The facts of your case are quite clear: (1) your typing productivity was well below any reasonable standard; (2) established procedures have been followed in dismissing you.

At the formal hearing Middlekauff testified that the logs were the most important piece of evidence of unsatisfactory performance, although he was also aware of the prior faculty and staff complaints. Domengeaux's testimony was consistent with that of the chairman, describing the logs as the last

contributing factor, along with prior complaints and evaluations, leading up to the final termination decision.

In summing up Warfield's dismissal from the history department, it is appropriate to assess Sayre's testimonial denial of CSEA's claims that her motivation was unlawful.

First, there was no evidence of any statement or expression on her part that was anti-union. All the evidence against Sayre was circumstantial, related to the timing as well as the disputed characterizations and explanations she gave to events.[11]

Second, on certain factual matters the disputes between Sayre and Warfield were not very convincing evidence of unlawful conduct, partly because these disputes often did not involve contested facts to be resolved in Warfield's favor and showing animus by Sayre. Rather, these disputes raised

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[11]CSEA did offer evidence implying that Warfield's office-mate also had suffered anti-union retaliation in the history department, and that faculty comments derived from the departmental grapevine showed animus toward Warfield. The situation with the office-mate was remote in time and cause, as well as vague and ambiguous as to the allegation of anti-union motive. The evidence regarding faculty comments was more precise, although largely inadmissible hearsay because of the unofficial nature of the remarks. One comment, however, suggesting that Warfield should not try to "muscle" the department, was made by a titular vice-chairman of the department. But that individual had no involvement in staff personnel affairs, was speaking as an acquaintance, and was giving a personal opinion unrelated to any specific management source of information. In any event, the limited evidence described here was of little probative value in assessing Sayre's motivation, much less that of department officials Middlekauff and Domengeaux.

inferences about communication breakdowns and deadline misunderstandings, without clear fault assigned to Sayre. Additionally, Warfield's own admissions about, or failure to adequately explain, selected performance issues (for example, the McDougall and Berry papers, punctuality) tended to offset the weight that might otherwise be ascribed to some of his complaints of unfair treatment. The adverse testimony of Warfield's fellow-workers also offset Warfield claims, adding weight to Sayre's account.

Third, on some factual issues where the dispute was sharp, and material, Sayre remained justifiably steadfast in her testimony, even if she otherwise conceded that Warfield's recollection and his memos reflected an accurate grasp of details. For example, Sayre insisted that she spoke with Warfield several times during summer and fall 1979, but that Warfield either forgot or denied these discussions when the February 1980 evaluation was analyzed. Warfield, on direct examination, also denied that the informal talks had previously occurred. Yet, on cross-examination, Warfield admitted that some discussions had taken place, explaining the inconsistency by stating that the talks were not really critical in nature.

Another example: Warfield testified that he was unjustly accused by Sayre of failing to meet his commitments on the Feldman and Hunt papers in March. Sayre insisted that Warfield had made deadline commitments. Warfield's explanations, from

his testimony as well as his memos, show that the commitments were made after initial coordination with Sayre. It can be concluded that Warfield's failure to meet these future deadlines was due in part to Warfield's apparent inability to assert control—or make a timely appeal to Sayre for relief—over increasingly longer assignments. It was shortly after these production problems in March that the new channelling process was introduced—without any objection by Warfield or CSEA, and, indeed, with their implied consent if prior criticisms of the February evaluation are taken into account.

Fourth, more generally, Sayre's demeanor was an especially persuasive aspect of her historical account. Sayre's testimony reflected the shock, dismay and anguish she felt as her social and working relationship with Warfield deteriorated. Her testimony was also emotionally consistent with her claim that she attempted to act as a conscientious, fair supervisor, who gave Warfield the benefit of doubt and opportunities to improve—not as a supervisor with a retaliatory ax intending to remove a troublesome employee. When CSEA challenged Sayre's intentions, on cross-examination, Sayre was singularly believable in describing her personal distaste for the disappointing course of events that led to Warfield's ouster. Also credited is the same painful ring of truth evident in Sayre's denial of anti-union animus.

Last, Sayre's testimony and related inferences, as corroborated by Middlekauff, Domengeaux and staff employees, assume greater weight and credibility because CSEA failed to recall Warfield as a rebuttal witness.

J. Arbitration and Reinstatement.

In October 1980 Warfield's internal University grievance was heard by an arbitrator. The arbitrator considered the grievances involving Warfield's warning letter and eventual dismissal, but excluded evidence on the question of anti-union discrimination. This exclusion was premised on the fact that the issue was pending in another administrative forum; that is, the PERB.

The arbitrator concluded that the logs utilized by the department for arriving at production standards were inadequate. He found that the six-page-per-hour measure was insufficiently reliable, was not validated in terms of the job requirements, and had not been clearly communicated to employees. Although the logs did not support dismissal in the arbitrator's view, he still concluded that a seven-week suspension without pay was appropriate given the factual record of performance inadequacies that were in evidence. Warfield was ordered "immediately restored to his former classification."[12]

[12]The arbitrator also had before him the grievance filed

The arbitrator's decision, issued at the end of November 1980, and officially adopted by the University in mid-December, was not implemented immediately. Initial conversation between Haberkern and Toby, the University's agent in the matter, took place shortly after the New Year. Haberkern, aware of Warfield's holiday plans, made no request for implementation prior to January.

Toby, meanwhile, had been in contact with officials in the history department. At first, Toby informed Middlekauff that Warfield would probably be placed in a different department, thus avoiding a potentially complicated personnel situation if Warfield returned to history. This news was welcomed by Middlekauff and pleased Sayre. Later, however, after Toby discussed the reinstatement issue with Marino, another personnel department analyst, the University decided to avoid possible difficulties elsewhere by keeping Warfield in history—a decision not strictly compelled, but also not precluded, by the terms of the arbitrator's decision restoring Warfield to his "classification." Actual reinstatement efforts were under way by the first week of January 1981, as Toby

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over Sayre's March 20 memo, a copy of which had been sent to a faculty member. The arbitrator concluded that the memo could stand as a letter of reprimand regarding performance problems, but that the matter had been "resolved" to the extent a claim was raised as to improper dissemination. This latter conclusion was presumably based on Middlekauff's April decision asking the faculty recipient to destroy her copy.

searched for another available position for the woman who had replaced Warfield the previous summer.

Two departmental plans followed the decision that Warfield would be reinstated in history. First, Middlekauff concluded that Domengeaux, rather than Sayre, would become Warfield's supervisor upon Warfield's return. This was intended to ease what had become a strained relationship in the past. Second, the department determined that Warfield would work part-time five days a week, rather than the three-day work week agreed upon when he was hired. Warfield's replacement had worked a five-day schedule and the department concluded it was more in keeping with the daily flow of faculty hours and materials produced. Department witnesses testified that the five-day part-time schedule would have been implemented the previous spring, except for Toby's advice that, at the time, a return to the pre-Warfield schedule might have had an aggravating impact on resolving his performance problems and could have been misinterpreted as a reprisal. There is no indication in the record that any other post-reinstatement change in Warfield's actual duties was anticipated.

During the first week of January 1981, Toby informed Haberkern of the pending reinstatement in history and of the search for a new position for Warfield's replacement. Haberkern was surprised by this information, based on his expectation that Warfield would probably be placed elsewhere.

At the hearing, Haberkern asserted that established University practice would have resulted in Warfield's reinstatement in a department other than history. No evidence of application of this alleged practice was introduced. Regardless, Haberkern did not object to the reinstatement announcement. The failure to object to reinstatement to the history department was consistent with testimony that Warfield viewed going back to that department as a form of vindication. During this conversation (or, in a second call a day or two later) Haberkern also urged at least partial payment of the back pay awarded by the arbitrator. Toby apparently had no problem with this request, although a question he had regarding unemployment insurance computations related to back pay could not be answered at that time.

By Friday, January 9, Toby had found a new (temporary) job for Warfield's replacement. Toby immediately took steps to reinstate Warfield as of the following Monday, January 12, in order to minimize disruption of the history department's work. To this end, Toby tried calling Haberkern, without success, and sent special delivery notification (via Domengeaux) both to CSEA and to Warfield. The next day, January 10, Toby called Warfield to see if the notice had been received and to confirm that he would be at work on Monday under the new five-day schedule. Toby also wanted an answer to the unemployment insurance question initially raised with Haberkern. Toby

described Warfield as almost completely silent and uncooperative during the conversation, with long pauses after Toby's statements, and termed the situation "bizarre." Toby testified that he found Warfield's extended silences frustrating in light of the imminent reinstatement and what Toby saw as a favor on his part to speed up the back pay. At one point, when Warfield told Toby to talk to Warfield's union representative, Toby ended the conversation by telling the recalcitrant Warfield to stop "behaving like an ass."

Warfield did not report to work on January 12. Instead, on January 13, Haberkern wrote (and telephoned) to Toby protesting the abrupt nature of the reinstatement directive, and the department's decision to change Warfield's hours. A meeting was requested and was held on January 20. Present were Haberkern, Warfield, Toby and Middlekauff.

At the meeting the chairman explained that the hours needed to be changed to improve the work flow for faculty typing. CSEA appeared to accept management's prerogative to alter the schedule under normal circumstances. Nevertheless, tension persisted in regard to the short notice Warfield had received. Haberkern (and Warfield) claimed that Toby's conduct on January 20 compounded the problem when Warfield was threatened with immediate discharge if he did not report to work that afternoon.

Toby and Middlekauff dispute that such a threat was made,

and claim that under University procedures Warfield would have been given the standard five-day grace period from the date of the meeting in which to report for work. This five-day period had already been extended the previous week, after CSEA had requested a meeting.

Regardless of whether this threat was actually made, Warfield, through Haberkern, responded by letter the following day, submitting his resignation and stating that it was forced as a result of continuing harassment. This harassment, said Haberkern, was evidenced by the change in hours, the abrupt recall, and the ongoing hostility that Warfield perceived. Haberkern specifically noted that Warfield was fearful of aggravating his medical condition by renewed stress on the job. Neither in the correspondence described above, nor at the meeting, is there persuasive evidence that Warfield or Haberkern requested reinstatement to the same classification in another department. Although Haberkern testified that such a demand was made, both Middlekauff and Toby denied the claim. Moreover, in his letters of January 13 and January 21, setting forth various objections to the University's reinstatement process, Haberkern raised no demand for reinstatement other than in the history department.

Warfield's back pay pursuant to the arbitrator's decision was forthcoming in February, and included compensation up to the time he was directed to return to work as of January 12.

The University contended in its testimony that the one-month delay was not inconsistent with University practice, and that Toby acted promptly to pursue Haberkern's request for prompt partial payment—subject to the need to secure information from CSEA (or Warfield) for final computation. CSEA offered no rebuttal evidence on this issue.

K. The Social Welfare Job Offer and Withdrawal.

In spring 1980, Warfield was plainly aware of the dimming prospects for a satisfactory work relationship in the history department. As early as March he started gathering letters of recommendation from faculty for whom he had worked. His collection increased by several in May and June. Armed with these letters, and with a motivation to improve his job situation, Warfield began making inquiries. Toward the end of May he had arranged an interview with Professor Steven Segal in the school of social welfare. Segal was looking for a research group secretary, to work 80 percent time, who would serve Segal in conjunction with a variety of projects. Warfield pursued the job because he thought the work would be more challenging, because it would pay more than his position in history, and because he would learn new word processing skills.

By all accounts, an interview on June 2 went well. Segal was impressed by Warfield's typing and transcription skills, and by his recommendations. No questions were posed by Segal about any trouble in the history department, nor did Warfield

volunteer such information. Shortly thereafter, Warfield was formally advised of a job offer and plans were made for him to start work July 7, the first Monday after the July 4 break.

Once the job offer was extended, an employee in the campus personnel office processing the initial paperwork and aware of Warfield's pending grievances, told Toby about Warfield's upcoming change. Toby testified that he then called Segal, pursuant to University regulation, to let Segal know of Warfield's pending dismissal from history. Toby's action was consistent with the personnel rules in evidence. (University of California, Staff Personnel Manual (1980), sec. 740.14.) Toby informed Segal of social welfare's option to hire Warfield after a one-day break-in-service so that a new probationary period would be created in case things didn't work out. Toby also told Segal, however, about Warfield's positive work qualities, indicating that Warfield had probably become bored with his work in history. According to Toby, Segal said the break-in-service advice would be followed. Toby denied telling Segal about any union involvement on Warfield's behalf. This was confirmed by Segal.[13]

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[13]About this time, Toby also called Warfield and left a message on a tape machine for Warfield to contact Toby. Haberkern followed up the call, to arrange the clearance for the new position, and testified that he discussed the possibility of an overall settlement of outstanding grievances if the social welfare position worked out. Toby had no recollection of this suggestion. The charging party has

Toby's phone call prompted Segal to contact Sayre.[14] Sayre told Segal that the problem with Warfield was largely a personality conflict, emphasizing that Warfield had outstanding editing and language skills beyond the needs of the history department. Sayre also said that the volume of work that had been required, under faculty pressures of a large department, did not allow for full use of Warfield's thoroughness and precision. There is no evidence that Segal was given a detailed description of the alleged problems with Warfield's work. Sayre also denied that she referred to any union activity on Warfield's behalf. This was confirmed by Segal. In fact, Sayre was delighted with the prospect of the conflict coming to a close and did her best to ease Segal's reservations. The gist of Sayre's testimony was corroborated by Taylorson, who overheard, from an adjoining room, Sayre's end of the conversation. Taylorson, knowing of the departmental disputes, was surprised by the overall favorable quality of Sayre's comments.[15]

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implied that Toby's involvement in the social welfare appointment was intended to create a "bargaining chip" to resolve the pending grievances. No other evidence was offered on this point, and, on rebuttal, CSEA made no attempt to impeach Toby's explanation based on University personnel rules.

[14]This actually may have been, according to Sayre, her second conversation with Segal. In each, Sayre claims she gave Warfield a generally favorable recommendation.

[15]Taylorson also testified that Sayre gave substantially

Still, Segal was distressed by the news of Warfield's pending termination from history. Toward the end of June, just before the effective date of dismissal from history, Segal contacted Warfield to arrange another interview. Segal informed Warfield that he was reconsidering the job offer and wanted to hear Warfield's explanation of events that had occurred in history. July 7, the date Warfield was supposed to have started work, was fixed for the interview because Segal was going out of town for several days. During the phone conversation, Warfield asked Segal if a union representative could attend. Segal gave his approval, although he also stated that he found the request a "surprise" and indicated his preference to speak with Warfield alone.

Accounts vary somewhat about what transpired when the July 7 meeting took place. According to Eugene Darling, a CSEA steward acting in place of the unavailable Haberkern, Segal announced at the start of the meeting that the job was being withdrawn, while also giving the impression that an acceptable explanation from Warfield might change Segal's mind. Segal claimed that Warfield had misrepresented the situation at their first meeting by not disclosing his trouble in the history department. When Darling protested, on Warfield's behalf, that

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the same favorable recommendation in a previous phone call inquiring about a Warfield application in a different department.

a union-related dispute existed, Segal, according to the charging party, repeatedly indicated that he didn't want to get into the middle of Warfield's dispute, nor did he want to choose sides. Darling told Segal that the best way for Segal to refrain from involvement was to let Warfield have the job and to allow the grievances to run their course. To do otherwise, by withdrawing the job offer, according to Darling, was to effectively choose sides against Warfield.

Although Darling testified that he and Warfield answered questions posed about the history department, few matters were actually raised because Segal stated he wasn't interested in details. Indeed, toward the end of the meeting, Darling and Warfield recalled that Segal, repeating sentiments stated earlier, expressed regret about the loss of the job and suggested that if he and Warfield had been able to talk alone, without the formality of a union representative, the situation might have worked out differently.

Segal's description of the July 7 meeting differs as to several particulars. Segal first testified on direct examination that his learning about Warfield's problems in history had been upsetting because of Warfield's alleged productivity and deadline problems, because Segal works with a substantial amount of confidential research material, and because Warfield's failure to tell Segal about his potential discipline caused Segal to question Warfield's

trustworthiness. Segal also testified that the job was withdrawn not at the outset of the meeting, when Darling showed up with Warfield, but only after Warfield gave unsatisfactory responses to Segal's inquiries about details of Warfield's situation in history. According to Segal, Darling (and Warfield) instead focused on Warfield's union affiliation as the main issue and did not concede the existence of work-related problems. The doubt created for Segal, first by Warfield's initial failure to disclose his problem, and, later, by Warfield's allegedly misleading answers, caused Segal to conclude that Warfield lacked sufficient integrity and was therefore not fit for the social welfare job.

However, under cross-examination and examination by the hearing officer, Segal explained that he never actually determined that Warfield was untruthful or in the wrong in the history department. Rather, Segal merely felt that Warfield's view was too "simplistic" and thus created doubt. For this reason, Segal surmised that Warfield was too great a risk to be hired.

Several other aspects of the situation were revealed in Segal's testimony and are worth noting. Segal admitted he had not probed Warfield's relationship with the history department at the initial hiring interview. Segal also failed to offer any explanation of why, assuming confidentiality was important on the job, Segal had not raised the matter at the first interview or sought full disclosure of Warfield's work record.

Segal conceded that he would have preferred a one-on-one meeting with Warfield to work things out, and admitted that Warfield's initial request for a union representative set off "blinking lights." Segal confirmed that he didn't want to be "plunked down" in a process "where a lot of things were going on."

Segal claimed that his displeasure at the encounter was compounded by Darling's discourteous and rude manner, of which specific descriptions were lacking, and by Darling's insistence that Warfield had anti-union retaliation problems, not performance problems. Without this union presence, Segal implied that Warfield had a better chance to keep the job. Yet, when examined by the hearing officer, Segal also admitted that Darling (or Warfield) did give answers to direct questions posed about events in the history department.

Segal further conceded that he did not check with Sayre again, after the July 7 meeting, about Warfield's union discrimination claims, nor did Segal check with any of the faculty members who had written on Warfield's behalf. This was so, even though Sayre's remarks had been quite laudatory, and Toby had made favorable comments. Segal had also been given a personal letter of reference from Professor Samuel Haber praising Warfield. All of these recommendations contradicted negative inferences drawn by Segal. Moreover, Segal testified that although it would have been better if both Sayre and Toby

had informed Segal about Warfield's claims of anti-union retaliation—by then heavily documented—their failure to tell him about that issue did not cause Segal to question their integrity in the same way he had questioned Warfield's for failing to disclose the pending dismissal.

Also, although Segal could faintly recall Toby's break-in-service suggestion, he gave no explanation for disregarding the idea. Since Toby's testimony is credited, it therefore appears that Segal's actual decision to withdraw Warfield's appointment was made, at least tentatively, about the time of the July 7 interview, after union involvement was known to Segal, and was confirmed in the course of the meeting.

Other testimony by Toby relates to this meeting and corroborates, in part, Warfield's claim of anti-union prejudice by Segal. Toby recalled that in the course of investigating this incident in July, Segal told Toby that Warfield would have been hired but for the belligerent attitude of the union representative who was present. Segal, at the hearing, provided no details to support this assertion. Darling denied that he was discourteous, rude, or otherwise belligerent at the July 7 meeting.

It may be inferred from all the testimony that Darling put Segal on the spot, so to speak, by firm disapproval of Segal's withdrawal of the job offer. But even if this caused Segal some discomfort, such behavior by a union representative in a

private exchange is not necessarily abusive, much less a credible reason to withdraw a job offer. Further, if Darling had been offensive, it is reasonable to assume that the meeting would not have lasted the 15 to 30 minutes it did, but would have broken down much sooner.

Finally, Darling's testimony at the hearing, including rebuttal, was concise, matter-of-fact, low-keyed, internally consistent, and believable. Darling's manner was hardly indicative of an individual who would carry aggressiveness to excess. Warfield, who was a highly interested participant-observer at the July 7 meeting, was also straight-forward, and was consistent on material facts with the account given by Darling.

Segal, on the other hand, was demonstrably nervous during his testimony, as well as evasive, inconsistent, vague and hesitant about disclosing details and information. At times, Segal's appearance of attempting to withhold relevant testimony was accompanied by noticeable embarrassment when he realized the inconsistencies of his own testimony. Segal's telling demeanor was most obvious when testimony was elicited about his attitude toward the presence of a union representative, about the details of the history dispute that were offered upon his request, about the nature of Warfield's alleged misrepresentations, and about his failure to either accept the Sayre and Toby recommendations or to conclude that Sayre or

Toby might have misrepresented matters when neither disclosed Warfield's union discrimination claims. Segal's demeanor, therefore, strongly supports the conclusion that he was trying to hide or cover up a discriminatory purpose.

For the reasons summarized above, the testimony of Darling and Warfield is credited in regard to the events leading up to and occurring on July 7.

Warfield's grievance against social welfare for withdrawing the appointment was filed in early July. This grievance contended that Segal's comment to Warfield about not wanting to be involved in Warfield's formal dispute constituted a reprisal against Warfield for having used CSEA in connection with his history department grievances. Warfield's grievance also alleged that Segal's remarks indicating his preference to have spoken with Warfield alone, attempted to coerce Warfield into waiving his right to representation. The remedy sought by Warfield in this grievance was placement in the secretary "II" position, originally offered by Segal, plus retroactive pay to July 7, 1980.

The grievance was denied shortly after it was filed. The response was prepared by Harry Specht, the dean of the school. Specht was not called to testify, however. In Specht's responsive comments, based on his investigation, he stated that Warfield was re-interviewed because Segal believed that Warfield had been less than candid initially and that trust and

confidence were important attributes on the job. According to Specht, Segal requested the meeting to find out why Warfield had not accurately described his employment situation previously and also to discuss further the details of the secretarial assignment. Specht denied that Segal's intent was simply to withdraw the employment offer, explaining that if so,

> . . . he would have used the telephone and not bothered to have a meeting.

Regarding the claim of interference with representation rights, Specht denied that this occurred since, if that were Segal's intent,

> . . . he would not have agreed to meet with you and your representative. (Emphasis added.)

However, as noted above, Segal testified that he was surprised by Warfield's request for union assistance, the first he knew of union involvement, and gave his immediate consent. Other remarks raising an anti-union inference were made on July 7, after several days had elapsed, with an opportunity for Segal to think further about the situation.

Specht's explanation concluded:

> Dr. Segal never alluded to withdrawing the job offer due to your dismissal or grievance filing. To the contrary, it was Dr. Segal's intent to have a candid discussion with you pertaining to your employment as his secretary.

But, as Segal conceded, contrary to Specht, Darling (or Warfield) did answer questions posed by Segal, were willing to

provide details, and resisted Segal's premise for withdrawing the job; namely, that Segal didn't want to be put in the middle of a dismissal dispute involving others.[16]

Eventually, Warfield's grievance over the social welfare issue awaited further disposition, along with Warfield's other grievances against the history department. Haberkern attempted prior to the October grievance hearing to have the social welfare issue joined with the others. The University objected. At the hearing, Haberkern also requested joinder. The arbitrator, however, did not overrule the University's decision, which had been made pursuant to University procedures governing submission of issues. Still, during the proceeding, Sayre was cross-examined, apparently for the purpose of determining her motivation, about her telephone conversation with Segal preceding the withdrawal of Warfield's appointment. Also, at the arbitration, Haberkern claimed the social welfare issue was part of the series of issues pending in the PERB administrative proceeding.

A few months after the arbitrator's decision in November 1980 the social welfare grievance was set for hearing in March 1981. However, Warfield waived his right to this

[16]A second grievance was also filed by Warfield in July against the history department, alleging that Sayre had given improper, unfavorable information to Segal, thereby affecting Warfield's job opportunity. This grievance was also denied in July.

hearing, informing the University in February that he would pursue the issue through an unfair practice proceeding, along with the other charges on file. By that time, following the reinstatement failure, the earlier charges had been reactivated.

L. Observations Concerning the History Department and Peter Warfield as an Employee.

The vastness of the University of California's Berkeley campus belies the small size and close-knit character of the history department staff operation. By the conclusion of this hearing, nearly half the non-professional employees in the history department had testified; that is, five out of nine or ten permanent workers, and one part-time employee. Most of the employees summoned had worked in the department for two to three years, or longer. Their intelligence was evident in their manner, speech, and vocabulary. At least one employee, Shannon, also had such a demonstrably high level of skill at her job that she was capable of typing in foreign languages, including Latin, as previously noted.

Warfield's background and intellectual capacity were consistent with the capacity of others in the department. He too had multi-lingual skills and a highly developed vocabulary.[17] His thoroughness and precision were constant

[17]One professor was impressed when Warfield spotted the misspelling of "daguerreotype" in a draft.

themes in the several written recommendations that were confirmed when the subscribing professors testified. Some of the faculty supporters also observed that Warfield was a pleasant conversationalist who blended in well with the academic climate.

It was also apparent, however, that a certain team spirit was nurtured in the department, with employees identifying their own interests to some extent with those of the faculty. One example of this was in regard to the McDougall letter that Warfield refused to type late one afternoon in August 1979. The letter was a rush response to a highly critical review. Other employees were aware of the critical review, and sympathetic to McDougall's desire to respond. Warfield's lack of sympathy, perceived perhaps as an individualistic response, cut against the grain. The same might be said for his attitude toward office sharing, the ditto machine problem, and for his passing on work to other employees but not volunteering to share in their burdens too.

In other respects, staff criticisms of Warfield in the latter stages of his employ also indicate that he had become the so-called "odd man out." Taylorson and Klein, as noted, were upset with Warfield giving work to others that he could and should have done himself. The resentment of each was bitterly expressed in the tone of their testimony. Shannon felt that Warfield, for his part, was too peevish: for example,

refusing to type McDougall's paper because he didn't like the way McDougall raised the subject, and declining to post his own part-time office hours because he didn't want to be treated as an object. Sayre, initially Warfield's friend as well as supervisor, came to view him as a prima donna whose childish defensiveness and extended silences made a continuing working relationship very difficult if not impossible.[18]

All of this is not to say, however, that Warfield was fundamentally a disagreeable or unpleasant person, or a worker without admirable ability. Certainly in the early stages of his job in the history department he was well liked and his skills and contributions greatly appreciated. Comments from faculty witnesses make it plain that Warfield often went out of his way to do more on a particular assignment than the faculty member expected in terms of grammatical, spelling, and stylistic corrections, as well as editing suggestions. Indeed, staff and faculty uniformly stated their impressions that Warfield was under-employed in terms of his abilities. It was

[18]In addition to Sayre and Toby, Professor Diane Shaver Clemens also testified about problems arising from Warfield's conversational silences. Clemens had been solicited by Warfield's office-mate in April 1980 to offer mediatory assistance. After making an overture to Sayre on Warfield's behalf, which Clemens thought beneficial, she thereafter had an unproductive conversation with Warfield. The gist of her testimony was that Warfield, for the most part, was inexplicably silent and non-responsive. In the end, Clemens' efforts came to naught.

also suggested that after his probationary period Warfield was increasingly restless with the more mundane and routine secretarial assignments of processing correspondence and memos for a large faculty department. Perhaps for this reason, most witnesses, when asked, concurred that Warfield would have been happier in a more challenging position. Consistent with this view, as borne out by the reinstatement finale to this process, Warfield's attitude reflected a greater desire to have his pride vindicated than a desire to continue an employment situation he found intrinsically rewarding.

CONCLUSIONS OF LAW

I. The Extent of Warfield's Protected Rights.

Before reaching the merits of CSEA's claims that the University discriminated against Warfield, the extent of Warfield's protected rights must first be determined. Once the scope of protected activity is defined, further analysis will be undertaken to decide whether University actions were unlawful.

First, did Warfield have a right to be protected under the HEERA for his conduct prior to the involvement of CSEA in mid-March 1980; specifically, for his protest against the ditto machine being placed in his office, and for his unaided administrative appeal of the unfavorable evaluation he received in February and March 1980? The charging party claims that section 3567 of the Act confers protected status on Warfield's actions:

> Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to Section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. The employer shall not agree to resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution, and has been given the opportunity to file a response.

This particular provision, however, does not afford Warfield protection. By its terms, the provision is drafted in the context of individual or group action after the selection of a collective bargaining representative. It does not raise day-to-day personnel matters prior to selection of a representative to the status of protected activity. This conclusion is consistent with established precedent. The Legislature's choice of language in section 3567 is comparable to that of the Congress in drafting the proviso to section 9(a) of the National Labor Relations Act (hereafter NLRA), an amendment which protects an employer against a charge of unlawful bargaining if the employer discusses a grievance with an individual employee after the choice of an exclusive representative. See section 9(a) (29 U.S.C, sec. 159(a)); Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50; Black-Clawson Co., Inc. v. International

Association of Machinists (2d Cir. 1962) 313 F.2d 179 [52 LRRM 2038].[19]

The central premise of the HEERA, in accord with the PERB's interpretation of comparable legislation, is that individual action with or on behalf of others is deemed concerted action and therefore entitled to protection, but that conduct less than that, divorced from collective concerns, is protected not by the HEERA, but, if at all, by other legal redress. See, e.g., Baldwin Park Unified School District (4/4/79) PERB Decision No. 92; Grossmont Community College District (3/19/80) PERB Decision No. 117.

Thus, as a general rule, an individual complaint of a personal nature, regardless of justification on the merits, does not trigger the protections of the HEERA. Here, for example, even if Warfield had good reason to object to the ditto machine in his office, his action was an isolated health and safety complaint, unrelated to actual or threatened group action. The HEERA, with its specific focus on collective action, does not apply under these facts (cf. NLRB v. Charles H. McCauley (5th Cir. 1981) ____ F.2d ____ [108 LRRM 2612]), even

[19]The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C, section 151 et seq., may be used to guide interpretation of the HEERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 6-8, 616.

assuming that this conduct, before the July 1, 1979 effective date of the HEERA, was protected against retaliatory employer action after that date (cf. Santa Monica Community College District (9/21/79) PERB Decision No. 103, enf. (1980) 112 Cal.App.3d 684). Similarly, Warfield's evaluation appeal, at least prior to the involvement of CSEA in mid-March 1980, was no more than an individual complaint protesting an alleged personal injustice and was thus unprotected by the Act.

Once CSEA entered the picture, however, the question arises of whether Warfield's status under the HEERA changed. At that juncture he was joining with others to pursue the goal of collective representation. Even though CSEA was not yet an exclusive representative, and thus not certified to engage in collective bargaining, CSEA was free to provide grievance representation in conjunction with Warfield's right to "form, join and participate" in an employee organization,

> . . . for the purpose of representation on all matters of employer-employee relations. . . .

This right is recognized throughout the statutory design of the HEERA. For example, section 3560(e) allows employees to designate,

> . . . representatives of their own choosing for the purpose of representation in their employment relationships with their employers. . . .

Also, section 3562(g) defines an employee organization as one which exists for the purpose,

> . . . of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees.

Since the HEERA was part of a legislative chain expanding the statutory rights of employees to collective representation (sec. 3560), it would be anomalous to conclude that Warfield's pre-certification request for CSEA assistance, and that CSEA actions on his behalf, protected under comparable legislation, were not also entitled to protection under the HEERA against unlawful employer interference and discrimination. Cf. Professional Engineers in California Government (3/19/80) PERB Decision No. 118-S; Robinson v. State Personnel Bd. (1979) 97 Cal.App.3d 994. This conclusion is buttressed by the fact, as shown by the testimony of both Toby and Haberkern, that the University's past practice has been to allow for employee choice of representation. (Also see University of California, Staff Personnel Manual (1980) sec. 280.31.)

Finally, CSEA also argues, as a third type of protected conduct, that Warfield and CSEA had a right to file unfair practice charges with the PERB. The charging party has asserted that certain University actions after the filing of the initial charge in April 1980 discriminated against the charging party and Warfield for having pursued relief from the Board. Although respondent contends that evidence does not

support this claim, no challenge is made that CSEA has failed to present a triable issue of law by alleging retaliation for the exercise of a clearly protected right (that is, filing an unfair practice charge) established by the Act. See section 3571(a); cf. NLRB v. Scrivener (1972) 504 U.S. 117.

II. The Retaliation and Discrimination Claims.

Several of the particularized charges fall within the general category of retaliation and discrimination claims, including the following:

1. The February and March 1980 evaluation;

2. The office relocation in March 1980;

3. Sayre's critical memo of March 20, 1980, a copy of which was distributed to a faculty member;

4. The warning letter and dismissal in May and June 1980;

5. The reinstatement conflict in January 1981.

(As noted previously, the charges involving the social welfare school will be considered separately.)

A. The test for discrimination under the HEERA.

The PERB has not expressly stated the appropriate test for discrimination under the HEERA. However, a decision under the Educational Employment Relations Act (hereafter EERA), based on the same statutory language, does provide guidance. Carlsbad Unified School District (1/30/79) PERB Decision No. 89. Under the Carlsbad test,

> . . . where there is a nexus between the employer's acts and the exercise of employee

> rights, a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. If the employer offers operational necessity in explanation of its conduct, the competing interests of the parties are balanced accordingly. If the employer's acts are inherently destructive of employee rights, however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by inference from the record. (Santa Monica Community College District, supra, PERB Decision No. 103 at p. 17.)

In this case, as in many discrimination cases, the trier of fact is obliged to weigh both direct and circumstantial evidence, to determine whether an action would not have been taken against the employee but for the exercise of protected rights. See, e.g., Belridge School District (12/31/80) PERB Decision No. 157 at p. 5; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730; Bekiaris v. Board of Education (1972) 6 Cal.3d 575, 592-594; Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169] enf. (1st Cir. 1981) ___ F.2d ___ [108 LRRM 2513].

Assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Thus, once employee misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

B. The February and March evaluation.

The charging party contends that this evaluation was unlawful because it was given in retaliation for Warfield's protest against placement of the ditto machine in his office the previous April. But, as already indicated, that personal protest, even if well-founded, was not protected by the HEERA. Assuming the evaluation was retaliatory, no violation under the Act would arise. NLRB v. Charles H. McCauley, supra, ___ F.2d_____[108 LRRM 2612]; also see NLRB v. Big Horn Beverage (9th Cir. 1980) 614 F.2d 1238 [103 LRRM 3008]; Kohls v. NLRB (D.C. Cir. 1980) 629 F.2d 173 [104 LRRM 3049]. In any event, the charging party's claim of retaliation is weak, since the evidence shows that the ditto machine played no determinative role in Sayre's evaluation, and that the addendum was issued in March, after Warfield's discussion with Domengeaux, at Warfield's request.

C. The office relocation.

There is an initial question, not addressed in the briefs, of whether this decision was made by the department before respondent knew that Warfield was being represented by CSEA, even if carried out after Haberkern set up the March 20 meeting. Since the events occurred in close proximity, for the

sake of argument, the benefit of doubt has been given to the charging party.

Yet the timing of Warfield's office relocation is the only evidence in support of the charging party's allegation that he was moved in retaliation for his administrative protest, with CSEA, regarding the evaluation. Balanced against this single factor is the University's unrebutted showing that the office was needed for a distinguished visiting professor, and that faculty space was in short supply. Under the facts presented, no violation is found.

D. Sayre's critical memo of March 20.

The charging party argues that Sayre's memo of March 20, criticizing Warfield for alleged misconduct, and distributed to a faculty member whose work was discussed in the memo, was a retaliatory action on the part of the employer. As before, CSEA has difficulty, on the evidence, overcoming the initial hurdle of showing that the employer's action came after knowledge by Sayre of CSEA's involvement. But even if it may be presumed that this hurdle has been surmounted, the University's defense is virtually unchallenged.

The dispute between Sayre and Warfield, based on their respective memos of March 20 and March 26, involved questions of productivity arising earlier in the month in regard to several faculty assignments. The issues were first discussed verbally, and only later put in writing—to Warfield's evident

displeasure. One of the assignments discussed was the "Hunt paper." Hunt had asked Sayre to be kept informed of the status of this project. Sayre did just that by distributing to Hunt a copy of the March 20 memo to Warfield. Sayre may have been indiscreet in sending a copy to Hunt containing other faculty references, and may have overstated her case against Warfield for his lapse. But, such supervisory error does not constitute sufficient proof of retaliation in the absence of any other contemporaneous evidence of animus on Sayre's part.

E. The warning letter and dismissal.

The charging party's claim of discriminatory warning and dismissal is based on several circumstantial aspects of the situation, going back to the earlier evaluations and hostility in the department. Specifically, the charging party's letters, grievances and charges contend that the employer's initial complaints against Warfield were not specific, and that the few complaints that were adequately identified did not justify subsequent corrective action. Thereafter, alleges CSEA, the logs maintained by Sayre, of Warfield's work as well as the work of others, compounded the weak foundation of the earlier evaluations, because they were themselves insufficient for disciplinary purposes.[20] Finally, in the charging party's

[20]At the start of the formal hearing, CSEA asked that the arbitrator's findings and conclusions disapproving use of the logs as an adequate basis for discipline be binding in this

view, respondent's disciplinary determination only followed the several grievances and unfair practice charges, as well as the charging party's vigorous advocacy on Warfield's behalf.

The employer responded with testimonial evidence, credited by the hearing officer, that Sayre had had a number of conversations with Warfield about specific incidents and criticisms, leading up to and after the time of his 1980 evaluation. Sayre's comments were also referred to in Middlekauff's April 1980 letter denying Warfield's evaluation appeal. The employer claims that these incidents and criticisms provided sufficient justification for concern about Warfield's performance, and that the logs were an appropriate means for verifying departmental perceptions about Warfield. In the end, the employer argues that Warfield was given repeated opportunities to perform adequately and that customary steps of progressive discipline were followed.

It is concluded that the evidence supports the respondent. Sayre did talk to Warfield on several occasions, as he admitted

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case. A reasonable argument can be made in favor of an estoppel against the University on this narrow issue. Estoppel would be based, in part, on respondent's opportunity during the arbitration to fully present evidence and to cross-examine witnesses about the logs and, in part, on the University's personnel manual, which provides that such findings shall be binding. (University of California, Staff Personnel Manual (1980) sec. 280.24.) Nevertheless, this decision need not apply an estoppel rule, since, as found above, sufficient, independent evidence was offered impeaching the reliability and validity of the logs as a foundation for termination.

on cross-examination, about his punctuality and about various assignments that Sayre believed were not handled properly. Indeed, as to the McDougall and Berry incidents, both serious matters, Warfield had no adequate explanation of why he apparently acted in a self-serving fashion. Additionally, even if the logs were not scientifically valid measures of performance inadequacy, they were an indication of deficiency on Warfield's part and are entitled to some weight before this Board. This was confirmed by the credible testimony of employee witnesses who did similar work and who prepared the logs.

Further, the employer gave Warfield a number of opportunities before and after his evaluation both to answer specific questions and to improve his performance. During spring 1980, while Warfield was pressing his evaluation appeal, the department adjusted the supervision of Warfield's work to maximize his chance to demonstrate his ability. This was done through the new channeling procedures, through the reduction of backed-up assignments, and through the new log that Sayre maintained.

In addition, the University abided by its customary disciplinary steps. Informal conversations were followed by an evaluation. More conversation ensued. Warfield's demands for precise monitoring and for review of allocation responsibility were accepted. Critical memos were sent only when explanatory

discussions apparently failed. Several weeks of careful scrutiny and measurement (admittedly imperfect), preceded the eventual warning letter in May. The dismissal itself in June came after still another opportunity for Warfield's work to improve.

Simply put, although Warfield and CSEA have introduced circumstantial evidence of discriminatory motive on the employer's part, other evidence, direct and circumstantial, indicates a basis for the employer's claims of performance inadequacy. Although, as determined by an arbitrator, the employer's ultimate decision to dismiss Warfield was not justified under its own internal guidelines, that fact by itself does not prove unlawful intent where other evidence of some misconduct exists. In light of the contrary evidence offered by respondent negating the inference of anti-union animus, the charging party has failed to carry its burden of persuasion that the employer's actions were unlawfully discriminatory and not merely the result of bad judgment.

Despite the conflicting evidence on the question of motive, the employer's witnesses have been credited as to their intentions and, in conjunction with the inferences to be drawn from the employer's actions, it is concluded that Warfield's union association was not the "but for" leading up to and causing his dismissal. The inferences raised by respondent's defense gain greater weight because CSEA failed to recall Warfield as a witness when rebuttal evidence was offered.

The PERB itself recognizes that unlawful discrimination need not be found, even if an employer, acting upon a personality conflict, discharges an employee without good cause. Cerritos Community College District (10/14/80) PERB Decision No. 141. Federal labor relations precedent also is in accord with the decision here:

> The decision of the department chairman and the associate dean to evaluate Carper as below average may not have been a good or reasonable one, but so long as it was not in retaliation for protected activity the Board had no jurisdiction to question it. (Berry Schools v. NLRB (5th Cir. 1981) ____F.2d ___ [108 LRRM 2011, 2015].)

(Also see Florida Steel Corp. v. NLRB (5th Cir. 1979) 587 F.2d 735, 745 [100 LRRM 2451], quoting NLRB v. McGahey (5th Cir. 1956) 233 F.2d 406, 413 [38 LRRM 2142].)

F. The reinstatement conflict.

The charging party's theory of constructive discharge after the arbitrator's reinstatement decision is based partly on its contention that it was University past practice to place reinstated employees in a different department, and partly on Warfield's claims that he was harassed. This alleged harassment took the form of short notice recalling Warfield to work, a change in his original working days from three to five days per week, a threat of immediate discharge if he did not return to work on January 20 after his meeting with management, and a failure to promptly convey the back pay awarded by the arbitrator.

However, the respondent's evidence in its defense was more persuasive on the issue of whether Warfield was forced to quit. The employer's witnesses credibly denied that there was a University past practice of reinstatement in a different department. The charging party offered no specific rebuttal of this denial. Indeed, at the time, no objection was made either by Warfield or CSEA to reinstatement in history. It is true that the announcement recalling Warfield to work was sent only three days before the effective date, but it was preceded by discussions earlier in the week between Toby and Haberkern informing CSEA that the reinstatement order was being implemented and would occur as soon as another job was found for Warfield's replacement. There was also reasonable evidence of business justification for the short recall notice; that is, to avoid prolonged interruption of departmental typing. Further, the change in Warfield's work schedule to a five-day week was consistent with a reasonable business explanation of restoring a more efficient flow of daily typing production for faculty. And, although the work days were changed, it is undisputed that Warfield's duties would have remained the same.

Regarding the allegation of a threatened immediate discharge on January 20 if Warfield did not return to work that day, the denial of the threat by Toby and Middlekauff is credited. But even if such a demand were made, it would not have been necessarily prompted by anti-union motivation.

Rather, the warning could have been caused by understandable frustration at the fact that reinstatement set for January 12 had already been delayed for more than one week and, under University rules, Warfield had failed to report for work within the five days normally allowed. In any event, Warfield voluntarily resigned before any termination action was taken by respondent, so we have no more than the circumstantial evidence of a dismissal threat to support the ultimate claim of unlawful discrimination.[21]

Finally, the back-pay allegation is also without sufficient foundation to support a violation. The back-pay was forthcoming in February. It may be inferred from the record that the delay, if any, in processing was due to the December holiday recess and to the need for further information that Haberkern was unable to provide when the back-pay issue was first raised in January.

III. The Right to Representation: Interference and Denial.

At issue here are allegations by the charging party, separate from the discrimination issues discussed above, that the University both interfered with and denied Warfield his

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21other evidence offered by respondent also supports the employer's denial of a forced resignation. Warfield's supervisor, upon his return, would have been Domengeaux, not Sayre. This decision recognized Sayre's feelings that it would have been too difficult to have a satisfactory working relationship with Warfield at that point.

right of representation on several occasions. The allegations include the following events:

1. Middlekauff's March 31, 1980 comments.

2. The aborted meeting on April 1 1980.

3. The threat to summon the police if Haberkern did not leave on April 1, 1980 (and the failure the same month of respondent's personnel office to disclaim this threat).

4. Warfield's request for representation during meetings in April 1980 (and thereafter).

5. Toby's April 8, 1980 telephone call to Warfield.

6. Toby's January 10, 1981 telephone call to Warfield.

The charging party's legal position as to certain of these incidents is that an employee has a right to representation, free from threats of intimidation and coercion, conduct clearly proscribed by section 3571(a). Other incidents, however, raise the further question of an employee's right to assistance by a union representative when the employer wants to discuss matters that are related to possible discipline. This right is commonly referred to as the Weingarten rule. See Weingarten v. U.S. (1975) 420 U.S. 251, 260; Social Workers' Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382. The PERB has adopted the Weingarten standard in at least one decision (Marin Community College District (11/19/80) PERB Decision No. 145 at pp. 13-14), but has not resolved the scope of employer conduct

that comes within the purview of the rule. Regardless, the University does not challenge the premise that there is a right to union assistance at investigatory meetings that could lead to discipline, but only questions the applicability of the rule to the facts of this case.[22]

A. The March 31 comments by Middlekauff.

CSEA claims that Middlekauff's brief comments to Warfield during the afternoon of March 31, on the eve of the April 1 meeting, implied problems for Warfield arising out of the ongoing dispute with the department. The employer responds that Middlekauff's comments were impulsive, off-the-cuff remarks of an innocent nature designed to offer reassurance by putting to rest any concerns Warfield might have had that the lingering conflict and union involvement would adversely affect his future relationship with the department. Middlekauff's

[22]Although the respondent has not raised the issue, it should be observed that under the NLRA, the Weingarten right to union assistance follows from the selection of an exclusive representative, a status not enjoyed by CSEA in this case. However, in addition to the statutory right of pre-exclusivity representation discussed above (at pp. 58-59, supra), the CSEA agents here (Haberkern and Darling) were both serving under established practice as on-site stewards. Their presence did not raise the same concerns about employer property rights that are raised under the NLRA. Cf. Anchortank, Inc. v. NLRB (5th Cir. 1980) 615 F.2d 115T~[104 LRRM 2689]. The PERB has also recognized the grievance representation rights of a non-exclusive representative in the public school context. Santa Monica Community College District, supra, PERB Decision No. 103 at pp. 13-15, enf. (1980) 112 Cal.App.3d 684.

explanation of his action has been credited. The remarks and the context indicate no wrongful intent on the face of the evidence. The charging party has cited no authority that an employer shall refrain from all conversation with a grieving employee even when innocent remarks are made.

B. The April 1 meeting.

The charging party argues that Warfield was deprived of his right to representation when Middlekauff cancelled the April 1 meeting. The employer claims that the cancellation was not unlawful in light of Haberkern's excessive behavior.

It is concluded that the cancellation was justified by the interchange between Haberkern and Middlekauff, a conflict that was not part of the rough-and-tumble of normal labor relations for which allowance is made when considering whether activity is still deserving of protection. Santa Clara Unified School District (9/26/79) PERB Decision No. 104 at p. 20, citing American Tel, and Tel, v. NLRB (2d Cir. 1975) 521 F.2d 1159 [89 LRRM 3140]. On balance, Haberkern's unilateral and apparently unexplained retreat from the meeting within Middlekauff's office, and then his loud and angry "Listen, buster, are you cancelling the meeting," was not the type of conduct consistent with the minimal order and respect required for continuation of the meeting. (See NLRB v. Thor Power Tool Co. (7th Cir. 1965) 351 F.3d 584 [60 LRRM 2237].) If Haberkern had confined his remarks to a private conversation with

Middlekauff, and if his conduct had demonstrated a sincere desire to pursue the discussion, CSEA's case might rest on firmer footing. Instead, as Haberkern departed, the interchange culminated on the threshold of the doorway, at which point at least Haberkern's voice was loud enough for many employees to clearly overhear his intemperate remarks and to have their work disrupted.

C. The April 1 threat to Haberkern.

The charging party also contends that Middlekauff's subsequent threat on April 1 to call the police and to have Haberkern removed was an impermissible interference with (and threat of reprisal against) the right of access that is assured employee representatives under section 3568 of the Act.[23] In the charging party's view, Middlekauff's misconduct was compounded by the overbroad reach of his threatened reprisal, allegedly banning Haberkern not solely from the history department, but from the entire Dwinelle Hall office and classroom building.

The employer's response on April 1 was not, on balance, an unreasonable reaction to the disruption arising out of the

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23section 3568 provides, in relevant part:

> Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work. . . .

incident earlier that morning. For one thing, the decision was not made in the heat of the moment, but followed some deliberation. The nature and setting of Haberkern's angry remarks had prompted Middkelauff to solicit advice about options from a University vice-chancellor with authority over personnel matters. For another, Middlekauff's conversation followed Haberkern and Warfield absenting themselves from the history department, without Warfield securing release time permission and without an indication of when Warfield would be returning. Finally, Middlekauff's threat to call the police only followed another confrontation with Haberkern, this time in the hallway outside the main departmental offices, and after Middlekauff had asked Haberkern to leave. Several employees either saw or overheard the exchange. In view of the circumstances, Middlekauff's action was a reasonable attempt to restore calm.

It also would not be appropriate to find a violation even if the hearing officer declined to credit Middlekauff's testimony that Haberkern was asked to leave the departmental area and not the entire building. Middlekauff's scope of authority, as chairman of the history department and no more, was known to Haberkern, a seasoned veteran of University grievance representation. Perhaps for this reason, Haberkern didn't take the threatened banishment seriously. Haberkern testified that he didn't feel that Middlekauff's threat

prevented access to other parts of Dwinelle Hall, and Haberkern subsequently returned to the history department, without University objection, to prepare an aspect of Warfield's grievance.

In sum, in the context of the disruption and interference attending their interactions, Middlekauff's comments asking Haberkern to leave, and the threatened summons of the police, were a reasonable interim regulation of employee representative conduct that had created a "substantial threat to peaceful school operations." Richmond Unified School District (8/1/79) PERB Decision No. 99 at p. 19. Since there is no evidence that the measure was more than a temporary, emergency response to an egregious situation, there is no need to rule on whether the University's prohibition could have remained in force as a continuing ban.

For the reasons described above, it is also concluded that there was no violation of the Act arising from the subsequent failure of the University to disclaim Middlekauff's April 1 conduct. A threshold question is whether an independent violation could be sustained on a charge of failing to disclaim, as contrasted to the failure being evidence of employer ratification or condonation of the underlying threat. Compare Vista Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, 326-328. Regardless, the merits of the request by CSEA, under the circumstances analyzed above, did not call for a repudiation.

D. Representation requests in April.

CSEA alleged in its particularization of the charge that Warfield requested union representation on April 17 in a meeting with Sayre. The evidence, however, does not support this claim. When Sayre approached Warfield to discuss the "Malia paper," Sayre was asked, according to Warfield's testimony, to either put her comments in writing, or to talk to his union representative. Warfield therefore made no request for representation during that discussion. Anyway, in response, Sayre complied with the objection. She stopped talking to Warfield and put her remarks in writing, as asked.

The same conclusion is reached after examination of the limited testimony regarding other instances later that spring when Warfield was allegedly denied union assistance. Actually, Warfield himself could remember no specific instance other than the April 17 encounter, but had a vague recollection that such interchanges had occurred. Sayre could remember no request related to representation other than the April 17 encounter. Domengeaux, however, did remember two instances during that same period. But, each time that Warfield referred Domengeaux to his union representative she halted her conversation, based on advice she had received from Toby, even though she believed the discussions concerned day-to-day work assignments for which representation was not appropriate.

Even if Warfield and CSEA had produced persuasive evidence

that Warfield requested the presence of union assistance during a meeting, there is a further issue of connecting the meeting to possible disciplinary action or some other substantial issue of employee concern. The evidence indicates that the discussions were more akin to run-of-the-mill (or "shop-floor") conversations about work distribution and deadlines, and had no apparent relation to discipline or comparable concerns, other than to the extent any conversation between an employee and a supervisor about assignments bears that potentiality. See, e.g., Glomac Plastics (1978) 234 NLRB 1309 [97 LRRM 1441], enf. (2d Cr. 1979) 592 F.2d 94 [100 LRRM 2508]; Stewart-Warner Corp. (1980) 253 NLRB 136 [105 LRRM 1678].

E. The April 8 telephone call from Toby.

When Toby telephoned Warfield on April 8 an invitation was extended to Warfield to meet with Toby with or without union representation. CSEA suggests that the conversation implied a more favorable outcome for Warfield if he had accepted Toby's proposal to talk without the union present.

The evidence, however, does not support CSEA's claim. Toby's off-hand reference, in the context of a call about a missing cover letter, was no more or less than what it appeared—a genuine offer by Toby to meet with Warfield (and his representative, if Warfield preferred) to get a handle on a deteriorating situation. Warfield's testimony was consistent with Toby's on this point. CSEA offers no further authority

that Toby's conversational overture, standing alone, was impermissible once Warfield had designated CSEA his grievance representative.

F. The January 10 telephone call from Toby.

CSEA argues that Toby's January 10, 1981 call to Warfield about the pending reinstatement in the history department was improper, and that Toby's abusive manner was unlawfully intimidating.

The University contends, however, that Toby's call only followed an unsuccessful effort to reach Haberkern the previous day—assuming for argument that some restraint validly limited Toby's direct communication with a represented grievant. Hence, Toby had a business justification to contact Warfield related to implementation of the arbitration remedy and the need to avoid disruption of history department work. There was also the further justification, related to the pending back-pay request, of discovering information needed for a computation.

It is also relevant that Warfield was essentially silent during the call, listening to what Toby had to say, but being unresponsive other than to indicate, after long pauses, that a remark was heard and that Toby would be better advised to speak with Haberkern. Toby's reaction to this wall of resistance, calling Warfield an "ass" and hanging up the phone, may have been both unkind and unfortunate, but under the circumstances, it is concluded that Warfield shared some of the blame for

provoking the situation. Thus, given the frustrating context, and the private nature of the discussion, it is not concluded that Toby's remarks, aggressive though they were, exceeded the limits of a permissible spontaneous reaction and were likely to interfere with Warfield's exercise of his rights under the Act.

IV. Withdrawal of the Social Welfare Appointment.

A. Statute of limitations.

Prior to the hearing the employer objected to the charging party's proposed amendment raising the issue of discriminatory withdrawal of Warfield's job offer in the school of social welfare. Respondent's objection is based on section 3563.2(a), which provides:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

As the evidence showed, the job offer in social welfare was withdrawn on July 7, 1980. CSEA's amendments, however, were not offered until the pre-trial conference on April 27, 1981, nine months later. At the time of trial, respondent's objection to proceeding on this issue (and to the receipt of related evidentiary exhibits) was taken under submission. After the close of the hearing, the parties were also invited to brief the matter. It is concluded that two recognized legal

exceptions defeat application of the six-month rule against the charging party.[24]

The first exception to the limitations period is the doctrine of equitable tolling. The Board has confronted virtually the same issue under the SEERA, holding that the doctrine of equitable tolling applies to the six-month limitations period when State Personnel Board grievance procedures are utilized. State of California (Dept, of Water Resources) (12/29/81) PERB Order No. Ad-122-S; also see San Dieguito Union High School District (2/25/82) PERB Decision No. 194.

The charging party's allegations concerning the social welfare appointment were first raised as part of internal

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[24]The University also raised the six-month rule as an objection to the charging party's amendment at the pre-hearing conference alleging that the University has, since the date of the arbitrator's decision and for discriminatory reasons, denied Warfield promotional appointments even though his prior dismissal could no longer serve as a bar. Respondent's objection is not well-taken because the amendment was proposed on April 27, 1981, five months after the arbitrator's decision was issued on November 28, 1980. Regardless, on the merits, there is no evidentiary support for finding a violation on the basis of this allegation. First, Warfield's prior dismissal was never proven to be an absolute "bar," in the words of CSEA, to other employment in the University. Second, the University was never placed on notice by Warfield that the arbitrator's decision created an independent right to reinstatement to a job other than in the history department and, presumably, in a different (promoted) classification. Third, University agents were not shown to have discriminated against Warfield in denying a promotion to an available position on the basis of the dismissal per se.

University grievance procedures shortly after the offer was withdrawn. While the issue was pending within the University, CSEA steward Haberkern tried to have the dispute joined with the other grievances heard before the arbitrator, arguing that the social welfare claims were related. The University objected to the joinder and the arbitrator concurred. During the arbitration proceeding, however, Haberkern clearly expressed his view that the social welfare issue was already a part of the unfair practice case pending before the PERB.

Once CSEA was unable to have the social welfare conflict resolved at the arbitration, the internal University grievance mechanism still applied. Eventually, as reflected in February 1981 correspondence, CSEA waived a grievance hearing in favor of resolution through the PERB's unfair practice procedures.

Finally, it is relevant to the limitations question that the University has invoked in its answer to a charge in this case (SF-CE-23-H) the affirmative defense that the charging party had failed to exhaust internal University grievance procedures prior to filing the charge with the Board. Although such a claim is arguably confined to a narrow class of cases that can be arbitrated or settled as to all relevant statutory issues under the Act (£f. Dry Creek Unified School District (7/21/80) PERB Decision No. Ad-81a), it would hardly be fair to hold against CSEA as a limitations bar the same conduct that

the University itself expressly favors; that is, the pursuit of an internal settlement.

A second basis for overruling respondent's limitations objection is that the amendments offered by CSEA fall within the "relation back" doctrine of civil and administrative law. Under this doctrine, a party is permitted to amend when the subsequent claim arises out of the same general set of facts as the original complaint. See, e.g., Austin v. Massachusetts Bonding (1961) 56 Cal.2d 596. This principle has been applied under federal labor law where the facts are closely related to the violations initially alleged and also occurred within the relevant time period of the related charge. NLRB v. Pinion Coil Co. (2d Cir. 1952) 201 F.2d 484 [31 LRRM 2223].[25] The PERB, too, has applied a similar doctrine, finding a violation for related conduct that was not initially alleged by a charging party, but was only offered at a hearing after the elapse of the six-month bar. Santa Clara Unified School District, supra, PERB Decision No. 104 at pp. 18-19; Belridge School District, supra, PERB Decision No. 157 at pp. 11-12,

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[25]It may also be noted that Warfield's June 30, 1980 grievance of his dismissal specifically alleged that respondent's actions could jeopardize other job opportunities. The open-ended nature of a protest, under similar circumstances involving an unfair practice pleading, may be sufficient to overcome a limitations defense. See, e.g., NLRB v. I.G.A. Foodliner (6th Cir. 1981) ___ F.2d ___ [107 LRRM 2576].

citing Kwano, Inc. v. Agricultural Labor Relations Bd. (1980) 106 Cal.App.3d 937.

The social welfare issue relates back to the other charges since it grew out of the dispute that originated in the history department. It is uncontested that were it not for the dismissal from history, Toby would have had no contact with Segal about Warfield's new job in social welfare. This action prompted Segal to contact Warfield, and, in part, formed the basis for Segal's reconsideration of his previous job offer. Segal's decision then followed the union's assistance at the July 7 meeting and his disapproval of the union's characterization of the reasons for Warfield's dismissal.

It is irrelevant for present purposes that the dismissal in history was not unlawfully discriminatory under the Act. Rather, whatever the ultimate finding, the importation of that disputed claim and CSEA representation into the social welfare arena was directly related to the alleged injury that ensued. Even Segal admitted in his testimony that Darling's (and Warfield's) explanation of the events in history, particularly the claim of anti-union discrimination, was not satisfactory to Segal and formed the basis, in part, for his withdrawal of the appointment. When Segal tied his decision to the existence of the union-related conflict, he sealed the bond necessary for the CSEA amendment prior to trial.

Last, regarding both the tolling doctrine and the

relation-back doctrine, it is worth observing that respondent suffered no demonstrable prejudice from trial on the amendments (other than the adverse result discussed below). The employer had advance notice of CSEA's claim that an unfair practice charge existed. This notice was given at least as early as October 1980 at the arbitration hearing. Further notice was given in February 1981 when the social welfare grievance hearing was waived and CSEA stated it would rely on the proceedings pending before the Board. Formal notice of the amendments was given April 27, ten days before the start of trial. The employer sought no continuance at that time, nor was any continuance sought at a later date, after the charging party had presented its evidence. Moreover, respondent's chief witness on the social welfare issue—Professor Segal—testified on the last day of the hearing, a month after it began, following the testimony of other key CSEA and respondent witnesses who offered evidence on the question.

B. The discrimination claim.

The charging party argues that but for Warfield's union-related dispute in the history department and his union representation at the July 7 meeting with Segal, the social welfare appointment would not have been withdrawn. CSEA claims that Segal's proffered justifications were pretextual; namely, that Warfield and Darling misrepresented the nature of the dispute, and that the confidentiality requirements of Segal's

work precluded hiring Warfield. Respondent categorically denies anti-union animus influenced Segal's decision. It is concluded, for several reasons discussed hereafter, based on an analysis of the evidence and credibility findings related to the demeanor of witnesses at the hearing, that the charging party's claim of discrimination is well-founded.

First, Warfield's dismissal from history was not itself the basis for Segal's action, even assuming that the dismissal alone, not previously known to Segal, would have provided a reason to withdraw the offer. Once Segal knew of the dismissal he did not rescind the appointment, but asked Warfield to come back for another discussion, indicating only that withdrawal of the offer was being considered. It was during that telephone conversation that Segal first heard about union involvement. Although Segal thought it would be better to speak with Warfield alone, Segal consented when Warfield requested that a union representative be present at their next meeting.[26]

[26]NO question has been raised regarding applicability of the Weingarten principle to the social welfare dispute. Even though Segal was not, in a formal sense, investigating possible disciplinary action against Warfield, because Warfield was not yet on the official payroll, the meeting involved a significant employment-related matter and was equivalent to a pre-discipline interview. Warfield had been offered a job and had accepted the position. Segal, however, when he requested the meeting was considering withdrawal of the offer, thereby effectively threatening to terminate the employment relationship. The analogy to an investigation prior to a potential discharge is too strong, under the present facts, to exclude union assistance pursuant to Weingarten.

Second, as of the time Warfield met with Segal on July 7, Toby had suggested a one-day break-in-service as a type of insurance against future problems, since Warfield did have good basic skills. Toby testified that Segal concurred in the break-in-service suggestion. Segal vaguely recalled Toby's idea but did not provide an explanation about why it was not adopted. One intervening event, however, was Segal learning about union involvement in his phone call with Warfield.

Third, when the meeting occurred, Segal, according to the credited testimony of Darling and Warfield, had little or no interest in the details or merits of the history department conflict, but announced at the outset that he had decided to withdraw the job offer. Segal reaffirmed his recision throughout the meeting, over the protests and explanations of CSEA and Warfield. Again, an intervening explanation for Segal's decision, and his unwillingness to restore the original offer, was his then-recent knowledge of union involvement and the presence and comments of union steward Darling at the meeting. Circumstantial evidence of the timing of an employer's action in relation to union involvement can be evidence showing an unfair practice. See, e.g., NLRB v. General Warehouse (3d Cir. 1981) 643 F.2d 965 [106 LRRM 2729].

Fourth, even portions of Segal's testimony support this causal analysis. Segal conceded that the presence of a union representative for Warfield was not preferred, that if he had

talked to Warfield alone things might have worked out differently, that Darling (or Warfield) answered the few questions asked by Segal regarding details of the history dispute, and, that, in the end, Segal only reached the conclusion that Warfield was a risk, not that Warfield was untrustworthy.

Fifth, in reaching a conclusion that Warfield was a risk and that it was unnecessary to decide who was right in the history department dispute, Segal did not conduct himself in a manner consistent with an employer genuinely seeking to hire a qualified candidate. It can be assumed, for present purposes, that Segal had some justification for feeling uneasy about his new employee after finding out about the forthcoming dismissal in history. For this reason, further contact was not unreasonable, even though, as Segal conceded, he had not previously asked Warfield if problems existed in history and thus shared a measure of responsibility for his own disquiet.

But once Warfield and Darling met with him, despite the fact that Segal had received highly favorable recommendations, from faculty as well as from Sayre and Toby, Segal's limited investigation before the meeting on July 7 was coupled with no investigation at all after the encounter. Certainly, the explanations Segal heard from CSEA and Warfield would have put doubt into the mind of a reasonable employer about the trustworthiness of the employer's original sources of

(partially) adverse information—Toby and Sayre—since neither of them had disclosed the union discrimination claim that was well-documented in connection with the history dispute, nor had they gone into the details of Warfield's shortcomings. Rather than pursue an honest and fair evaluation of someone already retained, and about whom comparatively modest problems had been identified, Segal essentially jumped to the conclusion that Warfield was too hot to handle. The failure to investigate relevant facts may cast doubt on an employer's claim of good faith. See, e.g., Tama Meat Packing Corp. (1977) 230 NLRB 116 [96 LRRM 1148], mod. (8th Cir. 1978) 575 F.2d 661 [98 LRRM 2339]; Far-Mar Co. (1977) 231 NLRB 814 [96 LRRM 1133].

Sixth, contrary to respondent's assertion, there was no evidentiary relationship shown between Segal's expressed concern for the confidentiality of his research materials and his ultimate decision to withdraw the job offer. This claim, initially put forward by Segal in his direct testimony, fell apart upon further examination. There is no convincing evidence that the confidentiality criteria was truly an important, overriding element of the job in terms of normal expectations for careful screening and security checks on job applicants. Segal didn't mention the subject at the first meeting, and subsequently did little to examine Warfield's credentials. Indeed, by the end of his examination at the hearing, Segal conceded that he wasn't seeking the truth about

the history conflict. Thus, Segal had not reached a conclusion that Warfield was lacking in integrity, but only that hiring Warfield was a risk given the disputed facts—facts that Segal never deigned to fairly consider. If a stated motive is false or unsupported, the trier of fact can infer a desire to conceal an unlawful motive. Shattuck Denn Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466 [62 LRRM 2401, 2404].

Finally, and most important, Segal's conduct as a witness underscored the incredibility of his explanations. For example, Segal gave inconsistent and contradictory responses about why Warfield was not hired. Shifting and vague explanations may also raise inferences of an unfair practice. Stoll industries (1976) 223 NLRB 51 [92 LRRM 1188]; Roberts Press (1971) 188 NLRB 454 [76 LRRM 1337]. Segal's direct testimony about Warfield's misrepresentations and lack of integrity was in absolute conflict with his later testimony that he reached no conclusion about the merits of the dispute or about Warfield's trustworthiness. Segal was also reluctant to testify in a forthright manner. On cross-examination, and on examination by the hearing officer, he admitted relevant facts little-by-little, including the significant concession that Warfield and Darling did provide details about the history dispute the few times Segal asked. As previously noted (at pp. 48-49, supra), Segal's nervous, embarrassed demeanor, supported the conclusion that his denial of anti-union animus was unbelievable.

In sum, Segal was not only contradicted by virtually all other witnesses as to material events, including Sayre and Toby to the extent they had knowledge, but Segal also contradicted himself. When scrutinized, Segal's initial testimonial justifications did not apply. Segal's denial of anti-union animus was also not credible, in terms of both uncontested facts and his own demeanor. It is concluded that the reasons offered for withdrawing the Warfield offer were pretextual. Respondent therefore violated section 3571(a) of the Act when, for an impermissibly discriminatory reason, Segal refused to hire Warfield for the position previously promised. Santa Clara Unified School District, supra, PERB Decision No. 104; Los Gatos Joint Union High School District (3/21/80) PERB Decision No. 120.27

Additionally, it is concluded that respondent violated section 3571(b) by interfering with CSEA's right to represent employees. This violation arises out of the evident relationship between Segal's decision to withdraw the Warfield offer, and the involvement of the union on Warfield's behalf, both in the history department and in social welfare. Segal's

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27The discrimination finding is related to Warfield's protected right to have representation by CSEA as part of internal University affairs, and is not tied to a theory of retaliation for filing unfair practice charges with the PERB. There was no sufficient evidence introduced to support that latter theory of discrimination in regard to any alleged violation advanced by CSEA.

discriminatory action against Warfield harmed CSEA by undermining its ability to effectively organize and represent employees. The chilling and deterrent impact of penalizing a single employee for exercising his associational prerogatives under the Act could be felt in the future not only by Warfield, the obvious first victim, but by other employees as well.

REMEDY

Section 3563.3 of the HEERA states:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to back pay, as will effectuate the policies of this chapter.

A customary remedy in a case of unlawful discrimination is the issuance of a cease-and-desist order, and reinstatement and back-pay if a job has been lost. Santa Clara Unified School District, supra, PERB Decision No. 104 at pp. 26-28; Marin Community College District, supra, PERB Decision No. 145 at pp. 19-20. The cease-and-desist order is appropriate here, to prohibit a repetition of the unlawful conduct. Also, it is appropriate to order that Warfield be reinstated to the same position in the school of social welfare, or to a substantially equivalent secretarial assignment in the same classification.

However, Warfield's back-pay claim must be limited under established mitigation principles requiring that a wrongfully terminated employee should not improperly reject reasonably

similar employment pending the outcome of his disputed claim. See, e.g., Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177, 198; NLRB v. Madison Courier, Inc. (D.C. Cir. 1972) 472 F.2d 1307 [80 LRRM 3377]. In one case, akin to the situation here, an employer's back pay obligation was tolled, reducing the total amount owed, when the employee rejected reinstatement after a favorable arbitration award. Consolidated Freightways v. NLRB (D.C. Cir. 1981) ____ F.2d ____ [109 LRRM 2370].[28]

Respondent's back pay obligation should therefore be calculated in light of Warfield's voluntary resignation—a decision which was not forced upon Warfield. Thus, Warfield is entitled to back-pay at the scale he would have earned in the school of social welfare for the period during July and August 1980 (commencing on the July 7 starting date) when he was without any University employment. Warfield's back-pay from the end of that period, however, should be offset by the amount of back pay the University conveyed in 1981, pursuant to the history department arbitration decision. This offset is required not only because Warfield actually received the money,

[28]The tolling principle applied in Consolidated Freightways would not affect the reinstatement order in this case because Warfield was not offered a job equivalent in time to the 80 percent position in social welfare, but was only offered 50 percent employment. The back pay reduction principle does apply, albeit partially, because the history and social welfare secretarial duties were sufficiently comparable for mitigation purposes.

under mitigation principles, but, as a practical matter, because he could not claim the right to be made whole for two different jobs of the same employer at the same time without the award being considered punitive. Thereafter, for the period following Warfield's history department reinstatement offer (that is, after January 12, 1981) to the present, respondent should pay Warfield at the 80 percent social welfare scale, offset by the amount of money at the 50 percent history department scale that Warfield would have earned but for his rejection of the reinstatement offer.[29]

It also is appropriate that the University be required to post a notice incorporating the terms of the order. The notice should also inform readers that other charges filed against the University have been dismissed. The notice should be subscribed by an authorized agent of the University indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from

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[29]It should be made clear that this remedy does not foreclose additional University claims in a compliance proceeding that other Warfield income during this period, or the availability of other positions, should further reduce the amount owed. Normally, these questions are treated in post-decision enforcement proceedings (Alum Rock Union School District (9/22/81) PERB Decision No. Ad-115), but, because relevant evidence was already introduced, the remedy is limited as set forth above.

this activity and to provide other affirmative relief. It effectuates the purposes of the HEERA that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587, a posting requirement was approved. The U.S. Supreme Court has also approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426.

However, because of the limited scope of employer departments and personnel in this case, the posting remedy should be confined to the Berkeley campus history department, school of social welfare, and personnel office, in addition to the University's headquarters.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3563.3, it is hereby ordered that the Regents of the University of California, its governing board and its representatives shall:

1. CEASE AND DESIST from:

a. Restraining, discriminating against, or otherwise interfering with the rights of employees because of the exercise of their right to seek advice and assistance from an employee organization;

b. Denying an employee organization the right to represent employees in their employment relations with the employer.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION which is necessary to effectuate the policies of the Higher Education Employer-Employee Relations Act:

a. Immediately offer Peter Warfield employment in the school of social welfare on the Berkeley campus in the position and classification unlawfully withheld, or, in the next available equivalent position and classification in another department or school, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

b. Make Peter Warfield whole for any loss of pay and other benefit(s) he may have suffered by tendering to him a back-pay award equal to an amount that he would have been paid to the present absent the unlawful withdrawal of his employment offer in the school of social welfare on July 7, 1980. The total amount of this award shall be offset by:

(1) the amount Warfield received as back-pay in February 1981 pursuant to an arbitrator's award in November 1980 ordering such payment in connection with his prior dismissal from the history department;

(2) the amount Warfield would have received if he had accepted the employer's offer of reinstatement to the history department as a 50 percent, part-time employee effective January 12, 1981; and,

(3) the amount of Warfield's earnings as a result of other employment during this period.

c. Pay Peter Warfield 7 percent interest per annum on the net amount of back-pay owed pursuant to this order.

d. Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at the University's headquarters office and in conspicuous places at the location where notices to employees are customarily posted in the Berkeley campus history department, school of social welfare and personnel office. The Notice must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

e. Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco Regional Director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter, as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

3. IT IS FURTHER ORDERED that all other charges filed against respondent herein be DISMISSED in all other respects, and that the Notice attached as an appendix shall reflect this dismissal.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on March 31, 1982, unless a party files a timely statement of exceptions. (See Cal. Admin. Code, tit. 8, sec. 32300.) Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on March 31, 1982, in order to be timely filed. (See Cal. Admin. Code, tit. 8, sec. 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 Cal. Admin. Code, tit. 8, secs. 32300, 32305.)

DATED: March 11, 1982

BARRY WINOGRAD
Administrative Law Judge