STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

N. ERNEST KETTENRING,	
Charging Party,	Case No. LA-CE-4878-E
v.	PERB Decision No. 1930
LOS ANGELES UNIFIED SCHOOL DISTRICT,	November 28, 2007
Respondent.	

Appearances: Geffner & Bush by Erica Deutsch, Attorney, for N. Ernest Kettenring; Kathleen E. Collins, Associate General Counsel, for Los Angeles Unified School District.

Before Shek, McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by N. Ernest Kettenring (Kettenring) to the proposed decision (attached) of an administrative law judge (ALJ). The unfair practice charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA),[1] section 3543.5(a), by retaliating against Kettenring for engaging in protected activity. The ALJ dismissed the charge finding that Kettenring failed to establish that the District took adverse action against him because of his protected activity.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the ALJ's proposed decision, the hearing transcripts and exhibits, Kettenring's exceptions and the District's response thereto. The Board finds no prejudicial error in the ALJ's proposed decision and adopts it as the decision of the Board itself except as follows:

[1]EERA is codified at Government Code section 3540, et seq.

The ALJ credits the testimony of Principal Jean Batey that she would have taken the same actions against Kettenring even if he had not engaged in protected activity. (Proposed dec., at p. 13). However, based on our adoption of the ALJ's finding that Kettenring failed to demonstrate a nexus between his protected activity and the District's adverse actions, we need not address whether or not the District would have taken the same actions absent Kettenring's protected activity. Therefore we decline to adopt that portion of the proposed decision.

ORDER

The complaint and the underlying unfair practice charge in N. Ernest Kettenring v. Los Angeles Unified School District, Case No. LA-CE-4878-E is hereby DISMISSED.

Members Shek and McKeag joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

N. ERNEST KETTENRING, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4878-E PROPOSED DECISION (3/19/07)

Appearances: Geffner & Bush by Jesús E. Quiñonez and Jonathan Cohen, Attorneys, for N. Ernest Kettenring; Kathleen E. Collins, Associate General Counsel, for Los Angeles Unified School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a teacher alleges his school district retaliated against him for protected activities. The district denies any retaliation.

N. Ernest Kettenring (Kettenring) filed an unfair practice charge against the Los Angeles Unified School District (District) on July 25, 2005. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the District on September 27, 2005. The District filed an answer to the complaint on October 18, 2005.

PERB held informal settlement conferences on October 18 and November 16, 2005, but the case was not settled. PERB held a formal hearing on January 31, February 1 and 3, and March 6-7, 2006.[1] With the receipt of the final post-hearing brief on May 15, 2006, the case was submitted for decision.

[1] On February 3, 2006, the PERB complaint was amended to include additional alleged retaliation against Kettenring.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).[2] Kettenring is an employee under EERA.

Kettenring is a popular teacher and a forceful union activist. In the summer of 2005, he got into trouble at Evans Community Adult School (Evans), where he worked. The PERB complaint alleges that he suffered four adverse actions: a conference memorandum (dated July 13, 2005), another memorandum (dated July 27, 2005), a notice of unsatisfactory acts, and a notice of suspension (both dated August 10, 2005). The central question in this case is whether these four actions were taken because of Kettenring's union activities and other protected conduct.

The actions were all taken by Jean Batey (Batey), Kettenring's principal at Evans. Batey has had mutually respectful relationships with some other union activists, but not with Kettenring, although she testified she was not bothered by his protected conduct.

On June 13, 2005, Batey encountered another Evan staff member, whom I'll call Ms. A, distraught and in tears. Batey took Ms. A to her office, where Ms. A said she felt she had been harassed by Kettenring and another staff member, whom I'll call Mr. B. Batey told Ms. A to write up her allegations, which she did that same day, in specific detail.

On the next day, June 14, 2005, Batey asked Kettenring to meet with her on June 20, 2005, to discuss Ms. A's allegations. Kettenring responded on June 20, 2005, that he was "unavailable to meet on my own time on issues of this nature" but would "respond in due course." On June 22, 2005, Batey asked Kettenring to meet on July 7, 2005, but the meeting

[2] EERA is codified at Government Code 3540 and following.

was postponed so that Kettenring's representative could be present. It was ultimately held on July 12, 2005.[3]

On July 13, 2005, Batey issued Kettenring a conference memorandum summarizing the July 12 meeting. The memorandum stated in part:

> During the conference you stated the following:
>
> A. Most of what Ms. [A] said is untrue; some is true.
> B. This does not constitute harassment, which is a serious allegation.

According to the testimony at hearing, Kettenring had not specified what was true or untrue, and Batey had not asked him. Batey testified that, given Kettenring's limited response to Ms. A's detailed allegations, she felt "there might be something there."

The memorandum concluded:

> During the conference I offered you the following assistance and guidance:
>
> A. This type of behavior toward Ms. [A] is unacceptable.
> B. I suggested that you take courses in anger management.
> C. I gave you a copy of the District's policy regarding non-discrimination.
> D. I gave you a copy of the District's policy regarding the respectful treatment of employees.
>
> During the conference I issued you the following directives:
>
> A. Cease and desist your harassing behavior toward Ms. [A].
> B. Demonstrate respectful treatment of coordinators elected by your department.
> C. Make no attempt to retaliate against Ms. [A].
>
> Failure to follow the stated directives may result in disciplinary action.

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[3]Batey met separately with Mr. B. The details of that meeting are not in the record.

> If you wish to respond to this memorandum, please do so in writing by July 21, 2005.

Kettenring did not respond by July 21, 2005. Instead, on that date, he had his unfair practice charge mailed to PERB.

On the next day, July 22, 2005, Kettenring sent Batey a memorandum stating in part:

> I told you in the July 13 [sic] meeting, and I repeat here, that I will not follow your directive. Your directive is illogical. I cannot cease a behavior that I have not initiated. I also stated that all of the actions that Ms. [A] alleges to be harassment are not improper activities, and that I will continue to engage in such as I see fit. I am not going to modify my actions to accommodate Ms. [A's] personal issues.
>
> Your failure to ask me about the accuracy of Ms. [A's] allegations and your apparent failure to conduct even a cursory investigation before coming to your conclusion indicate a predisposition toward prejudicial action on your part. In addition, you have engaged in unprofessional conduct as referenced in the California Education Code, Section 44422.
>
> In response to your demonstrated prejudice and unprofessional conduct, I am offering you the following assistance and guidance:
>
> 1. Your behavior toward union representatives is unacceptable
> 2. I suggest you take courses in anger management
> 3. I am providing you with a copy of the district's policy regarding non-discrimination (attached)
> 4. I am providing you with a copy of the district's policy regarding the respectful treatment of employees (attached)
> 5. I draw your attention to the prohibition on retaliatory action against individuals providing union representation to Bargaining Unit Members under the Collective Bargaining Agreement, as per the California Government Code, Educational Employment Relations Act, Section 3543.5, Chapter 10.7, Division 4, Title 1
> 6. You should engage in no further acts of retaliation against Mr. [B] or myself

> Failure to follow this proffered guidance and assistance may result in further action.

Kettenring distributed the memorandum to several Evans staff members, with his unfair practice charge attached.

Batey responded to Kettenring on July 27, 2005, with a memorandum stating:

> Your memorandum of July 22, 2005, is insubordinate. It is also derogatory and defamatory.
>
> In my conference memorandum of July 13, 2005, I directed you to make no attempt to retaliate against Ms. [A]. I find your July 22, 2005, memorandum to be retaliatory in the extreme. It is particularly inappropriate now that I have received notification that Ms. [A] has filed a formal complaint and that an investigation is underway.
>
> You are directed to stop immediately distribution of your memorandum of July 22, 2005, the PERB charge filed July 20, 2005, and any other derogatory or defamatory materials.
>
> Failure to follow this directive may result in disciplinary actions being taken against you.

Batey testified she had found Kettenring's "write-up" of her to be insubordinate. She also believed that Ms. A's allegations should not have been publicly discussed.

Kettenring himself had earlier complained of a hostile work environment at Evans. On March 3, 2005, he sent a memorandum to Batey stating that a staff member, whom I'll call Ms. C, had "verbally assaulted various members of the faculty in the lunchroom." Batey asked Kettenring to identify the witnesses and the content of the verbal assaults, which he did. In a memorandum to Kettenring dated May 3, 2005, Batey stated in part:

> I have interviewed and or received statements from eleven witnesses to the incident of March 3, 2005. Based on the results of my informal investigation, I have concluded that your complaint has merit.

Batey met with the accused staff member, but she did not issue a conference memorandum, because she "did not have a chance to conclude" her investigation.

On June 17, 2005, Batey issued the following memorandum to all Evans instructors:

> It has been brought to my attention that some students have been advised not to attend classes during the week of June 20-24. Our ADA [Average Daily Attendance] is dependent on student attendance which generates teacher hours for the next school year. Although students are finished [with] promotional testing, it is the responsibility of all instructors to plan activities for students throughout your paid assignment. Your cooperation is appreciated.

Maintaining ADA at trimester's end is especially difficult because teachers have no extra paid time for doing grades and other paperwork. Teachers are expected to keep their students engaged in classroom activities while the teachers themselves do paperwork.

Events that followed were accurately summarized in a conference memorandum from Batey to Kettenring dated July 13, 2005, which stated in part:

> On Monday, June 20, 2005, at 8:30 a.m., Janet MacLeod, assistant principal, reported that there were no students in your U.S. History/1 class, nor were you in class. Rosario Galvan, assistant principal, later observed you in the faculty lounge with a group of instructors at 8:35 a.m.
>
> On Monday, June 20, 2005, at about 10:05 a.m., Mr. Galvan observed that your U.S. History/2 class was without students and you were not present.
>
> On Tuesday, June 21, 2005, Ms. MacLeod passed by your classroom at 8:15 a.m., during the time of your U.S. Government class and saw neither students nor instructor.
>
> On Tuesday, June 21, 2005, at 10:30 a.m., Ms. MacLeod found no students or instructor in your Consumer Economics class.
>
> At about 11:00 a.m. on June 21, 2005, I questioned you in the hallway regarding the whereabouts of your students. You told me that you had given them home study. I informed you that our school could not report ADA for home study and instructed you not to report any attendance on your rosters. You also stated that you were following a directive from administration to submit your grades on the due date.

> Though we did not observe whether or not you conducted class on Wednesday, June 22, 2005, you reported no attendance for your students for U.S. History/1 and U.S. History/2 for that day.

The memorandum summarized Kettenring's response at the conference in part as follows:

> You [Kettenring] did not fail to conduct class. Instead, you told your students that you were required by administration to have class, but you would not be available to them because you needed to prepare grades. You asked them to read the L.A. Times at home and find something applicable to the class.

The memorandum concluded:

> During the conference I issued you the following directive:
>
> * Encourage your students to maintain regular attendance throughout the entire trimester, including the last week.
>
> If you wish to respond to this memorandum, please do so in writing by July 21, 2005.

Kettenring apparently did not respond by the July 21 deadline.

The July 13 conference memorandum did not state that Kettenring's conduct was still under investigation and might result in discipline. A memorandum dated June 21, 2005, from Assistant Principal Janet MacLeod to Kettenring regarding his perceived failure to conduct class on June 20 and 21, 2005, concluded:

> You are directed to plan your subject material and curriculum accordingly to ensure that you instruct students for the full trimester for which you are assigned and paid. Failure to follow this directive may result in disciplinary action.

Like the July 13 conference memorandum, this June 21 memorandum did not indicate that Kettenring's past conduct might result in discipline.

In fact, however, Batey had already been discussing Kettenring's conduct with Susan Masters (Masters), a staff relations coordinator at the District's central office. Masters made no recommendation before the July 13 conference memorandum, but afterwards she recommended that Batey issue Kettenring a notice of unsatisfactory acts and a notice of a

3-day suspension. Batey decided to follow the recommendation, and on August 10, 2005, she issued the two notices, both based on Kettenring's conduct of June 20-22, 2005.

An area representative for Kettenring's union testified that it was "totally uncommon" for the District to follow up a conference memorandum with discipline for the same conduct. Masters, however, testified that it was "not uncommon." Batey testified that it could be standard procedure, depending on the circumstances.

Before recommending Kettenring's discipline, Masters discussed the matter with Santiago Jackson (Jackson), a District assistant superintendent, who found Kettenring's conduct to be unacceptable. Sometime around January 2005, Kettenring had requested that the District's inspector general investigate Jackson for fraud with respect to the reporting of time and payroll. A colleague of Kettenring testified that he had a conversation with Jackson in October 2005, in which Jackson said he had two problems with Kettenring:

> One was he had, Mr. Jackson had heard that at some event or some function, that Mr. Kettenring had told an administrator from another district that he was going to get rid of his principal. And Mr. Jackson said, well, we can't have that.
>
> He also raised the issue of the Inspector General reports, in that these had been damaging to the division and if Inspector General reports continued, that there might not be a division.

Jackson did not testify. There is no evidence that Kettenring requested the investigation of Jackson on behalf of the union or of other employees.

Kettenring was not the only teacher to have few students in attendance on June 20-22, 2005. When asked why she did not take action against any other teacher, Batey testified:

> Because Mr. Kettenring could have encouraged his students to come to class those three days. Instead he basically discouraged them from coming by the statements that he made to me and during the conference.

Batey acknowledged that Kettenring had otherwise "maintained exceptionally good student attendance," and she was grateful for that.

Batey credibly testified that she would have taken all the same actions against Kettenring even if he had not engaged in protected activity.

ISSUE

Did the District retaliate against Kettenring?

CONCLUSIONS OF LAW

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the

employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

In the present case there is no doubt that Kettenring exercised rights under EERA, both by engaging in union activities and by filing his unfair practice charge, and that Batey knew it. I note, however, that there is no evidence that Kettenring's request that Jackson be investigated for fraud was union activity or otherwise protected conduct.[4]

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[4]EERA section 3543(a) states in relevant part:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their

Nor do I doubt that Kettenring suffered adverse action, most obviously in the notices of unsatisfactory acts and suspension, but also in the memoranda of July 13 and 27, 2005. These memoranda, although not disciplinary in themselves, threatened Kettenring with disciplinary action, and a reasonable person would find them to have an adverse impact on Kettenring's employment.

The central question, as noted earlier, is whether the adverse actions were taken because of Kettenring's protected conduct. In his post-hearing brief, Kettenring argues in part that there is direct evidence on this issue, in that Jackson, who indirectly advised Batey, was quoted as saying he had a problem with Kettenring requesting an investigation of Jackson. As noted above, however, there is no evidence that Kettenring's request was protected conduct.

Kettenring also argues that there is circumstantial evidence of unlawful motivation. With regard to the July 13 conference memorandum, Kettenring argues that Batey treated him differently and conducted no investigation. Kettenring points out that when he himself complained of a hostile work environment, Batey had asked for details, including the identity of witnesses, and had concluded the complaint had merit after hearing from eleven such witnesses.

I find Kettenring's argument on this point unpersuasive. Ms. A's complaint against Kettenring and Mr. B was quite different from Kettenring's complaint against Ms. C. Ms. A's complaint was detailed and specific, and it identified one victim and two witnesses, Kettenring and Mr. B themselves. Kettenring's complaint was less specific, and it referred to multiple victims without identifying them. I find it unremarkable that Batey would want to know who

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

these victims were, and what particular conduct (if any) offended them, before proceeding further.

With regard to the investigation of Ms. A's complaint, it appears that it was Kettenring himself who short-circuited the investigation. After Batey postponed the conference twice to accommodate Kettenring, and after she presented him with Ms. A's detailed allegations, what Batey heard from Kettenring was that most of the allegations were untrue but some were true. It was reasonable for Batey to accept this as the response Kettenring chose to make, and to find it inadequate.

Kettenring also argues that Batey treated him differently and conducted no investigation with regard to the notices of unsatisfactory acts and suspension, because other teachers also had few students in attendance on June 20-22, 2005. I find no evidence, however, that Batey failed to consider that fact, along with Kettenring's own accounts of his conduct. It was reasonable for Batey to conclude that Kettenring, while paying lip service to District policy, actually and effectively discouraged student attendance (at the District's expense), and that this merited disciplinary action.

Kettenring finally argues that Batey departed from District practice in issuing the notices of unsatisfactory acts and suspension, because Kettenring had already received a conference memorandum covering the same conduct. A union area representative did testify that this was "totally uncommon." Kettenring argues this testimony was "unrebutted," but in fact it was rebutted by the testimony of Batey and Masters. I conclude that Kettenring did not sustain his burden of proof on this issue.

To the extent that this case implicates the character and credibility of Batey, I find her to be a credible witness and a fair-minded person. I credit her testimony that she would have

taken all the same actions against Kettenring even if he had not engaged in protected activity. Kettenring's unfair practice charge must therefore be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No. LA-CE-4878-E, N. Ernest Kettenring v. Los Angeles Unified School District, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; Gov. Code sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the

U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge