STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KENNETH MEREDITH, Charging Party, v. GROSSMONT UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5133-E PERB Decision No. 2126 August 13, 2010

Appearances: Paul Gomez, Representative, for Kenneth Meredith; Atkinson, Andelson, Loya, Ruud & Romo by William A. Diedrich, Attorney, for Grossmont Union High School District.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Kenneth Meredith (Meredith) to the proposed decision (attached) of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the Grossmont Union High School District (District) violated the Educational Employment Relations Act (EERA)[1] by giving Meredith a negative performance evaluation and demoting him because he: (1) sent a letter to his principal accusing the principal of violating the applicable collective bargaining agreement; and (2) requested union representation during a meeting with his manager, his principal, and the District's director of human resources.

Before the scheduled hearing in this matter, the Board issued a decision in a related case involving Meredith, *Service Employees International Union, Local 221 (Meredith)* (2008)

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

PERB Decision No. 1982, which arose out of the same incidents alleged in this case. In its decision, the Board held that Meredith failed to state a prima facie case that his union caused or attempted to cause the District to reject him on probation. Relying largely on the Board's findings in that decision, the District moved to dismiss the complaint.[2] The ALJ granted the District's motion.

The Board has reviewed the proposed decision and the record in light of Meredith's exceptions, the District's response, and the relevant law. Based on this review, we find the proposed decision to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself,[3] as supplemented by the discussion below.

DISCUSSION

Meredith excepts to the ALJ's conclusion that the District decided to reject him on probation before he engaged in the protected activities of writing a letter to Principal Timothy Schwuchow (Schwuchow) and requesting union representation during a meeting with Schwuchow and other District representatives. Meredith asserts that an "honorable agreement"

[2] In *City of Porterville* (2007) PERB Decision No. 1905-M, the Board, citing the "doctrines of res judicata and collateral estoppel," gave preclusive effect to a Board agent's dismissal of identical allegations in a separate unfair practice charge. However, a Board agent's review of a charge to determine whether it establishes a prima facie case of an unfair practice does not meet the "actually litigated" requirement for collateral estoppel. To be "actually litigated" for purposes of collateral estoppel, an issue must have been decided based on the presentation of evidence at a hearing. (*Groves v. Peterson* (2002) 100 Cal.App.4th 659, 668.) The Board has consistently held that the function of a Board agent's investigation is not to resolve the merits of the case because such resolution is reserved for PERB's hearing process. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *Eastside Union School District* (1984) PERB Decision No. 466.) We therefore overrule *City of Porterville*, *supra*, to the extent it granted preclusive effect to a dismissal of an unfair practice charge based solely on a Board agent's charge investigation.

[3] On page 4 of the attached proposed decision, the date in the fourth line of the only full paragraph on that page should read "July 18, 2007," not "July 17, 2008."

existed between himself and Schwuchow whereby Schwuchow would defer his decision regarding Meredith's rejection on probation until August 20, 2007, when Meredith was scheduled to complete a particular project. Meredith contends the ALJ erred by not allowing him to present evidence of the agreement at a hearing.

We find the ALJ's conclusion is supported by the record, particularly Meredith's July 29, 2007 letter to Schwuchow, which was not part of the record in *Service Employees International Union, Local 221 (Meredith)*, *supra*. The subject line of the letter states: "Declining Offer to Resign as Head Custodian (Meeting: July 20, 2007)." The letter contends Schwuchow did not give Meredith "time to consider your alternatives to either: a. voluntarily resign from my current position as Head Custodian (Probationary) and go back to my previous position as Custodian, or b. accept a poor evaluation and/or termination from Facilities Manager, Ms. Tree Torres." The letter closes:

> **I am, therefore, declining to accept your offer to resign voluntarily.** Any further actions upon your part are at your discretion and will determine my appropriate response/s in the future. If you would like to discuss this letter, feel free to contact me.

(Emphasis in original.)

It is apparent from Meredith's letter that during a meeting on July 20, 2007, Schwuchow offered Meredith the option to resign in lieu of being rejected on probation as head custodian. If, as Meredith claims, this meeting resulted in an agreement to defer Schwuchow's decision on his probation until August 20, 2007, Meredith would not have needed to reject the resignation offer on July 29. Thus, Meredith's own evidence supports the ALJ's conclusions that no deferral agreement existed and that Schwuchow had decided to

reject Meredith on probation by July 20, 2007 at the latest. Because this decision was made prior to Meredith's protected activity, the ALJ properly dismissed the complaint.[4]

Meredith also asserts for the first time in his exceptions that the District retaliated against him for filing the instant charge by sending a cease and desist letter to his representative, Paul Gomez (Gomez). The letter alleged that Gomez entered the Granite Hills High School campus without proper authorization and served a subpoena for the PERB hearing in this matter on a District employee. Meredith sent a copy of the letter and Gomez's response to the ALJ and served copies on the District. However, the complaint was never amended to add this allegation and the ALJ did not address the issue in his proposed decision. Consequently, this allegation is not properly before the Board. (See PERB Reg. 32300(a)(1)[5] [requiring exceptions to address "specific issues of procedure, fact, law or rationale" contained in the proposed decision]; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 [Board may not review "issues neither set forth in the complaint nor fully litigated after proper notice and an opportunity to defend"].)

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5133-E are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

---

[4] Although the ALJ quoted extensively from the Board's decision, he did not appear to give *Service Employees International Union, Local 221 (Meredith)*, *supra*, preclusive effect. Rather, the ALJ addressed the allegations in the complaint in light of the Board's findings in the prior decision while leaving open the possibility that the allegations, including some not made in Meredith's related charge, could establish a prima facie case. We thus conclude that the ALJ's analysis is consistent with our partial overruling of *City of Porterville*, *supra.*

[5] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

KENNETH MEREDITH, Charging Party, v. GROSSMONT UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5133-E PROPOSED DECISION (4/8/09)

Appearances: Paul Gomez for Kenneth Meredith; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Grossmont Union High School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an employee alleges that a school district unlawfully retaliated against him. The district denies the allegation.

Kenneth Meredith (Meredith) filed an unfair practice charge against the Grossmont Union High School District (District) on November 12, 2007. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the District on June 20, 2008. The District filed an answer to the complaint on July 23, 2008.

PERB held an informal settlement conference on July 22, 2008, but the case was not settled and was set for hearing. The District filed a motion to dismiss on November 1, 2008, before the hearing was to be held. Meredith filed a response to the motion on November 13, 2008. Because the motion to dismiss appeared meritorious, I told the parties I would take the case off calendar and issue this proposed decision.

FINDINGS OF FACT

Around the same time that Meredith filed his unfair practice charge against the District, he also filed an unfair practice charge against his union, the Service Employees International Union, Local 221 (SEIU), alleging in part that SEIU had caused or attempted to cause the District to retaliate against him. That charge was dismissed by a PERB agent, and Meredith appealed the dismissal to PERB itself, which issued a decision on October 24, 2008. (*Service Employees International Union, Local 221* (2008) PERB Decision No. 1982 (*SEIU*).

In both his charge against the District and his charge against SEIU, Meredith characterized the allegedly retaliatory action against him as a "demotion." In its *SEIU* decision, PERB stated in part, "Though the charge characterizes this action as a 'demotion,' it is clear from the facts alleged in the charge that Meredith was rejected on probation." Meredith was rejected on probation upon receiving an unsatisfactory performance report for his performance as head custodian, a position to which he had been promoted subject to a 180-day probation period.

In *SEIU*, PERB further stated, in part:

> The unfair practice charge alleged that the District demoted Meredith in retaliation for his protected activity. It further alleged that SEIU caused or attempted to cause the District to demote Meredith. More specifically, the charge asserted that [SEIU's] solicitation of grievances against Meredith from his staff caused the District to demote him.
>
> Under EERA, it is unlawful for an employee organization to cause or attempt to cause an employer to commit an unfair practice. (EERA sec. 3543.6(a).) A violation of this provision may only be established by a clear showing of how and in what manner the employee organization affirmatively acted to cause or attempt to cause the unfair practice. (Tustin Unified School District (1987) PERB Decision No. 626.) In addition, the facts must establish a causal connection between the employer's unlawful conduct and the employee organization's behavior. (State of California (Department of Personnel Administration) (1987) PERB Decision No. 609-S.)

Thus, before examining SEIU's actions, it is necessary to determine whether the charge established an unfair practice by the District. The charge alleged that the District rejected Meredith on probation in retaliation for his engagement in protected activity. To demonstrate retaliation in violation of EERA section 3543.5(a), Meredith must show that: (1) he exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; and (3) the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced Meredith 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 (North Sacramento)), 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 (Trustees of the California State University (1990) PERB Decision No. 805-H); (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 (McFarland Unified School District (1990) PERB Decision No. 786); (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

The only protected activity alleged in the charge is Meredith's request for union representation on August 1, 2007. (San Diego Unified School District (1991) PERB Decision No. 885.) Meredith's rejection on probation that same day constituted adverse action. (Madera County Office of Education (1999) PERB Decision No. 1334; State of California (Department of Industrial Relations) (1998) PERB Decision No. 1299-S.) While the adverse action certainly occurred close in time to Meredith's protected activity, the

> charge fails to establish that the District rejected Meredith because of his request for union representation. On July 17, 200[7], [Principal] Schwuchow gave Meredith the option to resign in lieu of receiving a poor performance review. This indicates that the District had already decided as of this date to reject him on probation. Accordingly, the rejection was not the result of Meredith's later request for union representation. [Emphasis in original; fn. omitted.]

PERB therefore affirmed the dismissal of Meredith's allegation that SEIU caused or attempted to cause the District to retaliate against Meredith.

In the present case, Meredith alleges that the protected activity for which the District retaliated against him included sending a letter to his principal on July 29, 2007, as well as requesting union representation on August 1, 2007. Because both of these activities occurred after July 17, 2008, when the principal gave Meredith the option to resign as head custodian in lieu of receiving a poor performance review and rejection on probation, it would appear from PERB's *SEIU* decision that neither activity could have caused the ultimate rejection. This was the basis of the District's motion to dismiss in the present case.

In his response to the motion to dismiss, Meredith stated in part:

> **7/18/07:**
> Meredith telephoned beforehand to meet with Principal Schwuchow asking for advice about his professional relationship with his immediate supervisor, Torres; specifically about her unprofessional, inappropriate, contradicting & contrariness, emotional behavior. In this meeting, Schwuchow called in Torres, and all talked about the work to be done. It was then that Schwuchow asked Meredith to consider resigning or else receive a poor evaluation. Not understanding his options and rights, he said that he would resign if he did not complete his projects by 8/20/07. Schwuchow was satisfied, praised him saying, "That's what I like to hear", and the meeting ended. It should be noted that Meredith believes that union representation is denied when discipline is brought up as an incidental topic, in an otherwise non-disciplinary meeting. Where discipline becomes intertwined, in the control of an employer, and where the dynamics of human behavior are such that an employee is uncomfortable, intimidated, or unaware of their ability to exercise their rights.

> In contrast to the District's Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof that the "District already decided as of the date of Charging Party's alleged protected activity to reject Charging Party from probation and issue him a less than positive performance evaluation", **a Demotion and Evaluation determination had not yet been made prior to Meredith's alleged protected activity--as evidenced by the verbal agreement above.** [Emphasis in the original.]

Subsequent to Meredith's response to the motion to dismiss, PERB denied a request to reconsider its *SEIU* decision. (*Service Employees International Union, Local 221* (2009) PERB Decision No. 1982a.)

ISSUE

Did the District unlawfully retaliate against Meredith?

CONCLUSIONS OF LAW

In the portion of PERB's *SEIU* decision quoted above, PERB clearly described the burden on Meredith to allege facts establishing that the District retaliated against him for his protected activity. PERB also clearly determined that Meredith did not meet that burden because the alleged facts indicated that the District had decided to take action against Meredith as of July 17, 2007, before Meredith engaged in any alleged protected activity.

In his response to the motion to dismiss in this case, Meredith alleges facts not alleged in the *SEIU* case: that on July 18, 2007, Meredith told the District "that he would resign if he did not complete his projects by 8/20/07" and that "Principal Schwuchow was satisfied, praised him saying 'That's what I like to hear.'" Meredith characterizes this as a "verbal agreement."

In considering the motion to dismiss, I accept as true Meredith's new factual allegations about what he said and what Principal Schwuchow said. (*San Juan Unified School District*

(1977) EERB[1] Decision No. 12.) I do not, however, accept the legal conclusion that this conversation created a "verbal agreement" to delay action against Meredith until August 20, 2007, when Meredith would either complete his projects or resign.

"That's what I like to hear" may be language of praise (sincere or insincere), but it is not language of agreement. Principal Schwuchow did not say that he consented to Meredith's proposed delay.[2] Principal Schwuchow did not say that Meredith had any options other than the two previously offered: to resign or to receive a poor performance review (and be rejected on probation).

I conclude that the new factual allegations in this case do not change PERB's conclusion in the SEIU case that the District decided to take action against Meredith before his alleged protected activity, not because of his protected activity. Accordingly, Meredith's allegations of retaliation in the present case must 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 underlying unfair practice charge in Case No. LA-CE-5133-E, *Kenneth Meredith v. Grossmont Union High 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:

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

[2] Civil Code section 1565 states in part, "The consent of the parties to a contract must be . . . [c]ommunicated by each to the other." Under the Civil Code, a "contract" includes an oral agreement not to do a certain thing (Civil Code §§ 1549, 1622).

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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; see also Government Code section 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