STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSE PEREZ, Charging Party, v. FULLERTON ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4377-E PERB Decision No. 1671 July 28, 2004

Appearances: M. Candice Bryner, Attorney, for Jose Perez; Law Offices of Margaret A. Chidester & Associates by Sharon J. Ormond, Attorney, for Fullerton Elementary School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jose Perez (Perez) of an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the Fullerton Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] by retaliating against him following protected activity. Perez alleged that this conduct constituted a violation of EERA section 3543.5(a).

After a review of the entire record, including the ALJ's proposed decision, Perez's exceptions and request for oral argument[2], and the District's response to the exceptions, the

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

[2]On June 15, 2004, the request for oral argument was denied.

Board finds the ALJ's proposed decision to be free of prejudicial error and adopts it as its own decision and dismisses the charge.

BACKGROUND

Perez was employed as a night custodian in the District. In 2001 he was transferred involuntarily from Ladera Vista Junior High School (after a three-day suspension) to Nicolas Junior High School. He filed an unfair practice charge related to the suspension and the case was resolved at an informal conference in August 2001.

In October 2001, during his shift, a teacher sought him out to clean up juice spilled on the floor during a school dance. Instead of cleaning it up, he pointed to the mop and the teacher cleaned up the mess. This was reported to his supervisor. He also was reported for writing notes to the day custodian in October and November 2001. Although he was not the supervisor of the day custodian, the notes were written as if he were.

After he became aware that he had been reported to his supervisor, he told the day custodian, Tom Krazel (Krazel), "It's open season on Tom."

Perez was placed on paid administrative leave while an investigation ensued following the "open season" comment. Mark Douglas (Douglas), the assistant superintendent of human resources, was assigned to investigate the situation. Douglas met with Perez and questioned him about the "open season" comment and other incidents involving interaction with school employees. During the course of the investigation, Douglas did become aware of Perez having been previously involved in the informal conference related to his prior case.

The investigation was concluded and Douglas prepared a four page memo with six pages of exhibits. This was from Gary Drabek, the District director of maintenance, and addressed to Perez. It gave notice of proposed discipline which was a five-day unpaid suspension. As a basis for the discipline five specific charges against Perez were set forth.

The discipline was based on the following:

(1) The October 25, 2001, incident in which Perez told the teacher where the mop was so she could clean up the spilled juice at the dance.

(2) The note left for Krazel on October 29, 2001. It was described as inappropriate because the day custodian (Krazel) is the lead custodian and reports directly to the school principal, not to the night custodian (Perez).

(3) The October 31, 2001, meeting in which Perez was called into the principal's office and told that he was inappropriate in his discussion with the teacher in the mop incident and that he was not to write any more notes to Krazel. In that meeting the principal said that he, not Perez, supervised the day custodian and that Perez was to bring any concerns about Krazel directly to the principal.

(4) The November 1, 2001, confrontation with Krazel where Perez confronted Krazel and told him it was "open season on Tom" and that it was considered a threat against Krazel.

(5) The May 21, 2001, conversation with Krazel in which Perez referred to Krazel as the "golden child." That occurred on the day of the custodial promotional exam.

The memo advised that Perez could dispute the allegations and proposed disciplinary action by filing an appeal before 4 p.m. on the fifth day following service of the document. Without an appeal, the disciplinary action would become final.

The memo was served by certified mail on November 21, 2001. According to Perez, he did not get the letter out of his mailbox until December 6, 2001. He then waited until December 13, 2001, to file an appeal. He was advised by the District that the appeal was untimely.

DISCUSSION

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 employees 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 (No. 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 (Transportation)); (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 (Santa Clara)); (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 (Parks and Recreation)); (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; No. Sacramento.)

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; fn. omitted.]

The ALJ noted that there was no doubt that Perez had exercised protected rights by his participation in the informal conference in August 2001, and that the District knew about it, even though Douglas did not know until he began the investigation. The timing of the discipline was just a few months after the protected action, but that was not enough for Perez to prevail. There must be a demonstrated connection, or nexus, between the protected activity and the adverse action.

To meet this test, there must be disparate treatment of the employee by the employer (Transportation); the employer departing from established procedures (Santa Clara); and/or inconsistent or contradictory justifications for the action (Parks and Recreation); a cursory investigation by the employer, failure to offer justification at the time the adverse action occurs or employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

The District had argued that the paid administrative leave was not a disciplinary action because Perez lost no pay or benefits. The ALJ did not reach that issue and we agree that it

was unnecessary to do so. We also agree there was no retaliation by the District in response to protected activity. It is true that there was protected activity in August 2001, but Perez' inappropriate conduct in October and November 2001 was the basis for the discipline.

The District followed its Personnel Commission rules regarding time limits when it denied Perez the opportunity to appeal the discipline. The District had no control over when Perez picked up his mail or the fact that even then he waited another week before filing an appeal. Perez clearly did not timely appeal and was not treated in a disparate manner.

Perez has not stated a prima facie case and the charges must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-4377-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSE PEREZ, Charging Party, v. FULLERTON ELEMENTARY SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4377-E PROPOSED DECISION (4/14/04)

Appearances: Cheryl Thomas, Attorney, for Jose Perez; Margaret A. Chidester & Associates by Sharon J. Ormond, Attorney, for Fullerton Elementary School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an employee alleges that a school district retaliated against him for participating in an informal settlement conference. The district denies any retaliation.

Jose Perez (Perez) filed an unfair practice charge against the Fullerton Elementary School District (District) on January 31, 2002. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on May 21, 2002, to which the District filed an answer on June 6, 2002. PERB held an informal settlement conference on August 14, 2002, and a formal hearing on March 25-27, 2003. With the receipt of the final post-hearing briefs on June 23, 2003, the case was submitted for decision.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).[1] Perez is an employee under EERA, employed by the District in a unit for which the California School Employees Association (CSEA) is the exclusive representative.

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

Back in May 2001, CSEA filed an unfair practice charge against the District (Case No. LA-CE-4295-E), alleging that the District had denied Perez representation at an investigative meeting. PERB issued a complaint and later held an informal settlement conference, on August 27, 2001, at which the case was settled. Perez participated in the informal conference and signed the settlement agreement, along with two CSEA representatives and one District representative.

Later, on November 5, 2001, the District placed Perez on a paid administrative leave, and on December 5, 2001, it placed him on a five-day unpaid suspension. The PERB complaint alleges that the District took these actions because of Perez's participation in the August informal settlement conference and thus violated EERA section 3543.5(a).

In the fall of 2001, Perez was working as a night custodian at the District's Nicolas Junior High School. Several of the events of this case involve his relationship with Tom Krazel (Krazel), a day custodian at the same school site. Perez and Krazel had tested for the day custodian position at the same time. Perez felt he was the better custodian, but it was Krazel who got the position. For this or some other reason, there has been mutual antagonism between Perez and Krazel.

On November 1, 2001, Krazel reported to Principal Allan Waterman (Waterman) a conversation Krazel had with Perez. On Waterman's advice, Krazel wrote a note describing the conversation, stating in part:

> Just a note to let you know that it is "open season on Tom [Krazel]" according to Jose [Perez]. Jose confronted me today (Nov. 1st, 3 p.m.) regarding the fact that he was called into Mr. Waterman's office about some recent complaints (from a few teachers) on Jose's work . . . Jose tells me he wanted to keep all complaints "In House", and/or that I should have "come to him," however, it was out of my hands as the teacher(s) had already gone to Mr. Waterman. I tried reasoning with Jose and offered that we try to communicate. But he says, "He doesn't have to." And from now on "He will try and find any little thing" that I

> might do wrong, and "report me" . . . I do not "take kindly" to "threats", verbal or otherwise. [Underlining in the original.]

In his testimony at the hearing, Perez disputed the accuracy of this note.

Krazel's account of the conversation with Perez, including the "open season" comment, came to the attention of Gary Drabek (Drabek), the District's director of maintenance and operations. Drabek considered the comment threatening and decided it was "in everybody's best interest" to place Perez on paid administrative leave pending an investigation.

Drabek consulted Mark Douglas (Douglas), the District's assistant superintendent of human resources. Douglas agreed that the "open season" comment could be assumed to be a threat and that a paid administrative leave for Perez was appropriate, pending an investigation. Douglas explained at the hearing:

> In fact, removing him [Perez] on paid leave during this time was also in his benefit so that no other allegations could be made against him.

Drabek and Douglas agreed that Douglas would take responsibility for investigating the "open season" comment as well as some other aspects of Perez's recent conduct.

Drabek consulted Douglas on Friday, November 2, 2001. At the time, Drabek knew about Perez's participation in the August informal settlement conference, but Douglas (who was new to the District) did not. There is no evidence that they discussed or otherwise considered Perez's participation in that conference.

On Monday, November 5, 2001, the next day that Perez was at work, Drabek called Perez and told him that he was being placed on paid administrative leave pending an investigation and that he should turn in his keys to the school site. Drabek also told Perez that any further information would come from Douglas, who was responsible for the investigation. Perez was unable to reach Douglas that day, but they met two or three days later, along with the CSEA chapter president. Douglas told Perez that the administrative leave "wasn't a

discipline." Douglas instructed Perez to stay home during work hours and not to talk to any co-workers. Douglas also asked Perez about the "open season" comment and some other recent incidents.

Douglas continued his investigation over the next week or so, delegating some of the interviewing to Principal Waterman and some of the drafting to the District's director of classified personnel. Douglas himself met with Perez two more times. During the course of the investigation, he did become aware of Perez's participation in the August informal settlement conference.

The end product of the investigation was a four-page memo, with six pages of exhibits, from Drabek to Perez. The memo gave notice of a proposed disciplinary action: an unpaid five-day suspension, with an effective date to be determined. The memo identified five specific charges against Perez, described in part as follow:

> 1.0 On or about October 29, 2001 a teacher and custodian at Nicolas Junior High School both reported to Principal Allan Waterman that your [sic] had acted inappropriately on October 25, 2001. According to certificated staff member Ms. Beth Boak, you told her to mop a spill on the floor. The spill occurred during a school dance when a student accidentally spilled juice on the floor of the cafeteria creating a potentially dangerous situation in that students and/or staff could have slipped and fallen, causing injury. Ms. Boak, who was supervising the dance, left the dance and students to find a night custodian. When she located you she asked you to mop the floor. Your response to this request was to point to the mop and state, "there it is." Ms. Boak, a new teacher, took the mop and mopped the floor herself. (exhibit 1)
>
> 2.0 On or about October 29, 2001, you left an inappropriate note for the day custodian at the site. This day custodial position is a lead position and reports directly to the site principal. You report to the Maintenance Department. Employees serving in this day custodial classification are often called away from regularly assigned duties to perform additional tasks not necessarily reflected on a routine cleaning schedule. The note you left not only chastised the custodian, Mr. Krazel, for not completing duties you felt were assigned to him, but directed him to perform

tasks you felt he should be performing. In addition to having no supervisory responsibilities over Mr. Krazel, your understanding of his assigned responsibilities was inaccurate. (exhibit 2)

In the note left for Mr. Krazel, you also cited a conversation you supposedly had with interim Lead Custodial Supervisor Larry Reyes. You state that "as per Larry Reyes, Acting Supervisor, it is your job and duties (sic) to bring in the flags and lock your doors". Not only was this information inaccurate, it was dishonest, in that, according to Mr. Reyes, he had not talked to you until late in the afternoon on October 31, 2001. It was at that time, not prior to October 29, 2001 when you actually left the offensive note, that you approached Mr. Reyes to complain about "Tom's continuing habit of leaving doors unlocked, mop bucket out, not communicating with the night staff, etc." Your "after-the-fact" conversation with Mr. Reyes appears to have been an attempt to cover your false statement in the October 29, 2001 note that you had previously talked to Mr. Reyes. (Exhibit 3)

3.0 On or about October 31, 2001 at approximately 3:00 p.m., Mr. Waterman asked you to come to his office. He discussed your inappropriate behavior with Ms. Boak during this meeting and told you that "no one is to speak to one another as you did during the 'mop' incident". You agreed with him. He also directed you to <u>not</u> send notes to Mr. Krazel. He told you that he is Mr. Krazel's supervisor and that if you had to make comments, to make them to him. Contrary to that directive, [the] following night you left a note for Mr. Krazel which complimented Mr. Krazel in a supervisory tone for his "good job" on his "little extra effort", (exhibit 5). This was insubordination.

4.0 The following afternoon, November 1, 2001, at approximately 3:00 p.m., you confronted Mr. Krazel and told him that it was "Open season on Tom". According to Mr. Krazel, "Jose confronted me today regarding the fact that he was called into Mr. Waterman's office about some recent complaints (from a few teachers) on Jose's work. Jose tells me he wanted to keep all complaints "In-house" and/or that I should "come to him". However, it was out of my hands as the teacher(s) had already gone to Waterman. I tried reasoning with Jose and offered that we try to communicate, but he says "He doesn't have to", and from now on "'he will try and find any little thing' that I might do wrong, and 'report me' . . . I do not take kindly to threats, verbal or otherwise." (exhibit 6)

5.0 This was not your first abusive conversation with Mr. Krazel. He also reported that on May 23, 2001, you loudly referred to him as the "golden child" on the day you and he were taking the

> custodial promotional test. This was in front of other applicants. You also stated that he had a conversation with him [sic] during which he told you he did not have prior custodial experience. This was untrue and appears to be part of a pattern of harassment against Mr. Krazel.

The memo stated that Perez could dispute the charges and the proposed disciplinary action by filing a appeal hearing request "by 4:00 p.m. on the fifth working day following service of this notice;" otherwise, the disciplinary action would become final.

The memo was sent by certified mail on November 21, 2001. Unfortunately, Perez did not collect it from his post office box until December 6, 2001. Perez filed a hearing request on December 13, 2001, but the District replied the next day that the request was untimely and that the unpaid suspension was effective December 5, 6, 7, 10 and 11, 2001. The District's Personnel Commission Rule 160.2.4 stated:

> The Notice of Proposed Disciplinary Action shall be in writing and served in person or by certified mail (Return Receipt Requested) to the employee. This requirement will be deemed to have been met if the Notice of Proposed Disciplinary Action is sent certified mail to the last known home address on file in the Personnel Commission Office. Failure of the employee to retrieve delivered mail, or respond to notifications by the US Postal Service of attempted delivery shall not be grounds for voiding notification, or the staying of the timelines outlined in these rules. The responsibility for keeping the District informed of a home address is the requirement of the employee. <u>For purposes of this rule, if a notice is mailed, the second working day following postmark date of the notice shall be considered to be the official date of receipt.</u> [Emphasis added.]

Under this rule, Perez was deemed to have received the memo on November 27, 2001, and his hearing request was due on December 4, 2001.

At the PERB hearing and in the post-hearing briefs, Perez has disputed the charges against him. With regard to charges 2.0 and 3.0, Perez points out that the notes to Krazel attached to the disciplinary memo as exhibits 2 and 5 bear the names of two additional night custodians, who were not disciplined. It is clear, however, that Perez was the one who wrote

the notes,[2] as well as the one directed by Principal Waterman not to send them. Perez also points out that Krazel wrote him some similar notes, but Perez admitted at hearing that he did not complain about those notes to his superiors.

ISSUE

Did the District retaliate against Perez for participating in an informal settlement conference?

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.)

In the present case, there is no serious dispute that Perez exercised rights under EERA, by participating in the informal settlement conference, or that the District knew about it (although Douglas found out only after he began his investigation).

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

[2] One note referred to the night custodians as "Duane, Luis and I [Jose Perez]."

(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; fn. omitted.]

In the present case, the District argues that Perez's paid administrative leave was not an adverse action, but I do not find it necessary to address that issue in order to decide the case.

The key issue in this case, as in most cases of alleged retaliation, is whether the charging party has shown a nexus with protected activity. I conclude that Perez has not.

Perez argues that he suffered disparate treatment in that neither his fellow night custodians (whose names were on the notes to Krazel) nor Krazel (who also wrote notes) were disciplined. It is clear, however, that Perez was the one who wrote the notes to Krazel, as well as the one directed not to send them, and that Perez never complained about Krazel's notes. It thus does not appear that Perez was singled out for any suspicious reason.

Perez also points out that he was placed on paid administrative leave before the charges against him were investigated. In context, this too does not appear suspicious. The District had reason to fear that Perez had threatened Krazel with the "open season" comment. I would not second-guess the District's decision to remove Perez from the workplace (with pay) until the alleged threat could be investigated.

Perez is understandably unhappy that he missed the opportunity to appeal the disciplinary memo, but again I find nothing suspicious about the District's conduct. It appears that the District simply followed Personnel Commission Rule 160.2.4. There is no evidence that the District departed from that rule for other employees. In short, there is no persuasive evidence that the District treated Perez any differently because of his participation in the informal settlement conference.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge in Case No. LA-CE-4377-E, Jose Perez v. Fullerton Elementary 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 before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing 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