STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LEONARD G. ISENBERG, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5118-E PERB Decision No. 2124 August 4, 2010

Appearances: Leonard G. Isenberg, on his own behalf; Kathleen Collins, Associate General Counsel, for Los Angeles Unified School District.

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

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on exceptions filed by Leonard G. Isenberg (Isenberg) to a proposed decision (attached) by an administrative law judge (ALJ). The complaint alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by not selecting Isenberg for a technical services coordinator position in retaliation for his protected activities. Isenberg alleged that this conduct constituted a violation of EERA section 3543.5(a).

The ALJ found Isenberg failed to establish a nexus between his protected conduct and the District's refusal to hire him for the position. Accordingly, the complaint was dismissed for failure to establish a prima facie case of unlawful discrimination.

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

The Board has reviewed the entire record in this matter and finds the proposed decision well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the proposed decision as a decision of the Board itself.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-5118-E are hereby DISMISSED.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LEONARD G. ISENBERG, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5118-E PROPOSED DECISION (09/02/2008)

Appearances: Charging Party Leonard Isenberg, in pro per; Kathleen Collins, Associate General Counsel, for Los Angeles Unified School District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On October 2, 2007, Leonard Isenberg (Isenberg) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) alleging that the Los Angeles Unified School District (District) refused to appoint him to the out-of-class position of technical advisor in retaliation for his protected activities. On December 13, 2007, the General Counsel of the Board issued a complaint alleging that by the above conduct, the District violated the Educational Employment Relations Act (EERA) section 3543.5(a).[1] In its answer to the complaint, the District denied any wrongdoing.

An informal settlement conference was held at the Los Angeles office of the PERB on January 22, 2008, but the matter was not resolved. Formal hearing was held before the undersigned on May 27, 28, 29, and June 11, 2008. At the hearing, with the consent of the

[1] The EERA is codified at Government Code section 3540 et seq. Section 3543.5 states in part:

> It is unlawful for a public school employer to do any of the following:
> (a) . . . discriminate or threaten to discriminate against employees . . . because of their exercise of rights guaranteed by this chapter.

parties, a portion of paragraph 3 of the complaint was amended as follows: "by filing a grievance" was changed to "by filing an alternative grievance procedure."

Upon the filing of post-hearing briefs, the matter was submitted for decision on August 11, 2008.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). Isenberg is a public school employee within the meaning of section 3540.1(j) and has been a classroom teacher at the District's Central High School (Central) for several years. United Teachers of Los Angeles (UTLA) is a recognized employee organization within the meaning of section 3540.1(l), representing a bargaining unit of the District's teachers. UTLA and the District have been parties to a series of collective bargaining agreements, the most recent of which is effective from 2006 until 2009 (Agreement). Article IX-A, "Assignments," section 5.1, provides in relevant part:

> b. The site administrator shall request that any eligible candidate for a dean or coordinator position submit a statement of interest. [Emphasis added.]
>
> c. To be an eligible candidate, a teacher must have permanent status . . .

Section 6.0 provides in relevant part:

> a. The site administrator shall select one eligible candidate from among the candidates who submitted a statement of interest, to serve in each available coordinator position. The site administrator shall then make public the names of the candidates who submitted statements of interest, and the name of the candidate selected to serve.
>
> b. Bargaining unit members shall determine, by secret ballot vote of a majority of those voting . . . either to confirm or not confirm each coordinator candidate selected by the site administrator . . .
>
> c. Post-Election procedures:

> (1) If a candidate selected by the site administrator receives a majority of the votes case (50% + 1), the candidate is confirmed . . . .
>
> (2) If the candidate is not confirmed by a majority vote, the site administrator and chapter chair shall immediately inform faculty members that the coordinator position is still vacant. If the non-confirmed candidate received 40% - 50% of the votes, that candidate and other interested candidates may submit statements of interest within 24 hours . . . The site administrator and chapter chair shall then seek to mutually agree upon the coordinator selection from among those candidates who submitted statements of interest within the time limits above . . . .
>
> (3) If the administrator and chapter chair do not reach agreement within a period of three (3) days following submission of the statements of interest, the selection authority will be delegated to a two member team from the District/UTLA Dispute Resolution Panel . . . They will make the decision within an additional period of three (3) days.

In addition to the Agreement, the District also follows a "Selection Process for Out-of-Classroom Teacher Assignments," which provides that a Staff Selection Committee (Committee) be responsible for "[e]stablishing selection policies according to current [Agreement] and procedures specific to the position that include an objective system for rating the candidates with input recommendations from relevant committees." Under the Selection Process, the Committee is to form an Interview Team composed of at least three members, including a UTLA representative or designee, the school principal or designee, the Committee chair or designee, and "other stakeholder groups."

In May 2007,[2] Janet Seary (Seary), Central's principal, announced a vacancy in the technical advisor position,[3] as the incumbent was due to retire in June. Two qualified candidates applied, Isenberg and Juan Perez (Perez), and both submitted statements of interest.

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[2] All dates refer to the year 2007 unless otherwise noted.

[3] This position is designated "coordinator."

The District had a Committee in place, consisting of Seary and approximately twelve individuals, mostly teachers; they reviewed the backgrounds of the two applications and conducted interviews.[4] However, the Committee could not reach consensus on either candidate; at one point, Camille Solis (Solis), Staff Selection chairperson and Committee member, told Isenberg that he and Perez "really have no chance for this position." Some Committee members even wanted to go outside the District to find someone but were finally convinced that the Agreement prohibited it. According to the Agreement, the decision was then left to Seary and the two UTLA chapter chairs, Clinton Woods (Woods) and Laura Slater (Slater). According to Seary, she and Woods originally favored Isenberg, but Slater convinced them otherwise, and they decided to recommend Perez to the faculty. On June 18 the faculty voted; Perez received 50 percent of the vote, and Seary offered him the position. However, on June 19 Seary became aware that, per the Agreement, Perez needed 50 percent plus one; she then retracted her offer and on June 20 she notified the faculty that the position was reopened. Perez and Isenberg reapplied, along with a new candidate, Nestor Albert Vargas (Vargas).

Seary testified that, although she had known Vargas for a couple of years, she did not solicit him to apply and does not know who did. At that time, he was a substitute teacher at Central, and his emergency credential was due to expire on July 1.[5] Seary testified that she did not know his credential was about to expire but did know that he was slated to be a District intern as of July 7.[6] She contacted David Vidaurrazaga (Vidaurrazaga), Staff Relations Field Director, who told her that "interns have special privileges." She claimed that she therefore

[4] The Committee held two interviews of each candidate, because they could not reach a consensus after the first interviews.

[5] Article IX.A. of the Agreement requires permanent credentialed teaching status.

[6] Solis testified that she knew Vargas was not qualified because he was a substitute, not a permanent teacher, and that Seary must have known this because Central was trying to "come into compliance" with the Agreement.

believed Vargas was qualified. Seary and the two chapter chairs met and unanimously decided on Vargas. Woods testified that he was not influenced by Seary; Slater did not testify. On June 21, with no faculty vote, he was offered the position and began on July 5.

Isenberg, however, knew Vargas was not qualified as he had only an expiring emergency credential and was not a permanent teacher. He met with Seary on July 10 to express his concerns. He also complained to Vidaurrazaga and to Paula Parr (Parr) of UTLA, both of whom told him that the Dispute Resolution process in the Agreement (see Article IX.A.6.0.c(3), quoted above) was the appropriate method for resolving the matter and he could obtain a form from Seary. When he asked Seary for a form, she argued that it was not the appropriate process and he should instead file a grievance,[7] but she eventually gave him the form, which contained her signature. He filled it out to the best of his ability and sent it by facsimile transmission to Staff Relations on August 6. He testified that in a conversation with someone from Staff Relations shortly thereafter, he was told the form was incomplete but they would process it anyway. But on September 5, Susan Masters (Masters) of Staff Relations returned the form to Seary with a cover memo rejecting it because it was incomplete, e.g., it did not indicate whether the dispute was resolved or not and it did not include Isenberg's name as the grievant.

In the meantime, Seary, after her July 10 meeting with Isenberg, sought advice from Vidaurrazaga, who consulted with UTLA and suggested to Seary that Dispute Resolution might resolve the matter. Thus, unbeknownst to Isenberg, Seary also submitted a Dispute Resolution form, indicating that the dispute was resolved as between the principal and the chapter chairs. Masters testified that she never saw Seary's form, and Vidaurrazaga testified that he could not recall ever seeing it. Seary testified that she believed the rejection from

[7] Isenberg did not file a grievance because he had no confidence in UTLA's ability to successfully resolve it.

Masters was to her form, not Isenberg's, and therefore she did not inform Isenberg of the rejection. In August, Staff Relations informed Seary that Vargas could not accept the assignment because he did not yet have permanent status, and advised her to reopen the position again in September, when vacationing faculty returned. On August 17 Seary appeared before the LEARN Council to request canceling the technical advisor position, but the Council disagreed.[8] Vargas was allowed to essentially remain in the position until August 20, but according to Seary, he did not receive the contractual pay differential during this time.

From late July through mid-September Isenberg also lodged several complaints with the following entities in an attempt to question Vargas's credentials and get him removed from the position: Seary's superiors at the District's Options and Adult Education offices; California State University Los Angeles (Cal State LA), where Vargas was performing his internship; and the California Commission on Teacher Credentialing (CTC), each of whom contacted Seary to find out what was going on. He also had several conversations about Vargas with UTLA and his fellow teachers, some of whom complained to Seary.

On September 21, Seary met again with Isenberg; she assured him that Vargas was back in the classroom and the technology advisor position would once again be reopened.[9] She accused Isenberg of being "despicable" for continuing to complain about Vargas to Cal State LA, CTC, UTLA, and his fellow teachers, even though he knew Vargas was no longer the technical advisor. Seary testified that she was "frustrated" with Isenberg because she thought highly of Vargas and his future with the District and was afraid Isenberg was trying to ruin his career by making false claims and trying to get him removed from his internship program.

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[8] Central is a "LEARN" school which, inter alia, employs a collaborative decision-making process in hiring and promoting.

[9] Isenberg claimed that he learned of Vargas' removal for the first time at this meeting.

According to Isenberg, Seary said that now he would never get the position and she would be the one to decide. Seary denied making these remarks.

Seary once again notified the faculty that the position was open.[10] Isenberg reapplied, along with Eric Barodte (Barodte), who had been a member of the Committee during the first selection process in May. There is no evidence as to whether he was solicited to apply by anyone; he did not testify. Barodte was unanimously selected by Seary and the two chapter chairs, who at this time were Slater and Michael Newman; Newman also did not testify. Barodte began in the position on September 24. On December 4 he left the District for another school district; Seary testified that she did not know of his intention to do this at the time of his appointment. The current technology advisor is Bob Wayne, chosen by the Committee as a whole; there is no evidence on the details of his selection.

ISSUE

Did the District refuse to appoint Isenberg to the position of technology advisor because he filed an alternative grievance procedure or engaged in other protected activities?

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 employees because of the exercise of those rights. (Novato Unified School District (1982)

[10] Isenberg claimed he never received a copy of Seary's notice announcing the reopening, but learned of it from Parr. Parr told him that after reviewing the Agreement more closely, UTLA changed its view of the Dispute Resolution process, and instead reached an agreement with the District to remove Vargas and reopen the position.

PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's actions 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 that might demonstrate the employer's unlawful motive. (Novato, supra; North Sacramento School District, supra.)

Here, it is undisputed that Isenberg engaged in protected activities, first when he met with Seary on July 10 to protest Vargas' appointment, and later when he contacted UTLA and

filed the Dispute Resolution form.[11] It is also undisputed that the District knew of his protected activities. Isenberg has therefore satisfied the first two prongs of the Novato requirement (Novato, supra), and the District does not disagree.

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 his post-hearing brief, Isenberg argues that in failing to receive the appointment, he was denied, inter alia, "an additional class period of monetary compensation." While there is no evidence as to the additional amount which could be earned, Seary testified to a "differential" pay, which Vargas did not receive after it was determined that he was appointed in error. Further, in its post-hearing brief, the District stated that it "does not dispute that being denied an assignment can constitute an adverse action." Accordingly, I find that Isenberg suffered an adverse action.

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[11] While the District concedes that Isenberg's July 10 meeting with Seary was protected activity, his later contacts with her superiors at the District, Cal State LA, the CTC, and even fellow teachers, are another matter. EERA section 3543(a) guarantees to employees "the right to represent themselves individually in their employment relations with the public school employer." However, Isenberg was not trying here to advance his own candidacy, nor could these entities have helped him; rather, he was trying to get Vargas removed. I do not find that these contacts concerned his own relationship with the District, and are therefore not protected. (California School Employees Association (Peterson) (2004) PERB Decision No. 1733 (discussions about matters outside the scope of representation is not protected).) I do, however, find his contact with UTLA regarding the Dispute Resolution process to be protected, as that was a direct attempt to have himself appointed instead of Vargas.

However, he has failed to show the required relationship, or nexus, between his protected activities and his not receiving the appointment. He alleges that Seary violated the Agreement's selection process in several ways, that she knew all along Vargas was not qualified, that she deliberately mishandled and withheld information on the Dispute Resolution process,[12] and that Barodte's appointment created a conflict of interest because of his prior service on the selection committee. If any of these allegations were true, they might under other circumstances serve as evidence of unlawful motivation. Here, however, the timing is fatal. Neither the Committee as a whole nor the Seary-Woods-Slater panel wanted to appoint Isenberg the first time around, when Perez was chosen in mid-June; nor did the panel want to appoint him the second time around, when Vargas was chosen on June 21. This was before any protected activity on his part. (Rio Hondo Community College District (1982) PERB Decision No. 272 (no nexus where employer's decision made prior to employee's protected activity).)

The only question then is whether his later protected activity, beginning with his meeting with Seary on July 10, was the cause of his not getting the position the third time around, when Barodte was chosen in September. Isenberg contends that Barodte's selection presents a conflict of interest, as he was a member of the Committee when Perez was selected. However, I do not find anything in the Agreement to prevent Barodte's candidacy and do not see any conflict in it. Nor is there evidence that Barodte was solicited by Seary to apply for the position. Isenberg also argues that Seary exerted undue influence on the chapter chairs, evidenced by certain benefits which they enjoyed. However, there is no record evidence that Slater, Woods, or Newman were granted any benefits by Seary. Isenberg also contends that

[12] Isenberg also argues that UTLA's change of mind about the Dispute Resolution process should be viewed with suspicion. However, there is no evidence that the union was influenced by the District, and there is no charge pending against it. I do not find this argument relevant to the issues herein.

her influence is shown by her telling him on September 10 that because of his contacts with various entities, including UTLA, he would never get the position and she would be the one to decide. However, even assuming arguendo that she made these remarks, the evidence is to the contrary: Slater, who was a chapter chair when both Perez and Vargas were selected, had argued Seary out of her original support for Isenberg, and there is no reason to believe that Slater would change her mind after Vargas was removed. Woods testified that when he served as chapter chair, during the selection for Perez and Vargas, Seary did not influence him; there is no reason to believe that she later influenced his replacement, Newman, or that Newman would have favored Isenberg at any time. I therefore cannot conclude that she influenced the panel to keep Isenberg from the position. Further, as analyzed above, Isenberg's contacts, directed solely toward an effort to remove Vargas, were not protected.

I therefore find that Isenberg has not satisfied the third prong of the Novato standard by showing that his protected activities were the motivating factor for his not receiving the appointment; or put another way, that he would have received the appointment "but for" his protected activities. (Novato, supra.) Accordingly, I conclude that the evidence is insufficient to sustain a prima facie case that the District denied Isenberg the technical advisor position in retaliation for his protected activities, in violation of the EERA.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this matter, having found that the District did not violate the EERA section 3543.5(a) by not appointing Isenberg to the position of technology advisor, the complaint and underlying unfair practice charge in Case No. LA-CE-5118-E, Isenberg 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 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).)

Ann L. Weinman
Administrative Law Judge