CITY OF LOS ANGELES
BEFORE THE EMPLOYEE RELATIONS BOARD

DECISION NO. U-206

IN THE MATTER OF:

ENGINEERS AND ARCHITECTS ASSOCIATION Claimant, – and – *DEPARTMENT OF NEIGHBORHOOD EMPOWERMENT* Respondent.	)	*UNFAIR EMPLOYEE RELATIONS PRACTICE CLAIM NO. 1705*
Alleged retaliation for protected activity	)	

DECISION AND ORDER

Pursuant to a Notice of Hearing dated on December 23, 2008, a hearing in the above-captioned matter was held February 6, 2009 before Hearing Officer Geraldine Randall to resolve a claim of Unfair Employee Relations Practice pursuant to Section 4.860 and in accordance with Sections 4.810 f (4), (6), and (8) of the Los Angeles City Employee Relations Ordinance ("Ordinance"). The above named parties had a full and adequate opportunity to present evidence, examine and cross-examine witnesses under oath, argue orally, and file briefs to the hearing officer.

The hearing officer submitted her Report and Recommendation to the Employee Relations Board ("Board") on May 18, 2009. A copy of that report is attached hereto. The Board provided copies of the report to the parties for their review and comment. No exceptions were filed.

On July 27, 2009, the matter was considered by the Board. The Board adopted the Hearing Officer's Report and Recommendation finding that the demotion of employee Mark Lewis by the Department of Neighborhood Empowerment was not in retaliation for conduct protected by the Ordinance and that UERP 1705 should accordingly be dismissed.

ORDER

Based on a consideration of the entire record and for the above reasons and pursuant to Section 4.810 of the Los Angeles City Employee Relations Ordinance, the Employee Relations Board of the City of Los Angeles hereby dismisses Unfair Employee Relations Claim No. 1705 in its entirety.

BY ORDER OF THE BOARD.

Edna E. J. Francis

EDNA E. J. FRANCIS, Chairman

DATED: August 24, 2009
Los Angeles, California

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EMPLOYEE RELATIONS BOARD

IN PROCEEDINGS PURSUANT TO THE LOS ANGELES CITY EMPLOYEE RELATIONS ORDINANCE

In the Matter of a Controversy between

ENGINEERS AND ARCHITECTS ASSOCIATION,

Claimant

and

CITY OF LOS ANGELES, DEPARTMENT OF NEIGHBORHOOD EMPOWERMENT,

Respondent

Alleged Retaliation–Mark Lewis

UERP NO. 1705

FINDINGS AND RECOMMENDATIONS OF THE HEARING OFFICER

Appearances

For the Claimant:

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For the Respondent:

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INTRODUCTION

These proceedings arise under the Employee Relations Ordinance of the City of Los Angeles, pursuant to which GERALDINE M. RANDALL was selected to conduct a hearing and to submit to the Employee Relations Board her findings and recommendations in Unfair Employee Relations Practice Claim No. 1705. The claim, filed by the ENGINEERS AND ARCHITECTS ASSOCIATION (hereinafter "Claimant" or "EAA") against the DEPARTMENT OF NEIGHBORHOOD EMPOWERMENT of the CITY OF LOS ANGELES (hereinafter "Respondent"), alleges that Respondent violated § 4.860a (1) of the Employee Relations Ordinance "by retaliating against an employee [Mark Lewis] who contacted his union for the purpose of reporting that [Respondent's General Manager, BongHwan Kim] was, together with a subordinate, drinking heavily during the workday". Lewis had been promoted, by Kim, to Principal Project Coordinator in December 2007. Kim demoted Lewis to Neighborhood Empowerment Analyst on September 15, 2008.

A hearing was held February 6, 2009, at the Board offices. The parties were afforded full opportunity for examination and cross-examination of witnesses, introduction of relevant exhibits and argument. The matter was submitted on written closing briefs filed on behalf of both parties.

POSITION OF THE CLAIMANT

General Manager Kim retaliated against Mark Lewis for engaging in a protected union activity: contacting the union about an employment-related matter involving his direct supervisor. A *prima facie* case of retaliation is made when it is shown that (1) the employee engaged in a protected activity; (2) the employer took an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action.

On August 14, 2008, Lewis reported to his union that Kim was drinking and hungover on the job. Lewis then went on a month-long vacation four days later. On the day Lewis returned from vacation, Kim demoted Lewis to the lowest coordinator position available. Lewis engaged in a protected activity when he contacted his union about his supervisor, which was an exercise of his

right, protected by § 4.860a (1) of the Los Angeles City Employee Relations Ordinance, to participate in union activities.

Knowledge of union activity is imputed to an employer in small office settings. Lewis's union representative, Benjamin Pezzillo, faxed Lewis's report regarding Kim's drinking to Respondent's Director of Personnel. The faxed document remained on the fax machine in close proximity to Kim's office for several hours where anyone, including Kim, could have seen it. Knowledge of Lewis's contact with the union is therefore reasonably imputed to Kim under the small shop doctrine.

Kim's discovery that Lewis had reported his drinking to the union was at least a factor in his decision to demote Lewis. An employee must prove only that the protected activity was a factor or one of many reasons for the adverse action; an employee is not required to prove that the protected activity was the sole or even dominant motive. Once the employee establishes a *prima facie* case, the burden shifts to the employer to establish a legitimate reason for the adverse action.

Motive is inferred from the totality of the circumstances – circumstantial evidence such as timing, disparate treatment, inadequate justification or lack of a rational basis for the adverse action are sufficient to show a causal link between the adverse action and the protected activity. In this case, the causal link and the pretextual nature of Kim's stated reasons for the demotion can be inferred from the totality of the circumstances.

First, the timing of the demotion suggest Kim was motivated by Lewis's report of his drinking to the union. Kim testified he had issues with Lewis's performance and that he was working with him on improvement, yet Kim demoted Lewis the same day he returned from a month-long vacation. Nothing in Lewis's performance had changed in that month because Lewis was not present. Were Kim's testimony truthful regarding the reason for the demotion, he would either have demoted Lewis before the vacation or waited for some time to pass after the vacation to observe whether Lewis's performance improved.

Second, the total lack of documentation of Kim's dissatisfaction with Lewis's performance indicates that Kim's stated reasons for the demotion were pretextual. Third, Kim had only vague "corporate speak" reasons for his dissatisfaction with Lewis's performance. Finally, Kim's

promotion of Martinez contradicts his claim that Lewis's failure to meet the deadline on the call-center project was part of his reason for the demotion. Kim knew the assignment had been properly delegated to Martinez, who failed to meet the deadline and yet was promoted to Lewis's position after the demotion. Kim later disbanded the entire project. Had Kim truly been concerned about the project, he also would have taken disciplinary action against Martinez.

POSITION OF THE RESPONDENT

Lewis was demoted for performance issues completely unrelated to any complaint he made to EAA or to EAA's complaint to the Personnel Department. EAA has failed to prove that Kim knew that Lewis had filed a complaint with EAA and/or that EAA had transmitted the complaint to the Personnel Department prior to making the decision to demote Lewis. Kim testified he had no knowledge of the complaint until he received a copy of the instant UERP. This testimony was unrebutted. That Kim was considering such a demotion prior to Lewis's filing of the complaint is established incontrovertibly by e-mail exchanges which occurred prior to Lewis's initial contact with EAA regarding the complaint. The Personnel Department responded to an inquiry from Kim regarding the possible demotion on August 7, 2008. Lewis did not complain to EAA until August 18, 2008, and his complaint was not forwarded by EAA to the Personnel Department until September 8, 2008. EAA produced no documents or witnesses to establish that Kim had knowledge of the complaint prior to making the decision to demote Lewis. Lacking such evidence, EAA attempted instead to impugn Kim's character by means of an e-mail obtained under questionable circumstances.

EAA's citation of Kim's statement that he "needed someone he could trust" is a classic example of using a comment out of context. Kim testified that he recalled saying "that I need to trust every manager that reports to me, [that] they will follow through on projects that are delegated to them... I need to trust that they will bring to me concerns that I need to be aware of because I am ultimately a final decision maker... And I need to trust because of the high visibility that our department has with the community, that I especially need to trust their assessment of the risks and liabilities of various issues that our department is faced with."

Under § 4.810 f(4) of the Employee Relations Ordinance, the Employee Relations Board has only the power to "investigate and determine the validity of charges of unfair employee relations practices, to make findings, and to issue orders to cease and desist which are not in conflict with other provisions of law." EAA is well aware that the ERB has no authority to order reinstatement of Lewis to the position of Principal Project Coordinator.

Principal Project Coordinator is a high-level, highly responsible position in which the incumbent is expected to act independently, with minimal supervision from the General Manager, and to provide leadership to subordinate staff. Because the Assistant General Manager position was vacant at the time Lewis served as Principal Project Coordinator, it was all the more important that Kim be able to rely upon Lewis to properly manage his division. Kim met with Lewis weekly to discuss projects and priorities and review what had been accomplished. However, Lewis had communication problems both with his subordinates and with the General Manager. In addition, Lewis failed to follow through on his projects and failed to make substantial progress on some of them.

Before demoting Lewis, Kim attempted to provide assistance and direction to him with a series of memoranda and charts which reflected tasks and priorities. Even with this assistance, problems with implementation and follow-through persisted. Kim had to provide more direct supervision of Lewis then what is expected for a Field Director. Kim did not provide Lewis with written evaluations based on advice he received from the Personnel Department that Lewis's position was exempt from civil service and was therefore an "at-will" position, and that Lewis therefore could be terminated at Kim's discretion. Had Kim elected to terminate Lewis, Lewis would have returned to his prior position of Clerk Typist in the Police Department. Had Kim had a retaliatory motive, this is certainly the action he would have taken. Because Kim believed Lewis had skills and knowledge which were of value to the department, he elected demotion rather than termination.

Lewis's performance in positions held before he was promoted to Principal Project Coordinator have no bearing on his performance in the latter. The duties of an entry-level clerical position such as Clerk Typist are not comparable to the duties of a Principal Project Coordinator.

During his hearing testimony, Lewis displayed difficulty in recalling his responsibilities as a Principal Project Coordinator and cited as a major accomplishment the preparation of a report that took four hours to complete.

FINDINGS AND DISCUSSION

Summary Of the Evidence

Lewis has been employed by the City of Los Angeles since 2001. He holds a bachelor's degree in history from the University of California, Berkeley, and a master's degree in public administration from Harvard's Kennedy School of Government. RT 92. Despite these qualifications, his first position with the City was Clerk Typist in the Police Department. RT 89. In 2002, he transferred to the new Department of Neighborhood Empowerment ("DONE") as a Project Coordinator. RT 90-91. In 2005 he became a permanent Senior Project Coordinator. RT 90. In December 2007 he was promoted, by DONE General Manager BongHwan Kim, to Principal Project Coordinator for Field Operations. RT 91, Dept. Ex. 2. Because the Assistant General Manager position was then vacant, as Principal Project Coordinator, Lewis reported directly to General Manager Kim. Dept. Ex. 2.

The duties and responsibilities of a Principal Project Coordinator, and the aspects which distinguish it from other related positions, are set forth in the Class Specification, Dept. Ex. 1. The Class Specification states, in pertinent part,

> "A Principal Project Coordinator plans, organizes, and directs the work of professional staff involved in coordinating and administering the operations and activities of a complex network of Neighborhood Councils and other community-based organizations; serves as the department liaison to Department executive management for such organizations; applies sound supervisory principles and techniques in building and maintaining an effective workforce;...
>
> **Distinguishing Features:** A Principal Project Coordinator is distinguished from a Senior Project Coordinator in that the Principal Project Coordinator may manage one or more sections in a City department containing a large group of professional staff which may include Senior Project Coordinators, Project Coordinators, Senior Project Assistants, Project Assistants, Management Analysts, Management Assistants, and others who develop, administer and coordinate complex special projects or programs involving cooperative or collaborative efforts between various City departments and community nonprofit organizations."

Kim testified that Lewis failed to demonstrate the leadership skills required of a Principal

Project Coordinator; lacked the ability to communicate effectively with Kim and the Senior Project Coordinators Lewis supervised; did not adequately supervise and mentor the Senior Project Coordinators; failed to provide written reports detailing the progress of the various Department projects; and did not meet deadlines or follow through on those projects. RT 30-32, 35, 39, 43, 46. Some of these problems with Lewis's performance were apparent to Kim by March 2008, within three to four months of Lewis's promotion, and Kim saw no improvement in the following months. RT 39-40. Kim testified further that he met with Lewis weekly to provide direction and guidance. RT 35-36, 41-42. On March 28, 2008, Kim sent Lewis a memorandum (Dept. Ex. 3) outlining "Priorities for Field Division" which set forth such tasks and projects as, *inter alia*,

> "• How to prioritize the work of the field division within the current/future fiscal climate of declining staff positions and resources?
> ....
>
> • Develop and implement an NC empowerment model (vs service model)
> •
> • Sharpen focus of NEA's on their priority roles/responsibilities.
> o Develop effective, on-going two way communications, information sharing, and advice between DONE/NC's and the city.
> o Field staff workload tracking system
>
> • Field staff development plan – team building, skills, knowledge, and abilities most relevant to their roles/responsibilities for capacity building for NC stakeholders and city.
> ....
>
> • Better integrate the field division operations, communications, protocol, and procedures with admin, funding, BONC, Council/Mayor so that all divisions are focused on department wide goals. The desired outcomes are greater impact, improved efficiencies with each division improving their core competencies while pursuing department and system wide development goals, greater communication and coordination, better advice giving and support to NC stakeholders....

Kim testified that in May or June he began discussing Lewis's failure to meet expectations with the City's deputy mayor, Larry Frank. On July 8, 2008, Kim sent a memorandum to Lewis (Dept. Ex. 5) which requested Lewis to provide his plans for accomplishing various objectives, such as leveling the staff workload and implementing and clarifying PC tasks and responsibilities. The memorandum concludes, "... I know you would like to take most of august (sic) off but I'm concerned that these time sensitive projects cannot be delayed another month. I realize the importance of you needing time off to help with the Obama campaign but I feel the depts priorities

must come first and the timing of your request is less than ideal. I'd like to discuss how we can make sure the much-needed field division work continues to gain momentum." Kim testified further that he discussed Lewis's possible removal or demotion with Maggie Whalen and Shannon Pascual of the Personnel Department, in late July or early August 2008. RT 66-67. Lewis went on vacation from August 18 to September 15, 2008. RT 101-102.

On August 7, 2008, Kim inquired of the Personnel Department via e-mail, "I am thinking about demoting an exempt field director down to NEA. Is this an option? He has civil svs status as a mgmt analyst I believe. Would he have to go on new hire probation if he was not civil svs?" RT 67, Dept. Ex. 6. Pascual responded the same day, "Mr. Lewis has civil service status as a Clerk Typist and <u>not</u> as a Management Analyst. Because he is currently in an exempt position, he is not eligible for a Charter Section 1014 Transfer to the class of Neighborhood Empowerment Analyst. ... You always have the option of dropping him down to a Sr. Project Coordinator position in your department, he is on leave of absence to a Clerk Typist position with the LAPD." Dept. Ex. 6.

Kim testified that he considered terminating Lewis, which would have resulted in his being returned to the LAPD Clerk Typist position. However, he "felt like it would be a more humane decision to not terminate him completely because... it would create some economic hardship for him. And I also felt that because of his background with the Department that he still had enough knowledge and capability to serve in the role of what then became a neighborhood empowerment analyst position.... The option to terminate him and have him leave the Department was there, and I was given that advice by several people, but I decided in the end it would be better to demote him." RT 70, 73. Kim demoted Lewis to Neighborhood Empowerment Analyst on September 15, 2008, the day he returned from vacation. RT 102-103.

In early August 2008, in an unspecified manner, Lewis obtained a copy of an e-mail written by Kim to a subordinate (Union Ex. 1) which states, ".... I'm still hungover. We need to avoid drinking during the weekday – or curtail the intake volume. I guess I'll have to be the one to say when...." Kim testified he was referring in the e-mail, in a short-hand fashion, to drinking on a weekday evening. He denied drinking during the work day. RT 38, 46.

On August 14, 2008, Lewis gave the e-mail to Michael Vitkievics in the Personnel

Department. RT 101. On August 18, 2008, Lewis contacted EAA regarding the e-mail. On or about August 20, 2008, Benjamin Pezzillo, an EAA Labor Representative, faxed the e-mail to Vitkievics after leaving a voice message. RT 83-84. Vitkievics responded, via e-mail, on August 21, 2008, in pertinent part, "I will need the following information in writing (email is acceptable)... 1. The specific nature of the complaint or complaints.... Please note, in the future, if you have [a confidential] item you want to fax to me, call me first to make sure that I am able to retrieve the fax immediately after it appears. ... being in a meeting, I was not able to retrieve either your fax or voice mail for a significant period of time after they arrived." Kim testified he was unaware of the accusations being made by Lewis until he received EAA's complaint September 22, 2008. RT 49.

Analysis

The determinative finding of fact in the case at hand is whether General Manager Kim had knowledge of Lewis's allegations that Kim was drinking during the work day *before* he demoted Lewis on September 15, 2008. Kim testified he was unaware of the accusation until September 22, 2008, when he got a copy of EAA's complaint. There is no direct evidence that Kim had such knowledge earlier. EAA argues that knowledge should be imputed to Kim under the small office doctrine, and that someone, even Kim, could have seen the e-mail EAA Representative Pezzillo faxed to the Director of Personnel on or about August 20, 2008.

The Hearing Officer believes knowledge should not be imputed on the present record. There is convincing evidence that Kim was planning to demote Lewis in early August 2008. Via an e-mail dated August 7, 2008 (Dept. Ex. 6), Kim asked the Personnel Department what options were available to him, and he received advice the same day His inquiry preceded the earliest possible date he could have become aware of Lewis's accusations. Lewis testified that he first informed the Personnel Department of the e-mail (Union Ex. 1) on August 14. RT 101.

Because it was Kim who promoted Lewis to Principal Project Coordinator in December 2007, it must be presumed that Kim had a favorable opinion of Lewis's performance at that time. The record contains no reason to think Kim's opinion would have changed between December 2007 and August 13, 2008, for any reason other than actual dissatisfaction with Lewis's performance.

With regard to EAA's citation of Lewis's performance evaluations in his previous positions with the City, it must be observed that Principal Project Coordinator is a much more responsible, higher-level management position than any Lewis had held previously, and requires different knowledge and skills. Hence, Lewis's performance in his previous lower-level jobs is not probative regarding the quality of his performance as Principal Project Coordinator.

Documentary evidence supports Kim's testimony that he was becoming concerned about Lewis's performance by March 2008, just a few months after Lewis was promoted. Kim attempted to assist Lewis by meeting with him weekly, and by providing written guidance regarding his expectations of Lewis. See, for example, Dept. Ex. 3, dated March 28, 2008, as well as Dept. Exs. 4 and 5; RT 35-36, 41-42.

Finally, it is highly significant that Kim elected, against advice from others, to keep Lewis in his department, rather than terminate him. Kim testified he did so because he felt it was more humane, because it would lessen the economic impact on Lewis, and because Lewis had knowledge and skills Kim felt were still of value to the department. RT 70, 73. It is highly unlikely Kim would have voluntarily elected to retain Lewis at DONE if he had a retaliatory motive. To the contrary, one would expect that he would have wanted to remove Lewis from the department, to prevent Lewis from lodging complaints against him in the future.

For the foregoing reasons, the Hearing Officer finds that Kim was unaware of the complaint Lewis had lodged against him until after he demoted Lewis. Therefore, EAA has failed to establish a causal relationship between Lewis's complaint and the decision to demote him.

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RECOMMENDATIONS OF THE HEARING OFFICER

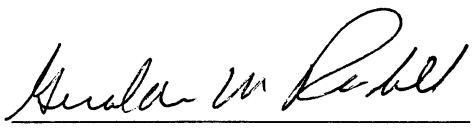
Recommended Findings of Fact

Based on the record evidence discussed above, the Hearing Officer recommends that the Board find as a matter of fact that General Manager Kim was unaware of the complaint Lewis had made until after he had demoted Lewis. Therefore, the filing of the complaint could not have been a factor in the decision to demote him, and there was no retaliation for exercise of a protected right.

Recommended Decision and Order

The Hearing Officer recommends that the Board find there has been no violation of § 4.860a (1) of the Employee Relations Ordinance, and that UERP 1705 be dismissed.

Dated: May 15, 2009



GERALDINE M. RANDALL
Hearing Officer