

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



VANESSA K. HAMILTON,

Charging Party,

v.

ORANGE COUNTY EMPLOYEES
ASSOCIATION,

Respondent.

Case No. LA-CO-215-M

Request for Reconsideration
PERB Decision No. 2674-M

PERB Decision No. 2674a-M

December 11, 2019

Appearances: Vanessa K. Hamilton, on her own behalf; Bridgette Washington, Chief Operations Officer, for Orange County Employees Association.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on Vanessa K. Hamilton's (Hamilton) request for reconsideration of the Board's decision in *Orange County Employees Association* (2019) PERB Decision No. 2674-M.¹ In that decision, we affirmed an administrative law judge's (ALJ) conclusion that the Orange County Employees Association (OCEA)

¹ Hamilton's filing cites PERB Regulation 32360, which governs appeals of administrative determinations issued by Board agents. (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) The only applicable basis in PERB Regulations for challenging the Board's decision in this case is via a request for reconsideration pursuant to PERB Regulation 32410. Accordingly, we treat Hamilton's filing as a request for reconsideration.

breached its duty of fair representation under the Meyer-Milias-Brown Act (MMBA)² by failing to file a grievance signed and approved by Hamilton that included race and gender discrimination and retaliation claims, and instead, without informing Hamilton, filing a different grievance on her behalf that omitted the discrimination and retaliation claims. We disagreed, however, with the portion of the ALJ's proposed remedy ordering OCEA to pay reasonable attorney fees Hamilton incurred pursuing a lawsuit over the termination of her employment. Hamilton now asks us to reconsider our decision not to order OCEA to pay her attorney fees.

We have reviewed Hamilton's request for reconsideration and supporting documentation, and OCEA's response. Based on this review, we deny Hamilton's request.

DISCUSSION

Under PERB Regulation 32410, subdivision (a), the grounds for requesting reconsideration of a final Board decision are limited to claims that: "(1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence." "Because reconsideration may only be granted under the 'extraordinary circumstances' specified above, the Board applies the regulation's criteria strictly in reviewing requests for reconsideration." (*Jurupa Unified School District* (2015) PERB Decision No. 2450a, p. 2.)

In the underlying decision, we concluded Hamilton failed to demonstrate harm that would justify ordering payment of attorney fees as damages for OCEA's violation.

² The MMBA is codified at Government Code section 3500 et seq.

(*Orange County Employees Association, supra*, PERB Decision No. 2674-M, p. 11.) Our conclusion was based on the factual finding that Hamilton’s lawsuit against her former employer, the County of Orange (County), did not involve the same breaches of the OCEA-County memorandum of understanding alleged in her original grievance but instead challenged her subsequent termination, which was the subject of a different grievance OCEA filed on her behalf. (*ibid.*) This finding was legally significant because, under applicable case law, “attorney fees may be awarded only when the employee hires private counsel to pursue the claims in the grievance impacted by the union’s unlawful conduct.” (*Id.* at p. 10, citing *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1275-1276 (*Dutrisac*)). Because it would preclude the Board from considering a potentially available remedy, an incorrect factual finding on this point could be prejudicial to Hamilton.³

Hamilton contends our finding as to the substance of her lawsuit against the County was speculative because “particulars pertaining to Hamilton’s lawsuit were not a part of the record” before PERB. As indicated in the underlying decision, our finding was based on e-mail communications between Hamilton and OCEA representative

³ As we noted in the underlying decision, because Hamilton did not meet the “threshold requirement” for her damages claim—that her lawsuit covered the same topics as the grievance that OCEA failed to file—we had no cause to consider certain other issues relevant to her claim. (*Orange County Employees Association, supra*, PERB Decision No. 2674-M, p. 10, fn. 8.) Further, we note that PERB “has discretion to withhold various remedies at its disposal when doing so effectuates the purpose of the labor relations statute.” (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, p. 30, citing *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 13.) Thus, PERB’s authority to award damages “does not mean that PERB must or will award damages in every case.” (*Regents of the University of California* (2010) PERB Decision No. 2094-H, p. 48.)

Bridgette Washington. Those e-mails were entered into evidence by Hamilton, who could have testified as to what she intended by them. Absent such explanation, we drew from the language in the e-mails a reasonable inference that Hamilton intended to sue the County over her termination, not over the discrimination and retaliation allegations in the original, unfiled grievance. (See, e.g., *County of Siskiyou* (2007) PERB Decision No. 1894-M, p. 13 [PERB may draw reasonable inferences from the language of documents in the record].) Because our factual finding was supported by the evidence in the record, it did not constitute a prejudicial error. (See *The California State University, Chico* (1989) PERB Decision No. 729a-H, p. 3 [reversing on reconsideration a previously found violation that was not supported by the evidence].)

Moreover, in a duty of fair representation case “PERB does not presume damages on the part of employees, even where the representative has failed to adequately represent them.” (*United Teachers Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 91.) Accordingly, “employees are only entitled to an award of back pay or other damages where they can show that the union’s breach was the actual or proximate cause of their injuries.” (*Ibid.*) Here, in order to show OCEA’s breach of its duty of fair representation caused her to incur attorney fees, Hamilton had to prove her lawsuit against the County was based on the same claims that were in her original, unfiled grievance, i.e., her race and gender discrimination and retaliation claims. (*Dutrisac, supra*, 749 F.2d at pp. 1275-1276.) If Hamilton had evidence that the original grievance and her subsequent lawsuit involved the same claims, it was incumbent on Hamilton to put that evidence into the record during PERB’s hearing process. (*United Teachers Los Angeles (Raines, et al.)*, *supra*, PERB

Decision No. 2475, p. 92.) Her failure to do so does not constitute grounds for reconsideration.

Attempting to fill this evidentiary gap after the fact, Hamilton attaches to her request the amended complaint she filed with the California Department of Fair Employment and Housing (DFEH) on July 17, 2017. Under PERB Regulation 32410, subdivision (a), a request to consider new evidence:

“must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.”

Hamilton’s request is not accompanied by such a declaration. Furthermore, it is beyond dispute that the July 17, 2017 DFEH complaint was available to Hamilton at the time of the November 28, 2017 hearing in this case. We therefore cannot consider this new evidence.

The remainder of Hamilton’s request consists of attempts to convince us that our legal conclusions regarding the appropriateness of an attorney fee order were wrong. A party may not use the reconsideration process to register its disagreement with the Board’s legal analysis, to re-litigate issues that have already been decided, or simply to ask the Board to “try again.” (*Jurupa Unified School District, supra*, PERB

Decision No. 2450a, p. 3; *Chula Vista Elementary School District* (2004) PERB
Decision No. 1557a, p. 2; *Redwoods Community College District* (1994) PERB
Decision No. 1047a, pp. 2-3.) We thus decline to consider Hamilton's legal
arguments.

In sum, we find no prejudicial error of fact in the underlying Board decision, and we cannot consider Hamilton's newly presented evidence because she has not met the requirements in PERB Regulation 32410, subdivision (a) for us to do so. Because Hamilton has not established a basis for reconsideration under PERB Regulation 32410, her request must be denied.

ORDER

Vanessa K. Hamilton's request for reconsideration of the Public Employment Relations Board's decision in *Orange County Employees Association* (2019) PERB Decision No. 2674-M is DENIED.

Members Banks and Krantz joined in this Decision.