STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 32, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5955-E Request for Reconsideration PERB Order No. Ad-475 PERB Order No. Ad-475a November 12, 2019

Appearances: Law Offices of Eric Bathen by Eric Bathen, Attorney, for Bellflower Unified School District; Andrew J. Kahn and Sonja J. Woodward, Attorneys, for California School Employees Association, Chapter 32.

Before Banks, Shiners, and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) again on Bellflower Unified School District's (District) request that we reconsider our decision in *Bellflower Unified School District* (2019) PERB Order No. Ad-475. In that decision, we granted the District's appeal from an administrative determination finding it had failed to comply with our decision in *Bellflower Unified School District* (2017) PERB Decision No. 2544, and remanded the matter to the Office of the General Counsel for an expedited compliance hearing. As grounds for reconsideration, the District contends that Order No. Ad-475 contained "prejudicial errors of fact." (PERB Reg. 32410.)[1]

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

Under PERB's Regulations, a request for reconsideration requires the existence of "extraordinary circumstances." (PERB Reg. 32410.) But even the most cursory review of Board precedent would have revealed that our Regulations do not permit reconsideration of decisions resolving administrative appeals. Therefore, we are persuaded that the District filed its reconsideration request for the purposes of delaying compliance and evading its obligations under the Educational Employment Relations Act (EERA).[2] For these reasons, we deny the District's request for reconsideration and grant the request of California School Employees Association, Chapter 32 (CSEA) for reasonable attorney fees for the time spent preparing a response to the District's bad faith request.

DISCUSSION

Because of the "extraordinary circumstances" requirement, the Board applies the regulatory criteria strictly when reviewing a request for reconsideration. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H, p. 5; *King City Joint Union High School District* (2007) PERB Decision No. 1777a, pp. 3-4.) There are only two grounds for reconsideration authorized by PERB Regulations: "(1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party [requesting reconsideration] has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence." (PERB Reg. 32410, subd. (a); *City of Palmdale* (2011) PERB Decision No. 2203a-M, pp. 9-11; *California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S, pp. 10-11, fn. 11.) The "extraordinary

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

circumstances" warranting reconsideration are thus limited to asserted errors or omissions *of fact*. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M, p. 8.)

Purported errors of law, including the Board's alleged improper application of its own Regulations, or a reversal of Board precedent, are not grounds for reconsideration. (*City of Palmdale, supra*, PERB Decision No. 2203a-M, p. 11; *CSEA (Hard, et al.), supra*, PERB Decision No. 1479a-S, pp. 6, 10-11, fn. 11; see also *County of Tulare* (2016) PERB Decision No. 2461a-M, pp. 3-4.) A party therefore 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* (2015) 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.)[3]

As we explained in *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, pp. 2-5 (*Lake Elsinore USD*), because "the reconsideration procedure is limited to Board decisions based on a proposed decision and developed *factual record* following a formal hearing or stipulated record" a party may not seek reconsideration of a decision arising from an administrative appeal. (*Id*. at p. 3, italics original, citing *Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405a.) Here, as in *Lake Elsinore USD*,

[3] The District complains that we shifted onto its shoulders the entire burden of production to establish its compliance with PERB Decision No. 2544. But the burden to prove that the affected employees did not mitigate their losses always belonged to the District as a matter of law. (*County of Lassen* (2018) PERB Decision No. 2612-M, p. 8.) Nevertheless, under PERB Regulations, the hearing officer possesses considerable authority to structure the presentation of evidence to suit the circumstances of this case. Among the available options, the hearing officer could, for the sake of efficiency, require CSEA to submit its evidence of interim earnings first, either through sworn declarations or live testimony, in order to set the stage for the District's responses.

supra, PERB Order No. Ad-446a, the underlying decision resolving the District's administrative appeal "involved no developed factual record resulting from a formal evidentiary hearing or stipulated record." (*Id.* at p. 4.) And in reaching the conclusion that a hearing was necessary to determine the facts of compliance, the Board itself made no factual findings.[4] In any event, the District's request does not cite to *Lake Elsinore USD* or any of the other cases on point, nor does it "make any argument for extending, modifying, or reversing existing Board law or for establishing new law." (*Id*. at p. 5.) "It is therefore unnecessary to consider the grounds asserted by the District for reconsideration, and its request is summarily denied." (*Ibid.*)

This conclusion does not end the inquiry, however, as CSEA requests that we award it attorney fees for the time spent on its response to the request. PERB precedent requires that, to obtain monetary sanctions, including attorney fees or other reasonable litigation expenses, the moving party must demonstrate that the claim, defense, motion or other action or tactic was "without arguable merit" and pursued in "bad faith." (*City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19; *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.) As interpreted by most appellate courts, the standard for determining whether an action or litigation tactic is "frivolous," as opposed to merely meritless, is whether the claim, defense, action or tactic is so manifestly erroneous that no prudent attorney would have filed or maintained it. (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635; *see also In re Marriage of*

[4] We did, however, make certain legal conclusions that circumscribe the universe of relevant evidence for consideration on remand. Among these was our conclusion that the District could not rely on the availability of school bus driver jobs created by its unlawful subcontract with Hemet Unified School District to challenge affected employees' mitigation efforts. (See *Bellflower USD*, *supra*, PERB Order No. Ad-475, p. 11.) As *Lake Elsinore USD* and many other cases make clear, it is inappropriate to challenge such legal conclusions through a request for reconsideration.

Flaherty (1982) 31 Cal.3d 637, 648-649 [interpreting Code Civ. Proc., § 907 authorizing reviewing courts to award such damages "as may be just" for appeals that are "frivolous or taken solely for delay"].)

We agree with CSEA that the District's request for reconsideration was without even arguable merit. It failed to comply with the basic requirements of the reconsideration regulation, ignored recent PERB decisional law directly on point, and included no serious argument for extending, modifying, or reversing existing law or for establishing new law to permit reconsideration of administrative determinations. We also find the request was filed in bad faith based on the fact that the District has engaged in delaying tactics before (see generally *Public Employment Relations Board v. Bellflower Unified School District* (2018) 29 Cal.App.5th 927), as well as the fact that in this particular case the District sought reconsideration of a decision that granted it the very relief it requested. The District's refusal to take yes for an answer, in this context, is clear and convincing evidence that its request for reconsideration was frivolous and "intended to cause unnecessary delay." (EERA, § 3541.3, subds. (h) and (n); Gov. Code, § 11455.30; see *Hacienda La Puente Unified School District* (1998) PERB Decision No. 1280.) Finding that the District filed its request "for no discernible purpose other than to delay" compliance in this case (*Bellflower Unified School District*, *supra*, 29 Cal.App.5th at p. 941), we order the District to reimburse CSEA for reasonable attorney fees for the preparation and filing of its response to the request for reconsideration, the amount

to be determined on remand along with all other outstanding compliance matters, as noted in PERB Order No. Ad-475.[5]

ORDER

Bellflower Unified School District's (District) request for reconsideration of PERB Order No. Ad-475 is DENIED. The District is ORDERED to pay all reasonable attorney fees incurred by the California School Employees Association, Chapter 32 (CSEA) related to the preparation and filing of its response to the request for reconsideration. CSEA is to prepare and submit fee amounts to the assigned hearing officer. After the conclusion of the hearing, the hearing officer shall prepare a written order specifying the reasonable attorney fees and shall serve that order on the parties, together with all other proposed findings and conclusions necessary to determine the District's compliance in this matter, as described in PERB Order No. Ad-475.

Members Shiners and Paulson joined in this Decision.

[5] As that Decision also notes, the hearing officer retains the authority to award additional attorney fees if the District engages in other bad faith conduct warranting further sanction. (*Bellflower USD*, *supra*, PERB Order No. Ad-475, p. 14.)