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 Administrative Appeal PERB Order No. Ad-475 September 13, 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.

Before Banks, Shiners, and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Bellflower Unified School District (District) of an administrative determination by PERB's Office of the General Counsel (OGC) finding that the District failed to comply with the Board's order in *Bellflower Unified School District* (2017) PERB Decision No. 2544 (*Bellflower*). In *Bellflower*, the Board found that the District violated the Educational Employment Relations Act (EERA)[1] by (1) refusing to provide the California School Employees Association, Chapter 32 (CSEA) with requested information, (2) unilaterally contracting out bus driver work to Hemet Unified School District (Hemet USD) beginning in the summer of 2014, and (3) laying off all of its bus drivers at that time. (*Id.* at

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

pp. 1-3.) The Board ordered the District to take specific steps to remedy the violations and effectuate the policies of EERA. (*Id.* at pp. 12-14.)

After a ten-month investigation, OGC determined the District had not complied with the order because it failed, *inter alia*, to rescind its unlawful subcontract with Hemet USD for school bus services, make affected employees whole through offers of reinstatement and payment of lost wages, and make CSEA whole by reimbursing it for any lost dues or agency fees. The District seeks reversal of the administrative determination on several grounds, including its contention that it did not receive adequate documentation of the affected employees' efforts to mitigate lost wages caused by the District's unlawful contracting out and layoffs.

In view of the District's claims, and in light of the contested factual issues, we grant the appeal and remand the case for an expedited evidentiary hearing, where the District will bear the burden of establishing through sworn testimony and documentary evidence that it has complied with all aspects of the Board's order, including but not limited to rescinding its unlawful contract for school bus services, offering reinstatement to the affected employees, and making employees and CSEA whole for all financial losses.[2]

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On December 15, 2017, the Board issued its decision in *Bellflower*, in which it determined that the District violated section 3543.5, subdivisions (a), (b) and (c), of EERA by failing to provide CSEA with necessary and relevant information regarding the District's plans to contract out work historically performed by the District's bus drivers, laying off all bus drivers, and unilaterally contracting out bargaining unit work historically performed by the

[2] In light of our remand for a hearing, we deny the District's request for a stay of enforcement actions as moot.

District's bus drivers for the regular school year, starting in 2014-2015, and for the extended school year (summer school), beginning in 2014. Section B of the Board's order required the District to:

> TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF [EERA]:
>
> 1. As soon as is practical, but not later than the end of the school year in which this decision and order becomes final, rescind its contract for bus driver services to transport students to and from school during the regular school year.
>
> 2. Upon completion of (B)(1), offer reinstatement to all bus drivers laid off in or around June 27, 2014.
>
> 3. Make whole for any financial losses suffered, including wages, benefit and extra hours wages, all laid off bus drivers until they are either reinstated or refuse an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.
>
> 4. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unlawfully layoff its bus drivers until each laid off bus driver is either reinstated or refuses an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.
>
> 5. As soon as is practical, rescind the private contract [with Hemet USD] for bus services to transport students to and from District schools during the Extended School Year and cease offering parents $25 to transport their own students to and from school during the Extended School Year.
>
> 6. Upon completion of (B)(5), reinstitute the bidding process used to assign Extended School Year work to District bus drivers.
>
> 7. Make whole for any financial losses any bus driver who lost Extended School Year bus driving work, during the 2014 Extended School Year and every subsequent [Extended School Year], until the bidding assignment process is reinstated. These amounts should be augmented by interest at a rate of 7 percent per annum.
>
> 8. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unilaterally assign Extended School Year bus driver work to outside sources, until it reinstitutes the Extended School Year bidding assignment

process. These amounts should be augmented by interest at a rate of 7 percent per annum.

9. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in CSEA customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in CSEA's bargaining unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

10. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. [The District] shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

On January 16, 2018,[3] the District filed a petition for writ of extraordinary relief, seeking to vacate the decision. On July 9, the Court of Appeal, Second Appellate District, summarily denied the District's petition. Since the District did not seek further review in the California Supreme Court, the Board's decision became final by operation of law.

Thereafter, on August 28, OGC initiated these compliance proceedings by sending a letter to Eric Bathen (Bathen), legal counsel for the District, requesting the District to file an initial statement of compliance by September 7. OGC also requested that the District furnish specific information about its posting of the Notice to Employees and the affirmative steps it took to comply with sections B.1 through B.8 of the Board's order.

[3] All dates refer to the year 2018 unless otherwise stated.

The District did not respond to this letter. After OGC sent a second request for basic compliance information, the District furnished its first response on October 22, admitting that it had taken no affirmative steps to comply with the Board's order. Specifically, with respect to the requirement that it rescind its unlawful contract for school bus services, the District stated that it preferred to allow the contract to expire by its own terms on June 30, 2019, and that it would make no offers of reinstatement to affected employees until that time. With respect to its obligation to compensate affected employees, the District stated it was "reviewing any issues dealing with lost wages and since no one has come forward claiming any back wages or financial impact, the District is still reviewing its options regarding those issues."

On October 26, OGC sent a third letter demanding further information about the District's compliance efforts, including, *inter alia*, proof that it posted the Notice to Employees, evidence that it could not rescind its unlawful contract for school bus services before the contract's expiration on June 30, 2019, as well as evidence that it offered reinstatement, made employees whole, and remitted dues or agency fees to CSEA.

The District did not respond in writing until January 14, 2019, when it raised several additional theories attacking the Board's order. With respect to the rescission of the illegal contract with Hemet USD, the District stated:

> The contract for busing services between the two school districts was for five years, ending June 30, 2019. Since this Order requires that the contract be terminated by the end of the school year when the unfair labor practice case became final, that date would be June 30, 2019. Therefore, the District will not be cancelling the contract with [Hemet USD], but will let the current contract expire as of June 30, 2019. The District has not yet decided what it will do for busing services commencing in the 2019-2020 school year.

As to the affected employees, the District stated it was not prepared to offer anyone reinstatement until after the expiration of its unlawful contract. With respect to backpay, the District again contended that it was the duty of the affected employees to come forward with claims:

> The District has received no demands from the union or from any individual setting forth financial losses from being laid off as a bus driver. It would be meaningless at this time for the District to calculate any lost wages, benefits or extra hours because the District is not aware that anyone suffered any "financial loss" because any loss that would have been suffered would have to be subject to mitigation by the laid off bus driver. Since we have received no demands for payment of a financial loss, the District has taken no action regarding this item.

With respect to all other outstanding matters, the District claimed either that it had no duty to furnish specific information about its compliance apart from its general assertions, or that the duty to furnish such information belonged to CSEA or the affected employees.

On February 13, 2019, CSEA filed with OGC and served on the District its calculations of lost dues and agency fees, which totaled $20,765.51. On March 11, 2019, the District filed a letter with a signed copy of the Notice to Employees, stating that the District had posted the Notice at certain locations for the period from December 20, 2018, to February 6, 2019. On April 12, 2019, CSEA responded that it had no reason to doubt the District posted the notice at the sites listed in its March 11, 2019 letter.

On May 15, 2019, CSEA filed with PERB and served on the District its calculations showing $1,224,899.54 in lost wages owed to the ten bus drivers that were unlawfully laid off in 2014. On May 20, 2019, the District filed with PERB and served on CSEA a letter demanding "any and all documents that deal with the information and numbers contained in [CSEA's May 15, 2019] letter."

In a May 23, 2019 letter, CSEA informed OGC that, instead of preparing to reinstate the laid off bus drivers after expiration of the unlawful contract on June 30, 2019, the District had given CSEA notice of its intent to enter into a new contract with Hemet USD for school bus services, in violation of the Board's order in *Bellflower*.

On May 28, 2019, the District filed with PERB and served on CSEA a letter asserting:

> The District is making every reasonable effort to comply with the PERB Decision No. 2544 Order and the statement in [CSEA's] May 23, 2019 letter that '[n]ow, the District indicates it will not comply' is simply not true. . . . As I [District's counsel, Bathen,] have stated over and over again, the contract [to provide school bus services] terminates June 30, 2019, by its own terms. The District now has a CBA and it is exercising its rights pursuant to the clear language of the CBA to again contract [] for transportation services.

On June 18, 2019, CSEA provided documentation in support of its lost wage calculations. This included W-2s, 1040s, and other tax, pay record, insurance, and education/training documents from all ten of the affected employees. The District responded by e-mail shortly thereafter, contending that all affected employees could have found work with the Hemet USD shortly after being laid off, and that the failure to obtain such work constituted a failure to mitigate damages.

In the resulting administrative determination, OGC found it unnecessary to hold a hearing in light of the extensive correspondence exchanged and evidence adduced during the investigation. Concluding that the District's conduct was merely for the purpose of delay and obstruction, OGC declared that "[t]he District's actions during the ten months that PERB has sought compliance with the Board's [order] have not demonstrated compliance and it has not been achieved in this case." However, the administrative determination did not contain a proposed order, include any findings with respect to the District's backpay liability to each of the

affected employees or the dues and fees owed to CSEA, or otherwise apprise the parties of the specific actions the District was required to take to meet its compliance obligations.

On appeal, the District disputes the administrative determination's conclusion that it has failed to comply with the Board's order. In addition to the arguments it made to OGC, the District now contends that the order to rescind the contract was in excess of PERB's jurisdiction because Hemet USD was an indispensable party that was not named in the underlying charge and complaint. For its part, CSEA urges the Board to adopt the administrative determination. In addition to the backpay, reinstatement, dues/fees, and contract rescission issues, CSEA asserts the District did not electronically distribute the Notice to Employees, and posted the physical notice for only 24 work days instead of 30 consecutive work days as ordered.

DISCUSSION

Compliance proceedings are governed by PERB Regulation 32980, subdivision (a), which provides in relevant part that "[t]he General Counsel or his/her designate may conduct an inquiry, informal conference, investigation, or hearing, as appropriate, concerning any compliance matter."[4] This provision grants OGC considerable discretion to determine the most effective method for ensuring compliance with a Board order.

Here, OGC's effort to determine compliance through an exchange of correspondence, which in most cases is sufficient, was understandable. In the particular circumstances of this case, however, we believe the better course would have been to issue a notice of hearing, summon the parties to present their evidence on contested issues, and thus obtain a complete record with the greatest possible speed. First, determination of disputed backpay amounts owed to affected employees, including whether employees failed to mitigate their damages, is well-

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

suited for resolution at a hearing, where PERB Regulations give the parties and the hearing officer ample means to obtain the information necessary to make an accurate and complete determination of the respondent's obligations.[5] (*Fresno County Office of Education* (1996) PERB Decision No. 1171, pp. 6-8.) Second, a hearing becomes all the more necessary when OGC believes, as was the case here, that the respondent is engaged in a pattern of delay or is otherwise acting to evade its obligations under a final Board order. Rather than enable obfuscation of the facts with endless rounds of unsworn correspondence, a formal hearing requires the respondent to put its evidence on the record under penalty of perjury. Finally, a hearing permits the hearing officer to craft a proposed order based on findings of fact and conclusions of law that articulates with specificity the steps the respondent must take to discharge its legal obligations.

Since the parties contest, among other matters, the amount of backpay the District owes the affected employees, and whether it complied with the requirement to rescind the unlawful contract with Hemet USD "as soon as practical," we remand this matter to OGC for an expedited hearing on all outstanding compliance issues.[6] We emphasize that the purpose of the hearing is to determine whether, or to what extent, the District has complied with the Board's order in *Bellflower*, *supra*, PERB Decision No. 2544. It is not an invitation to relitigate the merits of the underlying decision and order. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 14 (*Pasadena*); *County of Riverside* (2013) PERB Decision No. 2336-M, p. 8.) Nor is it an

[5] We do not mean to circumscribe the considerable discretion granted to OGC in compliance enforcement proceedings under PERB Regulations by mandating a hearing in every case where backpay amounts are disputed. Rather the point to be made is that a hearing may be the most expeditious way to resolve backpay disputes, as in this case.

[6] PERB Regulation 32147, subdivision (d) allows the Board itself to direct expedited proceedings "[i]n any case."

opportunity to exacerbate the already inordinate delay suffered by CSEA and the affected employees, who have now been waiting more than five years for resolution in this matter.

In order to ensure the parties remain focused on the limited subjects of the hearing, we provide the following guidance on remand. In its letters to OGC, the District claimed it owed the affected employees no backpay because they failed to mitigate their damages after being unlawfully laid off and replaced with employees of Hemet USD. However, a finding by the Board that an unfair labor practice was committed is presumptive proof that at least some backpay is owed. (*Arlington Hotel Co.* (1987) 287 NLRB 851, 855 , enfd. on point (8th Cir. 1989) 876 F.2d 678.)[7] Additionally, as we recently reiterated, the burden of establishing that employees failed to mitigate their economic losses rests squarely on the employer that committed the wrongful acts giving rise to those losses. (*County of Lassen* (2018) PERB Decision No. 2612-M, p. 8.) "To establish a failure to mitigate, the employer must demonstrate that the claimant failed to make efforts consistent with the inclination to work and to be self-supporting. Claimants are not expected to seek a job more onerous that [sic] the one from which they were removed but rather are expected to seek a substantially equivalent job." (*Id.* at p. 9, internal quotations and citations omitted.) A "wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the [employee] be successful in mitigating the damage." (*NLRB v. Westin Hotel* (6th Cir. 1985) 758 F.2d 1126, 1130.) It is well established that "any uncertainty [as to backpay] must be resolved against the wrongdoer whose conduct made certainty impossible." (*Fibreboard Paper*

[7] In *Fresno County Office of Education, supra*, PERB Decision No. 1171, the Board adopted the National Labor Relations Board's standard of proof for mitigation of damages. (*Id*. at pp. 3-5.)

Products Corp. (1969) 180 NLRB 142, 143; *Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 14.)

Furthermore, in direct response to the District's contention that the affected employees should have obtained employment from Hemet USD, it should be self-evident that a wrongfully terminated employee is not required to break with her union or violate her union convictions under the guise of mitigation. Here, CSEA correctly protested the District's unlawful decision to subcontract school bus services to Hemet USD, therefore the affected employees were under no obligation to abandon their union by accepting employment with the unlawful subcontractor. Indeed, the notion that the duty of mitigation required the affected employees to accept employment from Hemet USD under these circumstances is analogous to a suggestion that unlawfully fired workers must cross a picket line to maintain interim employment and become strikebreakers or else forfeit their right to backpay. (Cf. *Big Three Industrial Gas* (1982) 263 NLRB 1189, 1206, overruled on other grounds by *American Navigation Co.* (1983) 268 NLRB 426, 427 [duty to mitigate never held to encompass duty to engage in strikebreaking].) We reject such a notion as antithetical to the rights guaranteed by EERA.

Turning to the record of interim earnings, CSEA furnished significant evidence of the affected employees' efforts to support themselves after they were unlawfully terminated, including tax returns and W-2s.[8] According to those documents, not one affected employee failed to search for and obtain interim employment within a very short time after being laid off. Using these documents, CSEA calculated each employee's interim earnings and subtracted

[8] We note that the record does not contain supporting documentation for Treenitta Harber's claimed earnings in 2015. Of course, CSEA will have the opportunity to furnish such records and any other relevant supplemental documentation during the hearing.

those amounts from the wages they would have earned had the District not violated the law. Such evidence is typically sufficient to rebut a contention of failure to mitigate. Nevertheless, the District will have an opportunity to demonstrate that CSEA's evidence of interim earnings is inaccurate or deficient, or that some or all of the affected employees did not "make a reasonably diligent effort to obtain substantially equivalent employment during the backpay period." (*Contractor Services, Inc.* (2007) 351 NLRB 33, 36; *County of Lassen*, *supra*, PERB Decision No. 2612-M, p. 9.) In the meantime, of course, backpay and interest will continue to accrue until the District proves that some or all of the affected employees failed to mitigate their damages, until it reinstates them to their former positions, or until they refuse a bona fide offer of reinstatement, whichever occurs first.

In its letters to OGC, the District also contended that it was not practical to rescind the unlawful contract with Hemet USD before it expired by its own terms because rescission would lead to litigation between Hemet USD and the District. We note that the Board rejected a similar argument in *Lucia Mar Unified School District* (2004) PERB Decision No. 1640. There, we accepted a hearing officer's conclusion in a compliance proceeding that a school district violated our order to rescind its unlawful contract for school bus services at its earliest opportunity. (*Id.*, adopting proposed decision at pp. 10-13.) Here, the District will have to support its contention that it was not practical to rescind the unlawful contract before its natural expiration with evidence that it had no legal opportunity to terminate the contract before that date. [9]

[9] We also note that the record in this case contains the District's contract with Hemet USD, which expressly contemplated involuntary termination after a minimum of 90-days' notice.

Turning to the District's remaining justification for failing to rescind its unlawful contract and reinstate the affected employees, it is not appropriate to raise as a defense at this late juncture CSEA's failure to join Hemet USD as an allegedly indispensable party. "PERB recognizes and adheres to the policy that litigation shall not be had in a piecemeal fashion, so that when a party has a particular claim or defense in a pending cause of action, it must assert it in those proceedings, or it will be waived." (*Pasadena, supra,* PERB Order No. Ad-406-M, p. 14.) Since the District never raised this issue during the proceedings leading to our decision and order, it has forfeited that claim and cannot raise it during compliance proceedings. (See, e.g., *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 242 [even in the absence of an indispensable party the court still has the power to render a decision as to the parties before it which will stand]; *King v. King* (1971) 22 Cal.App.3d 319, 326 [where, as here, "a case has been fully tried without objection to the absence of parties and the claim that the absent parties were indispensable is raised for the first time on appeal, the rule's underlying policy considerations of avoiding piecemeal litigation and multiplicity of suits are of little consequence inasmuch as the judicial and litigant resources necessary to the litigation have already been expended"], internal citations omitted.) Therefore, on remand, the District will not be permitted to put on evidence in support of this waived defense.[10]

In connection with the District's obligation to rescind the contract, we also expect the parties to present on remand evidence regarding the District's alleged decision to enter into a new agreement for school bus services with Hemet USD. Depending on the surrounding facts and circumstances, that decision could constitute a violation of the Board's order in this case. In

[10] We further note that the District's contract with Hemet USD expressly contemplated the possibility of an adverse unfair practice finding, and required the District to defend and indemnify Hemet USD for any damages arising from legal claims asserted by CSEA as a result of the District's decision to lay off the affected employees.

accordance with PERB Regulation 32170, the assigned hearing officer will possess the authority to inquire fully into this and all other outstanding compliance "issues and obtain a complete record upon which the decision can be rendered."

Finally, we note that the District previously has resorted to dilatory tactics to evade a final Board order against it. In *Public Employment Relations Board v. Bellflower Unified School District* (2018) 29 Cal.App.5th 927, the Second District Court of Appeal concluded that the District appealed a writ of mandate enforcing PERB's order in a prior case "for no discernible purpose other than to delay the enforcement of the judgment." (*Id*. at p. 941.) Therefore, in light of the District's demonstrated proclivity to delay compliance through frivolous objections and legal maneuvers, the assigned hearing officer shall have the authority to impose sanctions on the District for pursuing any claim, defense, motion or other action or tactic in these compliance proceedings that is without arguable merit and pursued in bad faith. (See *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, pp. 5-6.) As previously noted, in an effort to prevent further undue delay, we order that the hearing in this case be expedited under PERB Regulation 32147.

ORDER

The Bellflower Unified School District's appeal from the administrative determination is GRANTED. This matter is remanded to PERB's Office of the General Counsel for an expedited evidentiary hearing where the District will bear the burden of establishing its compliance with all aspects of the order in *Bellflower Unified School District* (2017) PERB Decision No. 2544.

Members Shiners and Paulson joined in this Decision.