STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BRIAN CROWELL, Charging Party, v. BERKELEY FEDERATION OF TEACHERS, LOCAL 1078, Respondent.	Case No. SF-CO-789-E Request for Reconsideration PERB Decision No. 2405 PERB Decision No. 2405a April 29, 2015

Appearance: Brian Crowell, on his own behalf.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by Charging Party Brian Crowell (Crowell) of a decision of the Board itself in *Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405. The unfair practice charge alleged that the Berkeley Federation of Teachers, Local 1078 (Federation) breached its duty of fair representation in violation of the Educational Employment Relations Act (EERA).[1] The Office of the General Counsel dismissed the charge for failure to state a prima facie case. On appeal, the Board affirmed the dismissal of Crowell's unfair practice charge, adopting the warning and dismissal letters of the Office of the General Counsel as the decision of the Board itself.

Having given due consideration to this matter, the Board has decided that it need not determine whether Crowell has met the grounds for requesting reconsideration, let alone

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

decide the merits of the issues raised in Crowell's request, because, as a threshold matter, the Board is without the requisite jurisdiction to entertain Crowell's request. The Board therefore denies Crowell's request for reconsideration, as further explained below.

DISCUSSION

The issue raised by Crowell's request is whether the request for reconsideration procedure under PERB Regulation 32410[2] is available to challenge a decision of the Board itself affirming the Office of the General Counsel's dismissal of an unfair practice charge. While the Board has issued decisions in this procedural context before, none have grappled with the threshold issue of the Board's authority to do so. Although the Federation did not file an opposition to the request for reconsideration, the Board may take up and decide an issue sua sponte if necessary to correct a serious mistake of law or procedure. (*California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S.) That is the case here.

PERB's Regulatory Scheme: Exceptions and Review of Dismissals

Exceptions to proposed decisions and review of dismissals arise from two procedurally distinct regulatory tracks. The regulations on exceptions to a proposed decision fall under Article 2 of Subchapter 4 governing "Decisions of the Board Itself." After a formal hearing, the administrative law judge (ALJ) issues a proposed decision. A proposed decision has no effect upon issuance. A proposed decision takes effect and becomes final only if exceptions are not filed within the prescribed time period. (PERB Reg. 32305.) If exceptions are taken, the proposed decision never takes effect. Instead, the Board decides the matter under a "de novo" standard of review in a final PERB decision. The Board may adopt the proposed

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

decision in whole or in part, or not at all, but it is the Board's decision, and not the proposed decision, which becomes final and takes effect. The only administrative procedure available to challenge the Board's decision is a request for reconsideration. The request for reconsideration regulation is contained in the same subchapter as the regulations on exceptions. (PERB Reg. 32410.)

By contrast, the regulations on dismissals fall under a different subchapter, Subchapter 5 governing "Unfair Practice Proceedings." If the Office of the General Counsel concludes that the unfair practice charge does not state a prima facie case, the Board agent refuses to issue a complaint, in whole or in part. The written refusal constitutes a dismissal of the charge. (PERB Reg. 32630.) The dismissal is issued not as a *proposed* refusal/dismissal of the Office of the General Counsel, but as a final PERB decision that takes effect immediately upon issuance.

The procedure governing "Review of Dismissals" is contained in PERB Regulation 32635. It allows the charging party to appeal the dismissal of an unfair practice charge by the Office of the General Counsel to the Board itself. No administrative procedures are provided for in Subchapter 5 to challenge a decision by the Board itself arising from a dismissal of an unfair practice charge by the Office of the General Counsel.

PERB's Regulatory Scheme: Request for Reconsideration

There are only two grounds upon which a request for reconsideration may be granted under PERB Regulation 32410: (1) prejudicial errors of fact in the Board's decision; and (2) newly discovered evidence. Under the first ground, the party requesting reconsideration

"shall specify the page of the record relied on."[3] The charge investigation process does not result in a page-numbered record. Under the second ground, the party requesting reconsideration must establish that the evidence "could not have been discovered prior to the hearing with the exercise of reasonable diligence." The charge investigation process does not entail an evidentiary hearing, i.e., a formal hearing.

Thus, the text of the reconsideration regulation supports an interpretation that limits its applicability to Board decisions arising out of exceptions to a proposed decision. Such cases generate a page-numbered record and entail an evidentiary hearing. The request for reconsideration procedure is designed to allow the Board to reconsider a Board decision that is based on a hearing record. Under the first ground for reconsideration, the reconsideration procedure allows the Board to consider whether the hearing record supports a party's assertion that the Board has made, and prejudicially relied on, a factual error in arriving at its conclusions. Under the second ground for reconsideration, the reconsideration procedure allows the Board to consider new evidence that was not previously available and could not have been discovered with the exercise of reasonable diligence prior to the formal hearing before the ALJ.

By contrast, a Board decision arising out of the dismissal of an unfair practice charge by the Office of the General Counsel emanates from a determination that the charge fails to state a prima facie case as a matter of law and therefore a complaint should not issue. Such a decision does not adjudicate facts based on an evidentiary hearing record. Such a Board

[3] Although this language referring to a page-numbered record precedes the enumeration of the two grounds for reconsideration, it necessarily only applies to the prejudicial error of fact ground, and not to the newly discovered evidence ground. Newly discovered evidence, by definition, is not contained in a page-numbered record.

decision is not "a decision of the Board itself" of the type that lends itself to the reconsideration process provided for in PERB Regulation 32410.

Board Precedent

Historically, the Board accepted for review requests for reconsideration of Board decisions arising out of the dismissal of an unfair practice charge by the Office of the General Counsel. It is worth noting, however, that prior Board decisions have hinted at the problem we are highlighting here. *State of California, Department of Developmental Services* (1987) PERB Decision No. 551a-S is a good example. The California Union of Safety Employees (CAUSE) requested that the Board reconsider a partial dismissal based on "newly discovered evidence." The Board stated:

> PERB's standard for "newly discovered evidence" was created for the situation where a hearing on the merits has been held. (San Joaquin Delta Community College District (1983) PERB Decision No. 261b.) Several inherent problems inhibit any attempt to adapt the "newly discovered evidence" standard of Regulation 32410 to a prehearing setting. At the prehearing stage of this Board's proceedings, the regional attorney's task is to discern whether allegations in a charge constitute a prima facie violation of the statutes we administer. (Regs. 32615, 32620, 32630.) In connection therewith, the regional attorney performs an investigatory function entailing the solicitation of facts from the parties for the limited purpose of determining if a prima facie case has been alleged. The regional attorney, however, does not perform an adjudicatory role of making evidentiary determinations with respect to credibility, hearsay, or disputed issues of fact, nor does he otherwise weigh the evidence. The "newly discovered evidence" standard of Regulation 32410 appears to contemplate, however, the proffering of evidence, or more precisely, the failure to proffer evidence despite the exercise of reasonable diligence, within an adjudicatory setting. (San Joaquin Delta Community College District, supra; see also CCP secs. 657(4), 1008.) Thus, we do not consider the "newly discovered evidence" standard to be an appropriate grounds for reconsideration of this case.

The Board went on to analyze CAUSE's argument by "assuming" for argument's sake that the Board was authorized to entertain a request for reconsideration within a "prehearing context."

In another case, *San Francisco Unified School District and City and County of San Francisco* (2005) PERB Decision No. 1721a (*City and County of San Francisco*), the Board reviewed a request for reconsideration of a Board decision reversing a dismissal by the Office of the General Counsel and remanding the matter for issuance of a complaint. The respondent advanced several arguments, one of which was laches. The Board held:

> This argument must also be rejected. As the Board's decision noted, invoking laches at this stage is generally inappropriate since a factual finding of prejudice must first be made. Such a factual finding is more appropriate at a hearing before an administrative law judge.

As *City and County of San Francisco* illustrated, by its text, PERB's reconsideration procedure is available to "any party" including a respondent. The availability of the reconsideration procedure in cases arising out of a dismissal of a charge by the Office of the General Counsel becomes more problematic where the Board reverses a dismissal, and the respondent seeks to challenge the Board's reversal. Even in the absence of a reconsideration option, a Board decision reversing a dismissal may not issue until long after the charge is filed, investigated and dismissed. The inherent delay involved in the Board's review of a dismissal *already* poses many challenges for a charging party, i.e., the difficulty in preserving evidence and ensuring the availability of witnesses, the unreliability of fading memories, the diminishing relevance of the dispute and opportunity for a meaningful informal resolution, etc. This delay would be further compounded by a respondent availing itself of the reconsideration procedure. It could be years before the matter is finally back before the Office of the General Counsel for re-initiation of the charge investigation and/or issuance of a complaint.

It is easy to understand why prior Boards were confused by the regulations and therefore only hinted at the problem highlighted in this decision. Despite its references to "record" and "hearing," PERB Regulation 32410 starts off broadly in providing that "[a]ny party to a decision of the Board itself may, ... file a request to reconsider the decision."

In *Trustees of the California State University (East Bay) (Liu)* (2013) PERB Order No. IR-56a-H, the Board began to chip away at the notion that PERB Regulation 32410 has unlimited scope. The Board held that, notwithstanding the broad language at the outset of the regulation, the request for reconsideration procedure is not available to challenge a Board decision granting or denying a request for injunctive relief. The Board stated:

> Given the unique nature of proceedings for seeking injunctive relief, which require expeditious investigation by the Office of the General Counsel (see PERB Regs. 32455 and 32460), we conclude that the reconsideration procedure was neither intended nor designed to permit review of Board decisions granting or denying a request for injunctive relief. Subsection (c) in particular supports our conclusion. It provides for an automatic stay of Board orders in unfair practice cases upon the filing of a request for reconsideration.
>
> If PERB Regulation 32410 applied to injunctive relief requests, PERB's authority to seek injunctive relief would be effectively nullified. All requests for injunctive relief must be accompanied by an unfair practice charge, and therefore any order issued by the Board on a request for injunctive relief is an "order in an unfair practice case." (PERB Reg. 32450(a)(2).) If PERB Regulation 32410 applied to requests for injunctive relief, a party opposing such a request could easily thwart a Board determination to seek injunctive relief simply by filing a request for reconsideration. The Board's decision to seek injunctive relief would then be stayed automatically, pursuant to PERB Regulation 32410(c).

In cases where the Board decision reverses the dismissal of an unfair practice charge by the Office of the General Counsel and the matter is remanded for further investigation and/or

issuance of a complaint, a problem similar to the problem in *Trustees of the California State University (East Bay) (Liu), supra,* PERB Order No. IR-56a-H exists. The Board's processes for investigating an unfair practice charge and determining whether a prima facie case exists could be thwarted by the filing of a request for reconsideration pursuant to a procedure that was meant to apply only in cases where the Office of the General Counsel initially issued a complaint.[4] And in cases where the Board decision affirms the dismissal of an unfair practice charge, the charge investigation process and review of dismissal procedure afford a charging party an adequate and fair opportunity to make a case.

The National Labor Relations Board's Regulatory Scheme

In comparing PERB's regulatory scheme to the National Labor Relations Board's (NLRB) regulatory scheme, it is apparent that PERB borrowed heavily from the NLRB in setting up shop.[5] The NLRB has a set of rules for exceptions to ALJ decisions and a separate set of rules for review of refusals to issue a complaint. The NLRB has two different reconsideration procedures, one for each set of rules.

Section 102.48 of the NLRB Rules and Regulations governs exceptions to ALJ decisions. (29 C.F.R. § 102.48.) In the event no timely or proper exceptions are filed to an ALJ's decision, that decision automatically becomes the decision and order of the NLRB and all objections and exceptions are deemed waived. Upon the filing of exceptions, the NLRB

[4] A decision by the Office of the General Counsel to issue a complaint where it determines that the charge is sufficient to establish a prima facie case is generally not appealable to the Board itself. (PERB Reg. 32640, subd. (c).)

[5] California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (29 U.S.C. § 151, et seq.). (*City of San Jose* (2010) PERB Decision No. 2141-M; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615-617.)

may decide the matter on the record or after oral argument, or may reopen the record or make another disposition of the case.

The reconsideration procedure for decisions from exceptions is contained in subdivision (d)(1), which states:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Subdivision (d)(3) states:

> The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

Section 102.19 of the NLRB's Rules and Regulations governs appeals from refusals to issue a complaint. (29 C.F.R. § 102.19.) If after the charge has been filed, the Regional Director declines to issue a complaint, the parties are notified in writing and provided the procedural or other grounds for the action. The charging party may obtain review of such action by filing the "Appeal Form" with the General Counsel and a copy with the Regional Director. The charging party may also file a statement setting forth the facts and reasons upon which the appeal is based.

The reconsideration procedure for refusals to issue a complaint is contained in subdivision (c), which states:

> The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. A motion for reconsideration or the decision must be filed within 14 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

Like the NLRB, PERB has a set of rules for exceptions to ALJ decisions, which is contained in Subchapter 4, and a separate set of rules for review of dismissals, which is contained in Subchapter 5. But there is one notable difference between the two sets of rules. The NLRB has <u>two</u> reconsideration procedures, one in the section on exceptions and another in the section on review of refusals to issue a complaint. PERB, however, has only <u>one</u> reconsideration procedure. PERB borrowed from the NLRB's reconsideration procedure for exceptions in promulgating PERB Regulation 32410. PERB did not borrow from the NLRB's reconsideration procedure for review of refusals to issue a complaint.

PERB Regulation 32410, containing the reconsideration procedure, mirrors NLRB Rule 102.48, subdivision (d)(1), not Rule 102.19, subdivision (c), in all material respects, as illuminated by the following table:

NLRB Rule 102.48, subdivision (d)(1)[6]	PERB Regulation 32410, subdivision (a)[7]
"A party to a proceeding before the Board may"	"Any party to a decision of the Board itself may"
"because of extraordinary circumstances"	"because of extraordinary circumstances"
"shall state with particularity the material error claimed"	"shall state with specificity the grounds claimed"
"with respect to any finding of material fact shall specify the page of the record relied on"	"where applicable, shall specify the page of the record relied on"
"shall specify the error alleged … and the prejudice to the movant alleged to result from such error"	"[t]he grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or"
"shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing"	"(2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by … (1) was not previously available; (2) could not have been discovered prior to the hearing …; (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"
"The filing and pendency of a motion … shall not operate to stay the effectiveness of the action of the Board unless so ordered" (subdivision (d)(3))	"Unless otherwise ordered by the Board, the filing of a Request for Reconsideration shall not stay the effectiveness of a decision of the Board itself except that the Board's order in an unfair practice case shall automatically be stayed upon filing of a Request for Reconsideration." (subdivision (c))
"A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies." (subdivision (d)(3))	"A motion for reconsideration need not be filed to exhaust administrative remedies." (PERB Regulation 32400)

[6] Except where otherwise indicated.

[7] Except where otherwise indicated.

By contrast, PERB does not have a reconsideration procedure that mirrors the NLRB's procedure under Rule 102.19 for reconsideration of a refusal to issue a complaint. Also, the NLRB's procedure under Rule 102.19 for reconsideration of a refusal to issue a complaint is dissimilar in the same material aspects to both the PERB reconsideration procedure under PERB Regulation 32410 and the NLRB reconsideration procedure under Rule 102.48. The NLRB's reconsideration procedure under Rule 102.19 for reconsideration of a refusal to issue a complaint does not refer to "extraordinary circumstances" or to a page-numbered record or to prejudicial errors. Rule 102.19 simply requires that the error requiring reconsideration be described with particularity and that a motion for reconsideration based upon newly discovered evidence that has become available only since the decision on appeal be filed promptly on discovery of such evidence.

For all the reasons described above, we conclude that the PERB reconsideration procedure was never intended to apply to a Board decision arising out of a dismissal of an unfair practice charge. The language of the PERB reconsideration procedure was borrowed from the NLRB reconsideration procedure for exceptions, and not from the NLRB reconsideration procedure for review of refusals to issue a complaint. PERB's reconsideration procedure is found in Subchapter 4, the same subchapter that contains the procedure for filing exceptions. There is only one reconsideration procedure found in PERB's regulations, not two, as is true in the NLRB system. Subchapter 5 contains the regulation governing review of dismissals. Subchapter 5 does not include a reconsideration procedure, nor is there any cross-reference to the reconsideration procedure in Subchapter 4. PERB could have adopted a reconsideration procedure similar to the NLRB's reconsideration procedure applicable to NLRB decisions refusing to issue complaints, but it did not. Instead, PERB elected to have

one reconsideration procedure for exceptions and to forego having a reconsideration procedure for review of dismissals.

Charging parties have every opportunity during the charge investigation and processing stage to provide the Board agent with evidence to support their prima facie case. Board agents work closely with the parties to elicit the necessary information. Charging parties whose charges are likely to be dismissed are given a warning letter describing the deficiencies of the charge and are provided an opportunity to amend their charge. PERB regulations place no limit on the number of times a charge may be amended.[8] Once the investigation closes, the Office of the General Counsel has gathered as much information as possible and is called upon to make a judgment as to whether the charging party has satisfied their burden to establish a prima facie unfair practice violation.

If the charging party disagrees with the dismissal, the charging party is entitled to Board review. The Board's review is limited to the allegations of the charge and, where appropriate, the position statement of the respondent. A *second* Board review of the *same* allegations of the charge and, where appropriate, the *same* position statement of the respondent, serves no statutory or regulatory purpose. PERB's reconsideration procedure limits the scope of review to factual issues, not errors of law, and the "extraordinary circumstances" standard of review is extremely narrow. Allowing a second Board review under the reconsideration procedure in PERB Regulation 32410 in cases arising out of

[8] Although an unfair practice charge may not be amended once a charge has been dismissed, a new charge may be filed if newly discovered evidence shows that an unfair practice has been committed within the applicable limitations period.

dismissals of charges by the Office of the General Counsel[9] delays finality as evidenced in prior Board decisions,[10] is of no measurable benefit to the parties as also evidenced in prior Board decisions, and diverts Board resources away from cases where a prima facie unfair practice case has been stated.

And if a respondent disagrees with a Board decision on review of a dismissal that reverses the dismissal and remands the matter for further investigation and/or issuance of a complaint, PERB's processes are far from over. The respondent has multiple opportunities to make its case in defense of the charge, to the Office of the General Counsel before the complaint issues and to the ALJ at the formal hearing. If the respondent disagrees with the ALJ's proposed decision, the respondent may file exceptions; and, after that, a request for reconsideration.

Accordingly, we hold that the reconsideration procedure set forth in PERB Regulation 32410 applies only to Board decisions arising out of exceptions to a proposed decision by an ALJ after a formal hearing. Henceforth, the Board will no longer entertain

---

[9] A second review by the Board itself in a dismissal case, procedurally speaking, results in a third final agency decision: the Office of the General Counsel determination, the Board decision on review of dismissal and the Board decision on request for reconsideration. By contrast, a second review by the Board itself in an exceptions case results in only a second final agency decision because the proposed decision never takes effect.

[10] Six decisions on request for reconsideration of a Board decision arising out of a dismissal of a charge by the Office of the General Counsel have been issued in the past four years alone. All were denied. (*California Nurses Association (Rosa)* (2011) PERB Decision No. 2182a-M; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M; *Office of Professional Employees International Union, Local 29, AFL-CIO & CLC (Fowles)* (2012) PERB Decision No. 2236a-M; *National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M; *State of California (Department of Mental Health, Department of Developmental Services)* (2013) PERB Decision No. 2305a-S; *Service Employees International Union, Local 1021 (Kaboo)* (2014) PERB Decision No. 2322a [non-precedential].)

requests for reconsideration of a Board decision arising out of a dismissal of a charge by the Office of the General Counsel. Crowell's request for reconsideration is summarily rejected for lack of jurisdiction for the reasons given herein.

ORDER

Brian Crowell's request for reconsideration of the Public Employment Relations Board's decision in *Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405 is hereby DENIED.

Members Winslow and Banks joined in this Decision.