STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. ALLIANCE COLLEGE-READY PUBLIC SCHOOLS, ALLIANCE SUSAN & ERIC SMIDT TECHNOLOGY HIGH SCHOOL, and ALLIANCE RENEE & MEYER LUSKIN ACADEMY HIGH SCHOOL Respondents.	Case Nos. LA-CE-6025-E LA-CE-6027-E Request for Reconsideration PERB Decision No. 2545 PERB Decision No. 2545a June 20, 2018

Appearances: Bush Gottlieb by Jesús E. Quiñonez, Erica Deutsch, Dexter Rappleye and Megan Degeneffe, Attorneys, for United Teachers Los Angeles; Robert Escalante, Attorney, for Alliance College-Ready Public Schools, Alliance Susan & Eric Smidt Technology High School, and Alliance Renee & Meyer Luskin Academy High School.

Before Banks, Krantz, and Winslow, Members.

DECISION

WINSLOW, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on United Teachers Los Angeles's (UTLA) request for reconsideration of the Board's decision in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545. As relevant here, the Board in that decision reversed the administrative law judge's (ALJ) conclusion that Alliance College-Ready Public Schools (Alliance), Alliance Susan & Eric Smidt Technology High School (Smidt Tech), and Alliance Renee & Meyer Luskin Academy High School (Luskin Academy) (collectively, Respondents) constituted a "single employer." Relying on *California Virtual Academies* (2016) PERB Decision No. 2484, p. 66 (*CAVA*), and disapproving in part *El Camino Hospital District* (2009) PERB Decision No. 2033-M (*El Camino*), the Board determined that it could not use a single-

employer finding to exercise jurisdiction over the charter management organization, Alliance, which is a private entity not defined as a "public school employer" under the Educational Employment Relations Act (EERA).[1] The Board considered UTLA's argument—made for the first time in this case in its opposition to Respondents' cross-exceptions—that Smidt Tech and Luskin Academy could be found liable for Alliance's conduct based on an agency theory. However, the Board concluded that this theory did not satisfy PERB's unalleged violation test, because UTLA gave no notice of this theory during the unfair practice hearing, in its motion to amend the complaints, or its post-hearing briefs to the ALJ. The Board, therefore, dismissed the allegations in the unfair practice complaints against Alliance.

In its request for reconsideration, UTLA argues that the Board's conclusion that the unalleged violation test was not satisfied rests upon prejudicial errors of fact, and that the Board should either address UTLA's agency theory on the merits or request supplemental briefing from the parties.

The Board has reviewed UTLA's request for reconsideration and supporting documentation and Respondents' response thereto. Based on this review, the Board denies UTLA's request for reconsideration for the reasons explained below.

DISCUSSION

Requests for reconsideration of a final Board decision are governed by PERB Regulation 32410, subdivision (a),[2] which states:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . [T]he request for reconsideration shall . . . state

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references are to the Government Code.

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

> with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. . . . The grounds for requesting reconsideration 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 strictly applies the regulation's criteria. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H; *King City Joint Union High School District* (2007) PERB Decision No. 1777a, pp. 3-4.) "[A] request for reconsideration is not simply an opportunity to ask the Board to 'try again.'" (*Chula Vista Elementary School District* (2004) PERB Decision No. 1557a, p. 2.) Reiterating the same facts and arguments made on appeal does not satisfy the requirements of PERB Regulation 32410, subdivision (a). (*San Leandro Unified School District* (2007) PERB Decision No. 1924a; *Oakland Unified School District* (2004) PERB Decision No. 1645a.) Nor does asserting errors of law. (*Jurupa Unified School District* (2015) PERB Decision No. 2450a, p. 3.)

UTLA argues that the Board's decision contains a prejudicial error of fact in its conclusion that Respondents were not adequately placed on notice of UTLA's agency theory for purposes of the unalleged violation test. As we summarized:

> UTLA provided no clear notice that it intended to litigate the issue of . . . whether Alliance is an agent of any of those schools (including the other named Respondents, Luskin Academy and Smidt Tech). . . . In its post-hearing briefs to the ALJ, UTLA primarily argued that Alliance, Luskin Academy, Smidt Tech, and Gertz-Ressler constituted a single employer, and it did not argue any theory of agency. The ALJ found that Alliance, Luskin Academy, and Smidt Tech comprised a single employer, and made no findings of agency. UTLA's exceptions did not challenge the ALJ's findings or lack of findings in this regard, or his partial denial of UTLA's motion to amend the complaint.

> Thus, because UTLA raised these arguments for the first time in its response to the cross-exceptions, the unalleged violation doctrine is not satisfied.

(*Alliance College-Ready Public Schools*, *supra*, PERB Decision No. 2545, pp. 13-14, footnotes omitted.)

UTLA's request for reconsideration does not dispute any of these facts, but points out three others that the Board did not take notice of: (1) in a superior court complaint filed after the Board granted UTLA's request for injunctive relief related to these and two other unfair practice cases, *the Board* alleged that Alliance was the agent of the schools in its network; (2) during Alliance's[3] opening statement at the formal hearing in this case, its counsel acknowledged that UTLA "has been advocating an agency theory"; and (3) Respondents argued in their post-hearing opening brief to the ALJ that Alliance was not an agent of the schools. Based on these facts, UTLA argues that we should find that Respondents had adequate notice of UTLA's agency theory, and proceed to consider the merits of the allegations we previously dismissed.

We reject UTLA's request for reconsideration for several reasons. First, UTLA's request primarily asserts a legal error—the Board's application of the unalleged violation doctrine—not a factual one. Our decision made no findings of fact regarding the contents of PERB's superior court complaint, Alliance's opening statement, or Respondents' opening brief to the ALJ. Rather, in attempting to determine whether the unalleged violation doctrine was satisfied, we looked to UTLA's statements and filings to determine whether UTLA had provided notice of or attempted to litigate its agency theory. Underpinning UTLA's request for reconsideration is the proposition that the Board misapplied the unalleged violation test by looking at UTLA's statements and filings, instead of Respondents'. But this is a purported

[3] At the time of the opening statement, Alliance was the only respondent named in the complaints.

error of law, for which reconsideration is not available. (*Jurupa Unified School District*, *supra*, PERB Decision No. 2450a, p. 3.)

Second, to the extent this is in part a factual question, reconsideration is not available because UTLA made no attempt to bring the facts purportedly satisfying the unalleged violation test to our attention before we issued our prior decision. The Board has denied parties' attempts to use requests for reconsideration to make up for shortcomings in their previous filings. (*Castaic Union School District* (2010) PERB Order No. JR-25, p. 3 ["[A] party cannot use a request for reconsideration to make its first opposition to an appeal"]; *Lindsay Unified School District* (1992) PERB Decision No. 936a, p. 2 ["Failure by a party to present a well[-]organized case to a Board agent, or on appeal to the Board, does not constitute appropriate grounds under which that party may request reconsideration from the Board"].)

The intent of the reconsideration procedure is to allow the correction of prejudicial factual errors that appear in the Board's decision through no fault of the party requesting reconsideration. Such a procedure serves the purposes of promoting justice and fairness, and conserving administrative and judicial resources by averting unnecessary resort to the courts. Allowing a party to bring facts to the Board's attention for the first time in a request for reconsideration, on the other hand, does not serve those purposes, but only encourages delay through piecemeal litigation.[4] Because UTLA previously failed to present the facts

[4] As has been explained in the analogous context of a petition for rehearing following a decision by an appellate court:

> Generally, "[i]t is much too late to raise an issue for the first time in a petition for rehearing." [Citation.] Counsel must ensure that all points are properly presented in the original briefs and argument before the matter is submitted [citation], for once the case is submitted, we assume that counsel "have presented all the reasons upon which they rely for an affirmance or a reversal of the judgment." [Citation.] Our general refusal to consider arguments first presented on rehearing serves both judicial

purportedly allowing us to consider the unalleged violation, it may not make up for that failure now by requesting reconsideration of our decision.

Third, the Board's superior court complaint against Alliance is not part of the "record" of this case,[5] and therefore cannot be relied on to establish a prejudicial error of fact to warrant reconsideration.

Besides prejudicial errors of fact, the only other basis for reconsideration is newly discovered evidence. However, UTLA's request for reconsideration fails in this regard as well. The "prejudicial error of fact" ground for reconsideration presupposes that the correct fact has support in the record—hence the regulation's requirement that the request "where applicable, shall specify the page of the record relied on." (PERB Regulation 32410, subd. (a).) As a result, the superior court complaint is properly considered "new evidence," in which case UTLA was required, but failed, to provide "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." (*Ibid.*)

> economy and fairness. It prevents counsel from arguing cases "in a piecemeal fashion." [Citation.] And it protects the opposing party from having to defend against new theories that were not previously put in issue or raised at trial. [Citation.] Thus, arguments first raised on rehearing are usually forfeited.

(*Alameda County Management Employees Assn. v. Super. Ct.* (2011) 195 Cal.App.4th 325, 339.)

[5] The ALJ denied UTLA's request to take official notice of the pleadings in the superior court litigation. UTLA did not except to this ruling, and therefore waived any error. (PERB Regulation 32300, subd. (c).)

Request for Further Briefing

As an alternative to proceeding to a decision on the agency issue, UTLA urges us to request further briefing from the parties in light of *CAVA, supra*, PERB Decision No. 2484 and our prior decision in this case disapproving *El Camino, supra*, PERB Decision No. 2033-M. UTLA states:

> [It] is unaware of any case in which PERB, the NLRB, or any other adjudicative body held that the unalleged violation doctrine requires outright dismissal of a party's complaint where the parties and the ALJ framed their analysis of a jurisdictional issue in reliance on a legal theory that was viable at the time, the theory was undermined by case law decided after the hearing, and the record contains sufficient evidence to resolve the jurisdictional issue using the analysis endorsed by the new case law.

(Emphasis omitted.) UTLA asserts that before our decision in this case, it "had reason to believe that its single-employer theory was supported by PERB's precedents at the time it briefed this case."

UTLA also cites to *Massey Energy Company* (2012) 358 NLRB 1643 (*Massey*). In that case the National Labor Relations Board (NLRB) requested further briefing before deciding whether two entities alleged in the complaint to have an agency relationship were actually a single employer.[6] According to UTLA, *Massey* supports the proposition that where the underlying statutory violation is the same, the Board can find liability based on a theory not specified in the complaint without satisfying the more demanding standards of the unalleged violation test.

We are not persuaded that any of these points support a request for supplemental briefing at this stage of this case. We have no doubt of our authority to request supplemental briefing before rendering a final decision in an unfair practice case. The Board possesses

[6] The ALJ in *Massey, supra*, 358 NLRB 1643, concluded that the parent company was liable for the unfair practices of a subsidiary under a "direct participation" theory, rather than an agency theory, or under a single employer theory.

broad statutory authority in the resolution of unfair practice charges (EERA, § 3541.3, subds. (i), (n)), and broad regulatory authority on review of a proposed decision (PERB Regulation 32320, subd. (a) [the Board may "[i]ssue a decision based upon the record of hearing" or "[a]ffirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper"]). We have exercised this authority to request supplemental briefing sua sponte (see, e.g., *Salinas Valley Memorial HealthCare System* (2017) PERB Decision No. 2524-M, pp. 11-12; *United Teachers Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 8), to accept supplemental briefing submitted on a party's own initiative (*City of Long Beach* (2012) PERB Decision No. 2296-M, pp. 10-11), and to grant a party's request to submit supplemental briefing (*Regents of the University of California* (2015) PERB Decision No. 2422-H, p. 4). It may well also be the case that by soliciting supplemental briefing, we *may* find a violation based on a theory of liability not alleged in the complaint or litigated by the parties, as the NLRB did in *Massey*, *supra*, 358 NLRB 1643.

However, these cases are inapposite here. In each of them the supplemental briefing was solicited or provided before PERB (or the NLRB, in the case of *Massey*) rendered a final decision. After a final decision has been issued, our authority to request supplemental briefing on issues raised or addressed by that decision is necessarily more limited to issues that have been raised in a valid request for reconsideration. Otherwise, the strictly limited circumstances for reconsideration could be circumvented by requests to submit supplemental briefing.

Parenthetically, we note that UTLA had more than adequate opportunity to propose further briefing on the agency issue. *CAVA*, *supra*, PERB Decision No. 2484, was decided more than two months before UTLA submitted its opposition to Respondent's cross-exceptions (in which UTLA cited *CAVA* extensively), and nearly a year-and-a-half before our decision in

this case. Under any fair reading, *CAVA* plainly raised doubts about the validity of the single employer holding in *El Camino*, *supra*, PERB Decision No. 2033-M, or at least its applicability to EERA, by endorsing the proposition that "PERB cannot assert its jurisdiction over a matter involving the question whether two entities constitute a single employer where one of the entities is a private entity because private entities do not fall within EERA's definition of public school employer." (*CAVA*, *supra*, at p. 66.) Under any fair reading, this passage raised doubts about the validity of the single employer holding in *El Camino*, *supra*, PERB Decision No. 2033-M. UTLA therefore had ample time to ask to submit supplemental briefing in this case *before* the Board issued a final decision.

For these reasons, we decline to request further briefing in this case.

ORDER

United Teachers Los Angeles's request for reconsideration of the Board's decision in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545 is hereby DENIED.

Members Banks and Krantz joined in this Decision.