STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF PALMDALE, Employer, and TEAMSTERS LOCAL 911, Petitioner.	Case No. LA-PC-5-M Request for Reconsideration PERB Decision No. 2203-M PERB Decision No. 2203a-M December 22, 2011

Appearances: Cohen & Goldfried by David L. Cohen, Attorney, for City of Palmdale; Law Offices of Patricia S. Waldeck by Patricia S. Waldeck, Attorney, for Teamsters Local 911.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by the City of Palmdale (City) of the Board's decision in *City of Palmdale* (2011) PERB Decision No. 2203-M. In that decision, the Board adopted the proposed decision of the Hearing Officer (Board agent) as the decision of the Board itself in a matter arising under the Meyers-Milias Brown Act (MMBA)[1] out of a petition for certification filed by the Teamsters Local 911 (Teamsters or Union) seeking to become the exclusive representative of certain public works employees in the Maintenance and Traffic Divisions of the City's Department of Public Works.

In the proposed decision, the Board agent excluded the Traffic Division classifications and two of the nine disputed Maintenance Division positions. Regarding the remaining seven disputed Maintenance Division positions, the Board agent concluded that they shared a community of interest with the other employees in the petitioned-for unit and, therefore, should

[1] The MMBA is codified at Government Code section 3500 et seq.

be included in the unit. The Board agent had previously determined that there was majority support and that no other employee organization had filed a valid petition to represent any of the positions at issue. The Board agent, therefore, concluded that no election was necessary and that the City had no lawful reason to deny recognition to the Teamsters for the unit described in the proposed order.

The Board has reviewed the entire record in this case, including the City's request for reconsideration and the Teamsters' response thereto. Based on this review, the Board hereby denies the City's request for reconsideration for the reasons discussed below. Having disposed of the City's request for reconsideration, we also deny the City's request for stay.[2]

PROCEDURAL BACKGROUND

On December 24, 2008, the Teamsters filed a petition for certification with PERB along with proof of employee support for the petition. In response to an inquiry from the Board agent, the City confirmed by letter dated January 6, 2009, that the City had not adopted local rules governing certification proceedings. The City posted the certification petition from January 6, 2009 through January 27, 2009. (See PERB Reg. 61220.)

On January 12, 2009, the City submitted a list of employees in the proposed unit and, pursuant to PERB Regulation 61020(f), contended that the proof of employee support was obtained by fraud or coercion. By administrative decision dated March 9, 2009, the Board agent determined that the City had failed to demonstrate that the proof of support was invalid.

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[2] PERB Regulation 32410(c) states:

> 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.

(PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

The Board agent also determined based on a review of the proof of support that the 30 percent support requirement under PERB Regulation 61210(b) had been met and, in addition, that a majority of the employees in the proposed unit wished to be represented by the Teamsters under PERB Regulation 61240(c). The Board agent directed the City to file a decision regarding the petition for certification, and advised the City that recognition must be granted under MMBA section 3507.1(c) unless the City doubted the appropriateness of the unit. The Board agent's administrative decision was not appealed by the City. On March 30, 2009, the City filed a response, disputing the appropriateness of the bargaining unit.

An informal settlement conference was held on May 6, 2009, but the parties were unable to reach agreement over the composition of the bargaining unit. Six days of formal hearing were held on July 27-29, 2009, August 4-5, 2009, and September 8, 2009. Simultaneous closing briefs were submitted by the parties on November 25, 2009, at which time the matter was submitted for decision. On April 22, 2010, the Board agent issued a proposed decision. On June 7, 2010, the City filed exceptions to the Board agent's proposed decision. On June 28, 2010, the Teamsters filed a response. On September 23, 2011, the Board itself adopted the Board agent's proposed decision, as supplemented by a discussion of the City's exceptions, in *City of Palmdale, supra*, PERB Decision No. 2203-M.

THE CITY'S ASSERTED GROUNDS FOR RECONSIDERATION

The City asserts three grounds for reconsideration. First, the City asserts that there is newly discovered evidence, which establishes the following: (1) the total number of employees in the bargaining unit has allegedly diminished by almost 23 percent since the record in the PERB hearing closed, raising "reasonable doubt" as to continuing majority support; and (2) Steve Montenegro (Montenegro), an employee included in the bargaining unit, is now performing the duties of Sean O'Brien (O'Brien), an employee excluded from the

bargaining unit. Regarding the latter, the City requests that Montenegro be excluded from the unit for the same reasons O'Brien was excluded from the unit. Regarding the former, the City requests that PERB reexamine the proof of support and determine whether PERB should dismiss the certification petition or order an election. To that end, the City submitted copies of the signatures of the 64 employees currently in the bargaining unit, which were taken from files maintained by the City.

Second, the City asserts that the Board's decision contains prejudicial *errors of fact* in its alleged failure to apply *City of Santa Clara County District Attorney Investigators Association v. County of Santa Clara* (1975) 51 Cal.App.3d 255 (*County of Santa Clara*) and Board precedent in *Rio Hondo Community College District* (1979) PERB Decision No. 87 (*Rio Hondo*).

Third, the City asserts that the Board agent's decision of March 9, 2009, concerning whether proof of support was obtained by fraud or coercion lacks a "rational factual or legal basis." The City requests that the Teamsters' proof of support be found invalid and the petition for certification dismissed. In the alternative, the City requests that PERB order an election.

THE TEAMSTERS' RESPONSE

Following the order of the City's contentions as described above, the Union argues that the City's purported newly discovered evidence does not meet the criteria for granting reconsideration. Regarding proof of support, the Union asserts that a reduction in the size of the bargaining unit does not equate to loss of majority support. Regarding Montenegro, the Union asserts that the City did not bring to PERB's attention the change in Montenegro's job duties in a timely manner. Next, the Union argues that the City's critique of the Board's legal analysis does not constitute "prejudicial errors of fact." Finally, the Union argues that the City's request for review of the Board agent's March 9, 2009, decision is untimely.

DISCUSSION

Standard of Review on Request for Reconsideration

Requests for reconsideration of a final Board decision are governed by PERB Regulation 32410(a), which states in pertinent part:

> 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. [The request] shall state 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. A request for reconsideration based upon the discovery of 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.

To demonstrate that reconsideration is warranted, the City must show the existence of "extraordinary circumstances." (*San Joaquin Delta Community College District* (1983) PERB Decision No. 261b (*San Joaquin Delta*).) Because reconsideration may be granted only under "extraordinary circumstances," the Board applies the regulation's criteria strictly. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H.) 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.) PERB Regulation 32410(a) allows a party to request reconsideration of a Board decision only on two grounds: (1) the decision contains "prejudicial errors of fact;" or (2) previously unavailable and undiscoverable newly discovered evidence that is both relevant and submitted within a reasonable time of

discovery would impact or alter the decision. These limited grounds preclude a party from using the reconsideration process to reargue or relitigate issues that have already been decided. (*Redwoods Community College District* (1994) PERB Decision No. 1047a.)

Newly Discovered Evidence

As stated above, a request for reconsideration based upon the discovery of new evidence must be supported by a declaration establishing 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. (PERB Reg. 32410(a).) We decline to consider the City's alleged newly discovered evidence because these criteria have not been met.

1. Reduction in Size of Bargaining Unit

The City's newly discovered evidence purportedly establishes that the size of the bargaining unit has decreased from 83 to 64 employees "based on City's count."[3] According to the City, the reduction in size of the bargaining unit raises "reasonable doubt" as to continuing majority support for the Teamsters. It is unknown, however, at what point in time the total number of employees in the bargaining unit dropped to 64. Accordingly, the City has neither established that the evidence "was not previously available" under the first criterion, nor has it established that the evidence "was submitted within a reasonable time of its discovery" under the third criterion. Admittedly, the size of the unit has been in flux for the last three years, but the City fails to explain why 64 became the tipping point that raised

[3] The City states that the change in size of the bargaining unit amounts to a 23 percent loss and transpired since closure of the record in March 2009. The record in the representation proceeding, however, did not close in March 2009. The record closed on November 25, 2009, with the submission of simultaneous closing briefs.

reasonable doubt as to continuing majority support and not some other number reached earlier in time.

Moreover, the fifth criteria requires that the newly discovered evidence be material to the case in that it would alter or impact the decision. A change in the size of the bargaining unit is not tantamount to loss of majority support, and the City's "reasonable doubt" is not the same as evidence. The City failed to establish that a change in size of the bargaining unit would alter or impact the decision in this matter. (See, e.g., *Coast Community College District* (1986) PERB Decision No. Ad-159 [in incumbent union's appeal of a decertification petition filed by a rival union claiming that the actual unit size was much larger than the unit size considered by the Board agent and therefore the rival union lacked adequate proof of support for its petition, the Board ruled that the incumbent union's bald assertion about unit size was insufficient to sustain an appeal]; *Grossmont-Cuyamaca Community College District* (2009) PERB Decision No. Ad-380 [in union's appeal claiming that the employee list provided by the employer was inaccurate without specifying which employees were improperly included or excluded on the list, the Board ruled that the union's "grounds for appeal are, at best, speculative and insufficient to support the reversal of the administrative determination"].)

2. Changes in Job Duties and Compensation of Montenegro

The City's newly discovered evidence purportedly establishes that the job duties and compensation of Montenegro have substantially changed since the close of the record in the representation proceeding. Montenegro is allegedly now performing duties previously performed by Senior Maintenance Specialist O'Brien. The Board agent excluded O'Brien from the petitioned-for unit, having found that he did not share a community of interest with the other Maintenance Division employees. The City argues that because Montenegro now performs O'Brien's duties, Montenegro should now be excluded based on the same reasoning.

According to the declaration of Tony Columbo (Columbo), the current superintendent of maintenance, both before and after the last day of hearing in the representation proceeding (September 8, 2009), the City's Maintenance Division has been undergoing reorganization and restructuring due to decreasing revenues and a reduction in workforce. As a result, on January 6, 2010, Montenegro was reclassified as a senior maintenance specialist. At that time, his duties began to change. In September 2010, Montenegro's duties changed further when he assumed the duties previously performed by O'Brien.

The timeline provided by Columbo establishes that the City's evidence regarding Montenegro is not newly discovered. Montenegro was reclassified on January 6, 2010, well over three months before the Board agent issued a proposed decision in this matter. Montenegro assumed O'Brien's duties in September 2010, a year before the Board itself issued its decision. The City failed to establish that the evidence regarding Montenegro was not previously available under the first criterion. The City also failed to establish that the evidence was submitted within a reasonable amount of time of its discovery under the third criterion.

San Joaquin Delta, supra, PERB Decision No. 261b involved a request for reconsideration in which the employer's alleged newly discovered evidence had been in its possession for 18 months. The Board found that the evidence could have been submitted to PERB at or near the time the employer received it, which was slightly more than a month after the employer filed its exceptions and well in advance of issuance of the Board's decision. The Board noted that it might have been amenable to reopening the record and considering such evidence at that time, and that the employer offered no explanation for waiting 18 months before disclosing it. Accordingly, the Board declined to consider the employer's alleged newly discovered evidence submitted in support of its request for reconsideration. (See also, *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664a (*Oxnard*) [request

for reconsideration denied as the alleged newly discovered evidence had been in party's possession for 10 months and could have been presented to the Board "well in advance of the issuance of PERB's decision"].)[4]

The facts here are similar. Montenegro's assumption of O'Brien's job duties occurred three months after the City filed its exceptions to the Board agent's proposed decision and a year in advance of issuance of the Board's decision. The City did not explain why it waited for over a year before disclosing this evidence to PERB. Accordingly, consistent with precedent, we conclude that the City's alleged newly discovered evidence regarding changes in the job duties and compensation of Montenegro does not meet the criteria of PERB Regulation 32410(a) and, therefore, we decline to consider it.

3. Extraordinary Circumstances

As explained above, the City's alleged newly discovered evidence regarding unit size and Montenegro's job duties does not meet the specific criteria set forth in PERB Regulation 32410(a) and, thus, does not constitute grounds for reconsideration. It is worth noting one additional point. Requests for reconsideration are granted only upon the presentation of "extraordinary circumstances." (PERB Reg. 32410(a).) A request for reconsideration based on newly discovered evidence of facts arising after the conclusion of the hearing, particularly after the record has closed and the proposed decision has issued, as here,

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[4] *San Joaquin Delta, supra*, PERB Decision No. 261b and *Oxnard, supra*, PERB Decision No. 664a were decided under a prior version of PERB Regulation 32410, which stated, in pertinent part:

> The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

The subsequent amendments to the regulation do not call into question the continuing validity or precedential value of these decisions.

raises serious concerns. By the time parties have reached the reconsideration stage of PERB proceedings, they have been afforded a full opportunity to raise issues, reach settlement, litigate disputed issues and argue their case. Because requests for reconsideration may delay the point of finality in decision-making and reopen a case for re-litigation of issues that have already been decided, a party seeking reconsideration must affirmatively demonstrate the existence of "extraordinary circumstances" as required by PERB Regulation 32410(a).

Extraordinary is defined as "going beyond what is usual, regular, common or customary" and also as "having little or no precedent and usu. totally unexpected (an [extraordinary] combination of circumstances)." (Webster's Third New International Dictionary, unabridged (2002) at p. 807.)[5] Changes in the size of a bargaining unit and in the job duties of an employee are not unusual or unprecedented. Changes of this kind are typical given the dynamic nature of the workplace, and can be addressed through representation proceedings and administrative mechanisms provided under local rules and PERB regulations.

Reopening a case after it has been fully litigated and decided on appeal in order to address the types of changes alleged to have occurred here is simply not justified given the high standard of "extraordinary circumstances" required for granting a request for reconsideration. (See, e.g., *King City Joint Union High School District* (2007) PERB Decision No. 1777a [reconsideration jointly requested by employer and union granted given extraordinary circumstances occasioned by the discovery that compliance with PERB's make-whole order would bankrupt the employer and send it into receivership].) Accordingly, the Board finds that the City has not met its burden of demonstrating "extraordinary circumstances" warranting the Board's reconsideration of this matter.

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[5] The courts routinely cite dictionary definitions as an interpretative aid. (See, e.g., *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951 [citing dictionary definitions to assist in the interpretation of the word "construction" under California's prevailing wage laws].)

Prejudicial Errors of Fact

Apart from newly discovered evidence, there is only one other ground upon which a request for reconsideration may be granted, i.e., the decision of the Board itself contains prejudicial errors of fact. (PERB Reg. 32410(a).) The Board's errors must be factual, not legal, in nature. Therefore, a disagreement over the legal analysis employed by the Board is not grounds for reconsideration even if it amounts to a prejudicial error of law resulting from application of its own case law. (*California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S.)

Here, the City asserts that the Board ignored a statement made in *Rio Hondo, supra,* PERB Decision No. 87 that job function is prominent among community of interest factors,[6] and failed to consider the effect of the petitioned-for unit on the efficient operation on the public service under *County of Santa Clara, supra,* Cal.App.3d 255, 260.[7] The City's argument fails on its face. The pertinent portion of PERB Regulation 32410(a) does not permit reconsideration of a matter based on errors of law, only on prejudicial errors of fact. No prejudicial errors of fact have been cited by the City in the request for reconsideration. The

[6] To set the record straight, the Board adopted the proposed decision of the Board agent as the decision of the Board itself. The proposed decision states: "Among these various factors, the Board has considered similarities in job duties more heavily than other community of interest factors." (*City of Palmdale, supra*, PERB Decision No. 2203-M [proposed decision, pp. 23-24; internal citations omitted].) The decision of the Board itself cites job functions and duties, integration of work functions and goals as relevant community of interest factors (*Id.* at p. 5), and specifically addresses the City's exceptions relating to similarities in job function.

[7] While the City appears to argue that consideration of the effect on the public service is a mandatory part of the analysis, it ignores the beginning of the passage from which it quotes, which states that "further questions *may* be addressed to determine if those placed in a unit which on its face may be 'appropriate' is, in fact 'appropriate' . . . ." (*County of Santa Clara, supra,* 51 Cal.App.3d 255, 260; emphasis supplied.) As pointed out in the Board's decision, the Board has rejected a checklist approach in favor of examining the "totality of the circumstances," citing *San Diego Community College District* (2001) PERB Decision No. 1445. (*City of Palmdale, supra*, PERB Decision No. 2203-M, p. 6.)

City is attempting to disguise what it believes to be an error of law as a prejudicial error of fact in order to come within the purview of reconsideration. We see the City's argument for what it is, and reject it.

The Board Agent's March 9, 2009, Letter

By letter of January 12, 2009, the City filed contentions that the Teamsters' proof of support was obtained by fraud or coercion.[8] The City did not allege that any representative of the Teamsters had made promises to the employees to improve their working conditions. Rather, the City had argued that the statement at the top of the proof of support document rendered the proof of support invalid. The statement provided: "We the undersigned are employees . . . do hereby authorize [the Teamsters] to be our sole and exclusive representative for the purposes of collective bargaining to improve our wages, benefits, hours and working conditions."

By letter of March 9, 2009, the Board agent rejected the City's argument on the basis that a proof of support is a statement of the employees' intent, not of the employee organization's intent, citing Board precedent; that the cases of the National Labor Relations Board relied on by the City were factually distinguishable; and that even if the statement could be attributed to the Teamsters, there was insufficient information to determine that the use of the term "improve" meant something other than improvements associated with the uniform application of the MMBA. The Board agent concluded that the mere use of the word

[8] PERB Regulation 61020(f) states in relevant part:

> Any party which contends that proof of employee support was obtained by fraud or coercion, . . . shall file with the regional office evidence in the form of declarations under penalty of perjury supporting such contention within 20 days after the filing of the petition which the proof of support accompanied.

"improve" in the proof of support document is insufficient to demonstrate that the employees were unlawfully coerced into signing it.

Under PERB Regulation 32350, the Board agent's letter of March 9, 2009, constituted an "administrative decision."[9] An appeal may be filed with the Board itself from any administrative decision, except as provided in PERB Regulation 32380. (PERB Reg. 32360.) PERB Regulation 32380 provides in pertinent part:

> The following administrative decisions shall not be appealable:
>
> (b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

No appeal was filed pursuant to PERB Regulation 32200[10] within the applicable timeframe.[11] Thus, an appeal from the Board agent's letter of March 9, 2009, is clearly untimely, as the Union argues.

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[9] PERB Regulation 32350 provides:

> (a) An administrative decision is any determination made by a Board agent other than:
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> (1) a refusal to issue a complaint in an unfair practice case pursuant to Section 32630,
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> (2) a dismissal of an unfair practice charge, or
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> (3) a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to Section 32215.
>
> (b) An administrative decision shall contain a statement of the issues, fact, law and rationale used in reaching the determination.

[10] PERB Regulation 32200 provides:

> A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to

The City, however, was not required to file an immediate appeal of the Board agent's March 9, 2009, administrative decision in order to preserve its objection. The City had a second opportunity to reassert its arguments in its exceptions to the Board agent's proposed decision. (See, e.g., *California Correctional Peace Officers Association (Ford)* (1988) PERB Order No. Ad-168-S [where no immediate interlocutory appeal of a PERB agent's refusal to disqualify himself was taken under PERB Regulation 32155(d), moving party was free to reassert its arguments concerning disqualification in its exceptions to the proposed decision].) While the City's statement of exceptions was 115 pages long, the City did not except to any of the issues concerning proof of support disposed of in the Board agent's administrative decision of March 9, 2009.

"An exception not specifically urged *shall be waived*." (PERB Reg. 32300(c); emphasis supplied.) Based on the plain meaning of this regulation, the City has waived its right to appeal.

For the reasons set forth above, the City's request for reconsideration is denied as it raises no issues warranting review.

> Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:
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> (a) The issue involved is one of law;
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> (b) The issue involved is controlling in the case;
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> (c) An immediate appeal will materially advance the resolution of the case.

[11] An appeal of an administrative decision must be filed with the Board itself within 10 days following the date of service. (PERB Reg. 32360(b).)

ORDER

The City of Palmdale's (City) request for reconsideration of the Public Employment Relations Board's decision in *City of Palmdale* (2011) PERB Decision No. 2203-M is hereby DENIED. The City's request for stay of *City of Palmdale* (2011) PERB Decision No. 2203-M in Case No. LA-PC-5-M is hereby DENIED.

Members McKeag and Dowdin Calvillo joined in this Decision.