STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STANISLAUS CONSOLIDATED FIREFIGHTERS, LOCAL 3399, Charging Party, v. STANISLAUS CONSOLIDATED FIRE PROTECTION DISTRICT, Respondent.	Case No. SA-CE-711-M Request for Reconsideration PERB Decision No. 2231-M PERB Decision No. 2231a-M May 23, 2012

Appearances: Law Offices of William D. Ross by William D. Ross, Attorney, for Stanislaus Consolidated Fire Protection District; Wylie, McBride, Platten & Renner by Carol L. Koenig, Attorney, for Stanislaus Consolidated Firefighters, Local 3399.

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

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by the Stanislaus Consolidated Fire Protection District (District) of the Board's decision in *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M. The underlying charge filed on February 9, 2011, alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) engaging in unlawful surface bargaining; (2) unilaterally eliminating a negotiated contract provision relating to union access rights without satisfying its bargaining obligation; (3) unilaterally changing a negotiated contract provision relating to "mergers and consolidations" without satisfying its bargaining obligation; (4) unilaterally eliminating a past practice of allowing the use of union leave time from a "Union Time Bank" to participate in

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

union activities, including attendance at city council meetings when "State of the District" addresses were made, without satisfying its bargaining obligation; (5) failing/refusing to provide relevant and necessary information relating to a promotional hiring; (6) refusing to promote an employee in retaliation for his protected conduct; (7) interfering with employees' exercise of rights by stating that it was not "wise" to represent members seeking to promote to management positions; (8) bargaining to impasses a non-mandatory subject of bargaining; and (9) eliminating union access rights and the "Union Time Bank" in retaliation for protected conduct.

Based on the above charge allegations, the Office of the General Counsel took the following actions. On July 21, 2011, allegations 1, 2, 3, 5, 8 and 9 above were dismissed for failure to state a prima facie case. On July 25, 2011, a complaint issued on allegations 4,[2] 6[3] and 7.[4] In response to the partial dismissal, Stanislaus Consolidated Firefighters, Local 3399, (Local 3399) filed an appeal on August 10, 2011, seeking to reverse the dismissal of allegations 2 and 9. Consequently, neither the allegations encompassed by the complaint (4, 6 and 7) nor the dismissed allegations that were not appealed by Local 3399 (1, 3, 5 and 8) are currently before the Board itself.

On January 20, 2012, the Board issued its decision reversing the partial dismissal of the charge and remanding it to the Office of the General Counsel for issuance of an amended complaint. The Board held that Local 3399 had alleged sufficient facts to state a prima facie case that the District's conduct in repudiating Section 20-2 of the parties' memorandum of

[2] Complaint ¶¶ 4-9.

[3] Complaint ¶¶ 10-14.

[4] Complaint ¶¶15-18.

understanding (MOU)[5] regarding union access rights constituted a prohibited unilateral change in the terms and conditions of employment, a per se violation of the duty to meet and confer in good faith under MMBA section 3505 and PERB Regulation 32603, subdivision (c).[6] Further, the Board held that the District engaged in discrimination/retaliation and interference in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), when it repudiated Section 20-2 and abolished the Union Time Bank.

The District requests reconsideration[7] of the Board's decision on the following grounds: (1) the existence of a final and binding arbitration award under the MOU sustaining Local 3399's grievances concerning the Union Time Bank compels the Board to dismiss the allegations encompassed within paragraphs 4 through 9 of the complaint and affirm the Office of the General Counsel's dismissal of allegation 9 as it concerns the Union Time Bank; (2) the Board's conclusion that the District's repudiation of Section 20-2 of the MOU regarding union access rights constituted a prohibited unilateral change is belied by the District's participation in global mediation to resolve, among other disputes, an outstanding grievance concerning the "removal of MOU Section 20-2," its willingness to hold meetings on District property, its proposal to integrate a modified version of the provision into the successor agreement and its offer to meet and confer in February 2011 and on March 10, 2011; and (3) given the District's willingness to meet and confer over Section 20-2, there is no factual support for the Board's conclusion that the District's removal of Section 20-2 was retaliatory. Local 3399 opposes the

[5] The MOU was effective from July 1, 2006 through June 30, 2010.

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

[7] The District requested, in a single document, reconsideration of PERB Decision No. 2231-M and PERB Order No. Ad-392-M, the latter of which concerns the District's late filed response to the appeal. The Board's decision herein addresses the District's request for reconsideration of PERB Decision No. 2231-M only.

request for reconsideration on the basis that the request fails to set forth adequate grounds for reconsideration pursuant to PERB Regulation 32410.

The Board has reviewed the District's request for reconsideration and supporting documentation and Local 3399's response thereto. Based on this review and applying the relevant law, the Board denies the District's request for reconsideration for the reasons discussed below.

DISCUSSION

A request for reconsideration of a final Board decision is governed by PERB Regulation 32410, subdivision (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.

Because reconsideration may only be granted 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 (*Chula Vista*). PERB Regulation 32410, subdivision (a), allows a party to request

reconsideration of a Board decision on only two limited grounds, which are: (1) the decision contains "prejudicial errors of fact"; and (2) the party requesting reconsideration has discovered new evidence not previously available as supported by a declaration satisfying stated criteria. These limited grounds for granting a request for reconsideration and the "extraordinary" nature of a reconsideration proceeding preclude a party from using this process to reargue or relitigate issues that have already been decided. (*Chula Vista*; *San Bernardino Teachers Association, CTA/NEA (Cooksey)* (2000) PERB Decision No. 1387.)

The Union Time Bank

The District argues that the arbitration award concerning the Union Time Bank is newly discovered evidence warranting the Board's reconsideration of its decision.[8] While the award was issued on December 1, 2011, the arbitration was conducted on June 17, 2011. Therefore, the award does not constitute newly discovered evidence.

The District appears to be arguing that the arbitration award precludes PERB from adjudicating the unfair practice claims raised by the allegations relating to the Union Time Bank. As the Board has stated, a deferral to arbitration claim is not jurisdictional and therefore must be raised as an affirmative defense in a timely manner; otherwise, it is waived. (*State of California (Department of Food and Agriculture)* (2002) PERB Decision No. 1473-S; *East Side Union High School District* (2004) PERB Decision No. 1713 [arbitration deferral claim raised for the first time on exceptions to a proposed decision is untimely and deemed waived]; *State of California (Department of Corrections)* (2008) PERB Decision No. 1967-S

[8] The District also requests that the Board dismiss allegations 4 through 9 of the complaint based on the arbitration award. These allegations, however, are not before the Board. (See PERB Reg. 32640, subd. (c) [Board agent's decision to issue a complaint is not appealable to the Board itself except in accordance with PERB Reg. 32200, which pertains to interlocutory orders and rulings on a motion at a hearing].)

[arbitration deferral claim raised for first time at outset of hearing is untimely and deemed waived].)[9]

Neither the issuance of the complaint nor the dismissal of the remaining allegations by PERB's Office of General Counsel occurred until approximately one month after the arbitration. The District clearly knew long before the arbitration that the Union Time Bank grievances were subject to binding and final arbitration. At no time did the District raise the issue of deferral to grievance arbitration during the charge processing stage of PERB's proceedings.[10] Raising deferral to arbitration for the first time in a request for reconsideration is untimely, and therefore waived.[11]

In a similar vein, the District also argues that principles of collateral estoppel bar "relitigation" of issues decided by the arbitrator relating to the Union Time Bank. The question before PERB is whether the District's elimination of the Union Time Bank was in retaliation for engaging in the protected activity of filing grievances and/or interfered with employees' rights under the MMBA. The question before the arbitrator was whether the District's conduct violated the MOU. These questions are not synonymous. Moreover, assuming the issues before the arbitrator and PERB were identical, the District has offered no

[9] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[10] The powers and duties of a Board agent in processing an unfair practice charge include placing a charge in abeyance if the dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement; and dismissing the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of the applicable statutory scheme. (PERB Regulation 32620, subd. (b)(6).)

[11] In a post-arbitration setting, as here, PERB has jurisdiction over an unfair practice charge claiming that a final and binding arbitration award rendered pursuant to a collective bargaining agreement is repugnant to the purposes of the MMBA. (PERB Reg. 32661, subd. (a).) No such unfair practice charge has been filed in this matter.

authority that PERB is obligated to give collateral estoppel effect to a decision by an arbitrator. (See *Regents of the University of California (Berkeley)* (1985) PERB Decision No. 534-H, administrative law judge's proposed decision, pp. 44-45, fn. 14.)

Section 20-2

That mediation occurred in an effort to resolve grievances does not constitute newly discovered evidence warranting the Board's reconsideration of its decision. Subsequent mediation efforts simply are not relevant to the issue of whether the District's repudiation of Section 20-2 at an earlier point in time constituted a prohibited unilateral change, which is a per se violation of the duty to meet and confer in good faith under the MMBA. Neither are they relevant to the issue of whether the District's actions were taken in retaliation for the protected activity of filing grievances and/or whether the District's actions interfered with employees' rights under the MMBA.

The District argues that the Board's decision is premised on an incorrect understanding that the District refused to bargain in good faith and refused to permit Local 3399 to hold meetings on District property. The District claims that the Board's misunderstanding constitutes prejudicial errors of fact warranting the Board's reconsideration of its determinations that the allegations regarding the District's repudiation of Section 20-2 are sufficient to state a prima facie per se violation of the duty to meet and confer in good faith and a prima facie case of discrimination/retaliation and interference. The District confuses prejudicial errors of facts with factual disputes. Local 3399 disputed the District's factual assertions regarding its own conduct with specific factual allegations to the contrary. In reviewing a Board agent's dismissal of a charge for failure to state a prima facie case, the

Board assumes that the essential facts alleged in the unfair practice charge are true. (*San Juan United School District* (1977) EERB[12] Decision No. 12.)

Finally, the District asserts that it was a prejudicial error of fact for the Board to omit reference in its decision to the District's offer to meet and confer over Section 20-2 in February 2011 and on March 10, 2011. As Local 3399 points out, the prima facie allegations establish that the District's conduct constituting the prohibited unilateral change occurred several months prior to the District's offer to meet and confer. As the Board has held, the later reversal or rescission of a unilateral action or subsequent negotiation on the subject of a unilateral action does not excuse a violation. (*County of Sacramento* (2008) PERB Decision No. 1943-M; *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.)[13] Accordingly, because the District's subsequent offers to meet and confer in 2011 cannot cure the alleged unlawful unilateral change, the omission of these facts from the Board's decision does not constitute a prejudicial error of fact.

In sum, we find no basis for granting the District's request for reconsideration.

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[12] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

[13] Unilateral actions are disfavored for the following reasons: (1) such action has a destabilizing and disorienting impact on employer-employee relations; (2) such action derogates the representative's negotiating power and ability to perform as an effective representative in the eyes of the employees and undermines exclusivity; (3) such action denigrates negotiations under the applicable statutory scheme; and (4) such action unfairly shifts community and political pressure to employees and their organizations, and at the same time reduces the employer's accountability to the public. (See *County of Sacramento, supra,* PERB Decision No. 1943-M; *San Mateo Community College District* (1979) PERB Decision No. 94.)

ORDER

The request of the Stanislaus Consolidated Fire Protection District for reconsideration of the Board's decision in *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M is hereby DENIED.

Members Dowdin Calvillo and Huguenin joined in this Decision.