STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JENNIFER XU, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF MENTAL HEALTH, DEPARTMENT OF DEVELOPMENTAL SERVICES), Respondent.	Case No. SA-CE-1937-S Request for Reconsideration PERB Decision No. 2305-S PERB Decision No. 2305a-S March 8, 2013

Appearances: Jennifer Xu, on her own behalf; California Department of Human Resources by Barrett W. McInerney, Labor Relations Counsel, for State of California (Department of Mental Health, Department of Developmental Services).

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by Jennifer Xu (Xu) of the Board's decision in *State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S. In that decision, the Board affirmed the dismissal of the unfair practice charge by the Office of the General Counsel for failure to state a prima facie violation of the Ralph C. Dills Act (Dills Act).[1] Xu filed a timely request for reconsideration. The State of California (Department of Mental Health, Department of Developmental Services) (State) filed a timely response. [2]

[1] The Dills Act is codified at Government Code section 3512 et seq.

[2] On February 15, 2013, Xu filed an 11-page document entitled "PETITION FOR RECONSIDERATION OF CLARIFICATION OF THE RESPONDENTS' REPLY DATED ON FEB 11TH, 2013." PERB Regulations do not provide for the filing of a reply to a response to a request for reconsideration. (See PERB Reg. 32410.) Accordingly, the Board has not considered this document.

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

DISCUSSION

Requests for reconsideration of a final Board decision are governed by PERB Regulation 32410(a),[3] which states in full:

> 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. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. 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 in reviewing requests for reconsideration. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H.) Reiterating the same facts and arguments made on appeal does not satisfy the requirements of PERB

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

Regulation 32410(a). (*San Leandro Unified School District* (2007) PERB Decision No. 1924a; *Oakland Unified School District* (2004) PERB Decision No. 1645a.) Purported errors of law are not grounds for reconsideration. (*California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S.)

Xu's request for reconsideration is comprised of a two-page letter, "A Statement of Exception (A Brief)," followed by Exhibit X (the underlying decision of the Board itself); Exhibit 1 (copy of letter from counsel for State to PERB Board agent dated December 3, 2012, requesting permission to file a late response to the appeal and Xu's response thereto); Exhibit 2 (copy of letter from Xu to the Appeals Assistant dated October 28, 2012, requesting review of the dismissal by the Board itself);[4] Exhibit 4 (copy of letter from Xu to PERB dated January 10, 2013, asserting deficiencies in the underlying decision of the Board itself); and Exhibit 5 (copy of letter from Xu to counsel for State dated November 6, 2012, documenting counsel's lack of cooperation in Xu's requests for information).

Considered in its totality, Xu's request for reconsideration restates much of what has already been stated and argued below. She contends that even employees without paid sick leave are still entitled to take a leave of absence. She asserts as prejudicial error of fact that the attorney for the State and a counselor for the Department of Fair Employment and Housing attempted a settlement to "'erase' the AWOL." She appears to assert that the Board did not address her many concerns about the circumstances of her termination and the various legal matters that ensued. As stated in the underlying decision of the Board itself, it is Xu's burden to allege facts sufficient to constitute an unfair practice under the Dills Act. The allegations of the charge do not relate to any conduct that is within PERB's jurisdiction.

[4] There was no Exhibit 3.

Having reviewed the record in light of the request for reconsideration, the Board concludes that Xu's request for reconsideration fails to establish a ground for requesting reconsideration as set forth in PERB Regulation 32410(a). Xu does not cite to anything in the decision of the Board itself containing a prejudicial error of fact.[5] Nor does Xu cite to any newly discovered evidence in support of her request for reconsideration. Accordingly, the Board denies the request for reconsideration.[6]

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[5] Footnote 5 of the Board's decision states, "Xu was separated from employment with the State at or around the end of 2007." Xu takes issue with this characterization of the factual allegations, asserting that "the truth is while Jennifer Xu was on sick leave until Feb.8th 2008, [the Porterville Developmental Center] 'terminated' Jennifer Xu as 'AWOL.'" The Board acknowledges that "separation" is a term of art in employment law. (See *Mooney v. County of Orange* (2013) 212 Cal.App.4th 865.) For purposes of evaluating Xu's unfair practice charge, the Board accepts Xu's characterization that she was terminated. This characterization, however, has no bearing on the legal issues and therefore does not constitute a prejudicial error of fact for reconsideration purposes. Nor is such characterization legally binding in any other forum.

[6] Xu requests oral argument. Under the pertinent regulation, requests for oral argument may be considered in connection with exceptions to a proposed decision. (See PERB Reg. 32315.) This matter is before the Board on a request for reconsideration of the Board's decision affirming the dismissal of Xu's unfair practice charge, not on exceptions to a proposed decision. (*United Teachers – Los Angeles (Moszkowski)* (1992) PERB Decision No. 946a [on a request for reconsideration of a Board decision affirming the dismissal of an unfair practice charge, the Board held that PERB Reg. 32315 does not provide for oral argument on review of dismissals].)

Xu requests the production of witnesses pursuant to PERB Regulation 32162. This regulation prohibits the Board from disclosing confidential statements submitted by a party unless agreed to by the party or required by one of four stated bases. The confidentiality of Board investigations is not an issue presented by the facts of the case, and therefore will not be considered further.

Xu requests the production of witness statements pursuant to PERB Regulation 32206. This regulation requires that after direct examination of a witness upon motion of any party a hearing officer shall order the production of any statement made by a witness to a Board agent relating to the subject matter of the testimony. This case did not go to formal hearing. The relevance of this regulation is unexplained.

Xu requests disqualification of the Board agent and Board members who made the decision pursuant to PERB Regulation 32155. All parties are entitled to a fair and impartial process. While Xu believes the dismissal to be unfair, she has not stated any basis for disqualification, let alone a valid one under the regulation.

ORDER

Jennifer Xu's request for reconsideration of the Public Employment Relations Board's decision in *State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S is hereby DENIED.

Members Huguenin and Banks joined in this Decision.