STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALLIANCE JUDY IVIE BURTON TECHNOLOGY ACADEMY HIGH SCHOOL ET AL.,

Employers,

and

UNITED TEACHERS LOS ANGELES,

Petitioner.

Case Nos. LA-RR-1281-E
LA-RR-1282-E
LA-RR-1283-E

Request for Reconsideration
PERB Decision No. 2719

PERB Decision No. 2719a

October 14, 2020

Appearances: Liebert Cassidy Whitmore by Adrianna E. Guzman, Alysha Stein-Manes, and Alexander Volberding, Attorneys, for Alliance Judy Ivie Burton Technology Academy High School, et al.; Bush Gottlieb by Erica Deutsch and Dexter Rappleye, Attorneys, for United Teachers Los Angeles.

Before Banks, Shiners, Krantz, and Paulson, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request by Alliance Judy Ivie Burton Technology Academy High School (Burton Tech), Alliance College-Ready Middle Academy No. 5, and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex (collectively Charter Schools) that the Board reconsider its decision in *Alliance Judy Ivie Burton Technology Academy High School, et al.* (2020) PERB Decision No. 2719 (*Alliance*). In that decision we certified

[1] We also issue an errata today correcting the caption in the underlying decision.

United Teachers Los Angeles (UTLA) as the exclusive representative of certain certificated employees at the Charter Schools. They now ask us to reconsider those certifications. Additionally, shortly after the Charter Schools filed this request, UTLA moved for attorney's fees, contending that the Charter Schools' entire course of conduct throughout these representation proceedings was in bad faith.

In the underlying decision, the Board found that UTLA had demonstrated majority support in presumptively appropriate units and that the Charter Schools had failed to rebut this presumption.[2] Specifically, we found that each of the Charter Schools was a "public school employer" for purposes of the Educational Employment Relations Act (EERA), and that the petitioned-for units were statutorily appropriate under section 3545, subdivision (b)(1), because they included all certificated employees.[3] We further concluded that the Charter Schools had failed to rebut this statutory presumption by showing they belonged to a single employer consisting of all charter schools under the aegis of a non-profit charter management organization (CMO) called Alliance College-Ready Public Schools (Alliance). In reaching this conclusion, we held that the Charter Schools were judicially and equitably estopped from asserting that they were part of a single, integrated enterprise by virtue of prior inconsistent factual representations they and Alliance made in other cases. Additionally, and regardless of principles of estoppel, we held that those inconsistent representations fatally undermined their ability to prove they were part of a single

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[2] Member Shiners dissented from the majority's grant of UTLA's representation petitions. Nevertheless, he agrees the Charter Schools have not established any grounds for reconsideration and thus concurs in this decision.

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

employer. As a third independent basis for our decision, we concluded that the Charter Schools had not demonstrated that a single, systemwide unit consisting of all schools was more appropriate than the petitioned-for units.

In their request for reconsideration, the Charter Schools contend that the Board made a series of prejudicial mistakes of fact regarding the schools' status as a single employer, and that the Board erroneously included a classification, Special Education Coordinator, in the unit description at Burton Tech. Having reviewed the parties' arguments and the record evidence, we grant the request to modify the certification at Burton Tech and deny the request in all other respects. We also deny UTLA's motion for attorney's fees.

DISCUSSION

Under PERB Regulations, the grounds for requesting reconsideration of a final Board decision 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." (PERB Reg. 32410, subd. (a); *Regents of the University of California (Davis)* (2011) PERB Decision No. 2101a-H, p. 3 (*Regents*).)[4] The Charter Schools argue both grounds are met here. We disagree.

An incorrect factual finding is prejudicial only "when it is probable that the party against whom it was made would have achieved a better result but for the error." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674; see *The*

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

California State University, Chico (1989) PERB Decision No. 729a-H, p. 3 [reversing on reconsideration a previously found violation that was not supported by the evidence].) The Charter Schools point to no factual finding in the underlying decision that is unsupported by or contrary to the record. Instead, they take issue with how the Board resolved conflicting factual allegations, namely, the way in which the Board applied the doctrines of judicial and equitable estoppel to the Charter Schools' claim that they are part of a single employer. With respect to judicial estoppel, they argue that none of their prior positions in previous unfair practice litigation before the Board were inconsistent with the positions they took once UTLA filed the representation petitions in these matters. With respect to equitable estoppel, the Charter Schools argue that UTLA was always aware of the schools' intent to dispute a so-called "vertical" single employer theory while embracing a "horizontal" theory. Neither of these arguments warrants reconsideration of the Board's decision in this matter.

First and foremost, the Charter Schools conflate legal theories with facts. That is, while they assert their prior legal position does not conflict with their current legal position because they claim to be a horizontal single employer while earlier they denied they were part of a vertical single employer, the underlying decision rested on the Charter Schools' inconsistent *factual* representations. Specifically, the majority found that Alliance and the Charter Schools first declared with exquisite factual detail that they were autonomous from one another for purposes of avoiding unfair practice liability, but then asserted the opposite is true in an effort to defeat UTLA's petitions. Nothing in the Charter Schools' request calls into question these findings. Instead, the Charter Schools take issue with the Board's legal conclusions, which is not a

legitimate basis for reconsideration. (*Jurupa Unified School District* (2015) PERB Decision No. 2450a, p. 3 (*Jurupa*); see also, *California State University, Fresno* (1991) PERB Decision No. 845a-H, pp. 4-5 [finding that disagreement with the manner in which the Board resolves factual conflicts against a party does not constitute prejudicial error].) [5]

Second, the Charter Schools claim that the Board itself first raised the judicial estoppel doctrine without any such argument by the parties, and they thus did not anticipate that evidence in the parties' prior proceedings would form the basis of our decision. Accordingly, the Charter Schools argue that our decision constitutes "newly discovered evidence" warranting a reopening of the record to consider additional evidence absolving them of taking seemingly inconsistent legal positions.

Contrary to the Charter Schools' contention, their request does not fall under the line of cases where the Board has used the "newly discovered evidence" ground to correct an error in the underlying decision. Notably, those cases all involved the Board correcting an error or omission in its remedial order. (See, e.g., *County of Riverside* (2018) PERB Decision No. 2591a-M, pp. 4-5 [amending back pay order to run from date of administrative leave rather than date of termination]; *Regents*, *supra*, PERB Decision No. 2101a-H, p. 5 [correcting omission of make whole remedy from order];

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[5] The majority decision in *Alliance* already considered the explanation the Charter Schools renew now—that they can be part of a horizontal single employer without being part of a vertical one. This could have provided a colorable argument only if the Charter Schools had asserted a consistent set of facts supporting the belief that the schools were part of a horizontal rather than vertical single employer. Instead, Alliance and the Charter Schools stated the schools were always separate and autonomous until it became legally advantageous to declare exactly the opposite.

Desert Sands Unified School District (2004) PERB Decision No. 1682a, p. 4 [correcting failure to explicitly order return of bargaining unit work as part of restoration of status quo ante].) Apart from their request to amend the certification at Burton Tech, the Charter Schools do not seek to correct a remedial error in the underlying decision. Rather, they are clearly attempting to revisit legal conclusions under the guise of newly discovered evidence, which is not an appropriate basis for reconsideration. As we have stated repeatedly, a party may not use the reconsideration process to register its disagreement with the Board's legal analysis, to re-litigate issues that have already been decided, or simply to ask the Board to "try again." (*Jurupa*, *supra*, PERB Decision No. 2450a, p. 3; *Chula Vista Elementary School District* (2004) PERB Decision No. 1557a, p. 2; *Redwoods Community College District* (1994) PERB Decision No. 1047a, pp. 2-3.) We therefore find no reason to disturb or amend our prior findings and conclusions in this matter.

However, as described *ante*, the parties agree that our certification of the bargaining unit at Burton Tech mistakenly included "Special Education Coordinators," a classification not contained in UTLA's petition. We will therefore correct and reissue the certifications.[6]

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[6] Burton Tech claims that it purposely omitted the Special Education Coordinators from the list of incumbent employees because it considers them to be supervisors. UTLA disputes that characterization and claims that it did not include that classification only because it did not believe Burton Tech employed any Special Education Coordinators. The revised certification continues to include "all certificated educational personnel," and to exclude supervisors. During bargaining, the parties may negotiate over the inclusion of any incumbent Special Education Coordinators; if necessary, they may also file a unit modification petition pursuant to PERB's Regulations.

Turning to the motion for attorney's fees, UTLA argues that the Charter Schools denied recognition and pursued a duplicitous litigation strategy for the sole purpose of frustrating the representational rights of employees. Whether or not this is true, the Board has never awarded attorney's fees in the context of a representational proceeding and we believe it would not be prudent to do so here. Nevertheless, the Board's certifications stand, and the Charter Schools are expected to recognize and bargain with UTLA upon demand. Should the Charter Schools engage in future unfair practices, UTLA may file an unfair practice charge seeking an attorney's fee award or reimbursement of other increased costs as make-whole relief.

ORDER

The request for reconsideration is GRANTED in part to correct the certification at Burton Tech. In all other respects, the request is DENIED. UTLA's motion for attorney's fees is DENIED without prejudice.

It is hereby CERTIFIED that the United Teachers of Los Angeles is and has been the exclusive representative of employees in the following units, retroactive to May 2, 2018, the date of the filing of the petitions:

PERB Case No. LA-RR-1281-E (Alliance Judy Ivie Burton Technology Academy High)

INCLUDING: All certificated educational personnel including, but not limited to, certificated teachers; psychologists; counselors; social workers; ELD specialists; education specialists; resource teachers; substitute employees employed by the employer; and teachers holding other equivalent documents pursuant to Education Code section 47605, subdivision (l).

EXCLUDING: All other employees, including Management, Supervisory, and Confidential employees as defined in EERA section 3540.1.

PERB Case No. LA-RR-1282-E (Alliance College-Ready Middle Academy No. 5)

INCLUDING: All certificated educational personnel including, but not limited to, certificated teachers; psychologists; counselors; social workers; resource teachers; substitute employees employed by the employer; and teachers holding other equivalent documents pursuant to Education Code section 47605, subdivision (l).

EXCLUDING: All other employees, including Management, Supervisory, and Confidential employees as defined in EERA section 3540.1.

PERB Case No. LA-RR-1283-E (Alliance Gertz-Ressler/Richard Merkin 6-12 Complex)

INCLUDING: All certificated educational personnel including, but not limited to, certificated teachers; psychologists; counselors; social workers; substitute employees employed by the employer; and teachers holding other equivalent documents pursuant to Education Code section 47605, subdivision (l).

EXCLUDING: All other employees, including Management, Supervisory, and Confidential employees as defined in EERA section 3540.1.

Members Shiners, Krantz, and Paulson joined in this Decision.