

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**



VALERIE TRAHAN,

Charging Party,

v.

BERKELEY UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-3168-E

PERB Order No. Ad-467

August 6, 2018

Appearances: Valerie Trahan, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo, by Marleen L. Sacks, Attorney, for Berkeley Unified School District.

Before Banks, Winslow and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Berkeley Unified School District (District) from the administrative determination (attached) which, pursuant to PERB Regulation 32980<sup>1</sup> governing compliance proceedings, ordered the District to restore the e-mail privileges of Valerie Trahan in accordance with PERB Decision No. HO-U-1577. At issue is whether the e-mail privileges to be restored to Trahan, as the result of successfully litigating her unfair practice case against the District, include access to an e-mail listserv known as Berkeley High School (BHS) Conference.

The District's appeal contends that, as a substitute teacher, Trahan was not entitled to access to the BHS Conference listserv, and only had such access in January 2016, when the

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<sup>1</sup> PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

events giving rise to her unfair practice case arose, as a result of an oversight or mistake. Consequently, the District maintains that restoring Trahan's access to this distribution list would not return the parties as nearly as possible to the situation which would have obtained but for the District's unlawful conduct, but would, in fact, provide Trahan with a privilege to which she was not entitled as a substitute employee. Concurrent with its appeal and pursuant to PERB Regulation 32370, the District has requested that we order a stay of the administrative determination pending resolution of this appeal.<sup>2</sup> According to the District, restoring Trahan's access to the BHS Conference listserv would result in irreparable harm, because she would have an unfair advantage over other substitute teachers, who obtain assignments through a separate system known as Aesop, and who generally do not have access to the BHS Conference listserv.

Trahan's response to the District's appeal urges PERB to affirm the administrative determination and deny the District's request for stay. Trahan asserts, among other things,<sup>3</sup> that at least some other substitute teachers do have access to the BHS Conference listserv. She has also requested that PERB sanction the District for filing a baseless appeal and for its willful failure to comply with the final order in PERB Decision No. HO-U-1577.

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<sup>2</sup> PERB Regulation 32370 states that an appeal from an administrative decision will not automatically prevent the Board from proceeding in a case, but parties may seek a stay of any activity and "[t]he Board may stay the matter, except as otherwise provided in these regulations."

<sup>3</sup> Because PERB only has jurisdiction to enforce the statutes it is charged with administering and has no jurisdiction to enforce constitutional provisions, we have not considered Trahan's alternative arguments that the District's appeal violates the First Amendment rights of Trahan and other employees. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 41.)

We have reviewed the entire case file and fully considered the issues raised by the District's appeal and request for stay, and by Trahan's response thereto. We find the administrative determination to be well reasoned and in accordance with applicable law. We deny the District's appeal and request for stay, and adopt the administrative determination as the decision of the Board itself, as supplemented by the brief discussion below.

### DISCUSSION

#### The District's Appeal and Request for Stay

Under long-standing PERB precedent, a "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 27-29.) To that end, the order in PERB Decision No. HO-U-1577 directed the District to cease and desist its unlawful conduct and to take certain affirmative relief, including to remove, rescind and destroy a disciplinary document issued to Trahan and to "[r]estore Trahan's e-mail privileges." The crux of the District's argument on appeal and underlying its request for a stay is its contention that Trahan was not entitled to access to the BHS Conference listserv in January 2016, when the unfair practice dispute arose. Based on this premise, the District argues that Trahan's access to the BHS Conference listserv should therefore not be restored as part of the e-mail privileges which she would otherwise enjoy, but for the District's unlawful conduct. However, the District's contentions are undermined by the factual findings in PERB Decision No. HO-U-1577 and by the hearing transcript before the Administrative Law Judge (ALJ) who authored the HO-U Decision.

Trahan worked as a regular teacher at the District's Berkeley High School until her retirement in June 2015. Following her retirement, she retained her e-mail privileges with the District, including access to the BHS Conference listserv. According to the testimony of Evelyn Bradley, the District's Assistant Superintendent of Human Resources, in September 2015, Trahan distributed to the BHS Conference listserv a letter by the president of the Berkeley chapter of the National Association for the Advancement of Colored People (NAACP). As a result of Trahan's distribution of this letter, the District revoked Trahan's e-mail access and, with it, her ability to distribute materials over the BHS Conference listserv.

In January 2016, Trahan began substitute teaching for the District and, at that time, her e-mail access was restored, including her ability to distribute information to the BHS Conference listserv. At issue in PERB Decision No. HO-U-1577 was Trahan's distribution of another letter from the president of the Berkeley NAACP over the BHS Conference listserv on January 14, 2016. Among other things, the letter criticized the District for allegedly discriminatory employment practices. PERB Decision No. HO-U-1577 found that Trahan's distribution of this letter constituted protected activity under the Educational Employment Relations Act (EERA),<sup>4</sup> and that the District took various adverse actions against Trahan in retaliation for her protected activity.

The District has submitted a declaration in the present compliance proceedings speculating that Trahan's access to the BHS Conference listserv could have been the result of a mistake. However, the District restored Trahan's access to the BHS Conference listserv in January 2016, when she resumed working as a substitute teacher. It was thus not the case that

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<sup>4</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Trahan had simply retained her e-mail privileges following her retirement as a regular teacher due to oversight.<sup>5</sup> Rather, Trahan's e-mail privileges, including her access to the BHS Conference listserv, were restored in January 2016 by virtue of her employment as a substitute teacher.

In litigating the case before the ALJ, the District also presented testimony and arguments that were inconsistent with its current position. For instance, in its post-hearing brief to the ALJ, the District claimed that substitute teachers obtain e-mail privileges "if they need it and specifically ask for it." At the hearing, Bradley testified that the District "[n]ormally" provides e-mail access to "[c]ertain substitutes," including "long-term substitute[s]" because "they're doing day-to-day work for a long stint of time like covering a leave, for example, for the whole year." The evidence at hearing regarding whether Trahan was hired as a "long-term" substitute in January 2016 was inconclusive. Trahan repeatedly characterized herself as such, while the District presented records from its Aesop system tending to show that, at least initially, Trahan was hired on a daily or short-term basis.

However, Trahan also testified that, in April or May 2016, she took a long-term assignment covering for a teacher who had "suffered a tragedy," and that this assignment "lasted for either two or three months." The District put on no evidence to rebut Trahan's repeated characterizations of her position as a "long-term substitute." In fact, Bradley confirmed that, pursuant to the applicable collective bargaining agreement, Trahan was a "certificated substitute" and that the BHS Conference listserv included "pretty much everybody," including "certificated staff."

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<sup>5</sup> At each previous stage of this case, both parties have treated "e-mail privileges" and "e-mail access" as identical and as encompassing access to the BHS Conference listserv.

Thus, even accepting the District's contention that its restoration of Trahan's access to the BHS Conference listserv in January 2016 was the result of a mistake, the record demonstrates that Trahan would have gained access to the BHS Conference listserv in April or May 2016, either by virtue of her long-term assignment or her status as a "certificated substitute." Under these circumstances, the administrative determination appropriately concluded that Trahan's access to the BHS Conference listserv was part of the e-mail privileges which the District was ordered to restore in PERB Decision No. HO-U-1577. Accordingly, we deny the District's appeal and request for stay.

#### Trahan's Motion for Sanctions

To obtain monetary sanctions, including attorney's fees or other reasonable litigation expenses, the moving party must demonstrate that the claim, defense, motion or other action or tactic was "without arguable merit" and pursued in "bad faith." (*City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19 (*City of Alhambra I*); *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2 (*City of Alhambra II*)). As interpreted by most appellate courts, the standard for determining whether an action or litigation tactic is "frivolous," as opposed to merely meritless, is whether the claim, defense, action or tactic is so manifestly erroneous that no prudent attorney would have filed or maintained it. (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635; see also *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648-649 [interpreting Code Civ. Proc., § 907 authorizing reviewing courts to award such damages "as may be just" for appeals that are "frivolous or taken solely for delay"].)

Trahan contends that the District's appeal and request for stay lacked any support in the record and were therefore lacking even arguable merit. However, even if no prudent attorney would have filed the appeal and request for stay under the circumstances, PERB will not award

sanctions, unless the filing is *both* without arguable merit *and* pursued in bad faith. For the purposes of this test, the term “bad faith” may include conduct that is dilatory, vexatious or otherwise an abuse of process. (*City of Alhambra I, supra*, PERB Decision No. 2036-M, p. 19.) Because Trahan has pointed to no evidence that the District acted in subjective bad faith when filing its appeal and request for stay, we deny the motion for sanctions.

ORDER

The Public Employment Relations Board (PERB or Board) hereby DENIES the administrative appeal and request for stay by the Berkeley Unified School District (District) arising in compliance proceedings following PERB Decision No. HO-U-1577. The Board also DENIES the motion for sanctions filed by Valerie Trahan in her response to the District’s appeal and request for stay.

Members Winslow and Krantz joined in this Decision.

**PUBLIC EMPLOYMENT RELATIONS BOARD**

Los Angeles Regional Office  
700 N. Central Ave., Suite 200  
Glendale, CA 91203-3219  
Telephone: (818) 551-2806  
Fax: (818) 551-2820



May 7, 2018

Marleen Sacks, Attorney  
Georgelle C. Cuevas  
Atkinson, Andelson, Loya, Ruud & Romo  
5075 Hopyard Road, Suite 210  
Pleasanton, CA 94588

Re: COMPLIANCE WITH PERB DECISION NO. HO-U-1577-E  
*Valerie Trahan v. Berkeley Unified School District*  
Unfair Practice Case No. SF-CE-3168-E

Dear Ms. Sacks and Ms. Cuevas:

On January 22, 2018, the Public Employment Relations Board (PERB or Board) issued a final decision in the above-referenced matter finding a violation of the Educational Employment Relations Act (EERA).<sup>1</sup> Section B.2 of the Order in the above-referenced matter provides, in relevant part, that the Berkeley Unified School District (District) must “Restore Trahan’s e-mail privileges.” Charging Party (Trahan) asserts that the District has failed to comply with Section B.2 of the Order, because Charging Party is currently not on the e-mail distribution list (“BHS Conference”).<sup>2</sup>

### **Procedural History**

On February 8, 2018, the District filed its initial statement of compliance that provides in relevant part, “The District reinstated Charging Party’s email access well before the hearing in this matter and therefore no affirmative action was needed to comply with the order to reinstate Ms. Trahan’s email access.” An amended statement of compliance was filed by the District on February 22, 2018 re-asserting the aforementioned statement. On March 1, 2018, the District filed a so called, “Final Statement of Compliance.”

On March 16, 2018, Charging Party filed a letter informing this office that the District has not complied with the Order because she still has not been included on the “BHS Conference” e-mail distribution list. In response, the District filed a March 30, 2018 statement that included

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<sup>1</sup> The EERA is codified at Government Code section 3540 et seq.

<sup>2</sup> Charging Party does not dispute that the District complied with Sections B.1 and B.3 of the Order. Under Section B.1, the District was ordered to remove, rescind and destroy the January 21, 2016 Notice of Unprofessional Conduct (NUC) which informed Charging Party that her “email privileges have been revoked.” Section B.3. includes an order for notice postings.



the declaration of the District's Assistant Superintendent Evelyn Tamondong-Bradley. In its March 30, 2018 statement, Respondent asserts that it has fully complied with the Order and requests that PERB close the case.

On April 23, 2018, this office informed the parties that there is presently a dispute over whether the District is in compliance with Section B.2 of the Order and requested that the parties participate in a teleconference call. On April 30, 2018, the parties participated in a teleconference call with the undersigned Board agent. During the conference call, the District re-asserted that it has complied with the Section B.2 of the Order.

### **Relevant Facts**

"BHS Conference" is an e-mail listserv that enables staff at Berkeley High School (BHS) to send out "blast" e-mail messages to everyone on the list. Charging Party was included on this e-mail blast list when she was employed as a full-time, regular teacher at BHS. Charging Party retired effective June 12, 2015. Thereafter, she provided substitute services at BHS periodically. The District, including BHS, does not include substitute teachers on the BHS Conference e-mail blast list. However, Charging Party was included on the list when she was originally performing substitute work. According to the District, "this was likely due to an oversight" apparently because she was not removed from the e-mail list after her retirement.<sup>3</sup>

### **Discussion**

PERB Regulation 32980, subdivision (a)<sup>4</sup> provides in relevant part: "The General Counsel or his/her designate may conduct an inquiry, informal conference, investigation, or hearing, *as appropriate*, concerning any compliance matter." (Emphasis added.) This request does not raise disputes of material facts and will be decided based on the submissions of the parties. (*Los Angeles Community College District* (1984) PERB Decision No. 411; *Los Angeles Unified School District* (1993) PERB Order No. Ad-250; see also *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402 at pp. 17-18 [a Board agent may use an order to show cause to investigate whether there is a material factual dispute that must be resolved through an evidentiary hearing, but if none is raised, then an administrative determination is appropriate].)

Under Section B.2 of the Order, the District was ordered to "Restore Trahan's e-mail privileges." Following the District's rescission of the NUC, Charging Party's e-mail access

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<sup>3</sup> The District provides additional facts showing that notice of substitute assignments are made by using a computer and phone robo-dialing service called "AESOP" to which Charging Party availed herself to. Accordingly, argues the District, the "BHS Conference" list is not required to see all of the new substitute job postings.

<sup>4</sup> PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's regulations may be found at [www.perb.ca.gov](http://www.perb.ca.gov).

was restored, but not fully because Charging Party no longer receives notifications from the “BHS Conference” e-mail blast distribution list.

Charging Party was on the “BHS Conference” list after her retirement from her full-time teaching position in June 12, 2015 and continued to be placed on that list when she returned to the District for substitute teaching assignments. Prior to the revocation of her e-mail privileges in January 2016, Charging Party was included on the “BHS Conference” list, although other substitute teachers are not included on such list. However, Section B.2 of the Order does not qualify which distribution lists must be excluded from Charging Party’s e-mail account. A full restoration of Charging Party’s e-mail privileges, including the “BHS Conference” list must be reinstated. Accordingly, the District has not yet complied with Section B.2 of the Order.

**Conclusion**

The District is hereby afforded **30 days from service of this letter** to file information with this office showing that it has taken concrete steps to fully restore Charging Party’s e-mail privileges (namely, her inclusion in the “BHS Conference” e-mail blast list) in order to comply with Section B.2 of the Order. Service and proof of service pursuant to PERB Regulation 32140 are required.

Please contact me if you have any questions concerning this matter.

Sincerely,

Yaron Partovi  
Senior Regional Attorney

YP

cc: Valerie Trahan