STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MELVIN JONES JR., Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-646-M Administrative Appeal PERB Order No. Ad-398-M March 8, 2013

Appearance: Melvin Jones, Jr., on his own behalf.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from an administrative determination denying the third request for reconsideration filed by Melvin Jones, Jr. (Jones) in this case. For the reasons set forth herein, we affirm the administrative determination and dismiss the request for reconsideration.

FACTUAL SUMMARY

This case has as its genesis an unfair practice charge filed by Jones on April 20, 2009, Case No. SF-CE-646-M, in which Jones alleged that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by terminating his probationary employment in retaliation for having engaged in protected activity.[2] The crux of Jones's argument is that he was on an approved leave of absence when the County terminated his employment in part for being absent without leave. This is at least Jones's fourth attempt to obtain Board review of

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

[2] The charge also alleged that the County denied Jones the right to have an employee representative present during a meeting and interfered with protected rights.

that employment action. Because a complete procedural history is set forth in *County of Santa Clara* (2012) PERB Decision No. 2267b-M (*Santa Clara*), we summarize only the most pertinent procedural and additional facts here.

Following issuance of a complaint by the Office of the General Counsel and the conduct of an evidentiary hearing, a PERB administrative law judge (ALJ) issued a proposed decision dismissing the complaint and charge for failure to establish a violation of the MMBA. In rejecting Jones's argument that he had been terminated in retaliation for having engaged in protected activities, the ALJ found that Jones was unable to establish that he had received approval for the absences that led to his termination.

On May 12, 2012, the Board adopted the ALJ's decision as its own and dismissed the complaint and underlying unfair practice charge. (*County of Santa Clara* (2012) PERB Decision No. 2267-M.) In its decision, the Board rejected Jones's request to consider additional evidence in support of his claim that he was not absent without leave and concluded that, even if such evidence were considered, it would not establish that the absences were authorized. On August 12, 2012, the Board denied Jones's first request for reconsideration of that decision. (*County of Santa Clara* (2012) PERB Decision No. 2267a-M.) On October 16, 2012, Jones filed a request that the Board grant a new hearing to consider new evidence. On November 27, 2012, the Board issued a decision denying that request under the standards applicable to requests for reconsideration.[3] (*Santa Clara*, *supra*, PERB Decision No. 2267b-M.)

After the Board issued its decision affirming the ALJ's dismissal of the complaint in Case No. SF-CE-646-M, on August 8, 2012, Jones filed a second unfair practice charge over

[3] In addition, the Board found the request untimely.

essentially the same set of facts (Case No. SF-CE-988-M).[4] In that charge, Jones alleged that a statement made by the County in a brief filed before the ALJ in Case No. SF-CE-646-M constituted an admission that the County had unilaterally changed a provision in the memorandum of understanding covering his employment that established that his absences were authorized. After the Office of the General Counsel informed Jones that he lacked standing to allege a unilateral change violation, Jones amended the charge to allege that the County's statement in its brief constituted an admission that the County adopted and enforced an unreasonable local rule. On October 12, 2012, the Office of the General Counsel dismissed that charge for failure to state a prima facie violation of the MMBA. Jones filed a timely appeal from that dismissal, but, on October 19, 2012, filed a request to withdraw that appeal. On November 27, 2012, the Board granted Jones's request to withdraw his appeal in Case No. SF-CE-988-M. (*County of Santa Clara* (2012) PERB Decision No. 2292-M.)

On December 6, 2012, Jones filed a "Motion/Request (3rd) for Reconsideration [with affidavit filed concurrently], and Jones' Request in the alternative" in the instant case. In that request, Jones asserts that the Board's November 27, 2012, decision granting his request to withdraw his appeal in Case No. SF-CE-988-M constitutes "newly discovered evidence" warranting reconsideration of the Board's decision in this case. In the alternative, Jones requested that the Board allow him to file a motion for joinder of "SEIU 521" (presumably, his collective bargaining representative) so that he can proceed with a charge of unilateral change or pursue such a charge at a new hearing. On December 13, 2012, in an administrative determination, PERB's Appeals Assistant denied the request, finding that, under PERB

[4] The Board takes official notice of its record in Case No. SF-CE-988-M.

Regulation 32410,[5] a party cannot repeatedly file requests for reconsideration. Jones appeals from that administrative determination.

DISCUSSION

Multiple Requests for Reconsideration

PERB Regulation 32410 provides:

> Request for Reconsideration.
>
> (a) 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.
>
> (b) Any party shall have 20 days from service to file a response to the request for reconsideration. An original and five copies of the response shall be filed with the Board itself in the headquarters office. Service and proof of service of the response pursuant to Section 32140 are required.
>
> (c) 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

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

> unfair practice case shall automatically be stayed upon filing of a Request for Reconsideration.

PERB Regulation 32410 does not expressly address multiple requests for reconsideration of a Board decision. In *Bassett Unified School District* (1979) PERB Order No. Ad-67 (*Bassett)*, the Board granted a second request for reconsideration in a case where a prior grant of reconsideration had resulted in the Board vacating its prior decision and issuing a completely new and different decision. Recognizing the unique facts of that case, however, the Board stated:

> As we interpret our rule, the same party cannot repeatedly file requests for reconsideration. If the Board had rejected [the party's] request for reconsideration of [its prior decision], for example, [the party] would have had no right to file another request for reconsideration of the same decision. Such a right would waste the time and resources of the Board and the parties. (*Ibid.*)

We reaffirm the rule set forth in *Bassett, supra,* PERB Order No. Ad-67, that a party may file only one request for reconsideration of a Board decision, except in those cases where a prior request for reconsideration has resulted in the issuance of a completely revised decision. This rule preserves the right of parties to obtain reconsideration of a Board decision while avoiding an undue waste of the resources of both the Board and the parties. [6]

In this case, the Board has twice denied requests to reconsider the same decision on substantially the same grounds presented here. In essence, Jones seeks either to use this case as a means of reviving the charges in a case that he voluntarily withdrew or to use his voluntary withdrawal of that case to revive the underlying charges in this case. In either instance, the aim is the same: to relitigate the issue of whether the County violated the MMBA

[6] In reaching this conclusion, we do not intend to suggest that the filing of a second request for reconsideration styled as a "request for a new hearing" in this case was proper. Under the rule we reaffirm today, that request would have been subject to dismissal on that basis as well.

in terminating his employment. Jones had a full opportunity to litigate his case before the ALJ in Case No. SF-CE-646-M. He also had a full opportunity to present his case to the Office of the General Counsel in Case No. SF-CE-988-M, and to appeal the General Counsel's determination to the Board. Having withdrawn his appeal, he cannot use this proceeding to reopen that case. We find no useful purpose would be served by permitting a third request for reconsideration to be filed in this case. Accordingly, we affirm the administrative determination of the Appeals Assistant.

Grounds for Reconsideration

Even if we were to consider the request for reconsideration to have been properly filed, we would still deny it on the ground that the Board's decision granting Jones's request to withdraw his appeal from dismissal in Case No. SF-CE-988-M does not constitute "new evidence" warranting reconsideration in this case. Jones asserts that the withdrawal of his appeal "restores" the findings and decision of the General Counsel that his charge failed to state a prima facie case. While it is true that the decision of the General Counsel in that case is now final, that fact has no bearing on the issue of whether the Board should grant reconsideration in this case. Nothing in the Board's decision in Case No. SF-CE-988-M provides any new support for Jones's position that the County violated the MMBA in terminating his employment. Moreover, as indicated above, we cannot review the merits of that case in this proceeding. Therefore, we find no basis to reopen this case.

Request for Joinder

The Board has the discretion under PERB Regulation 32164 to order joinder of a party under specified circumstances, as follows:

> Application for Joinder of Parties.
>
> (a) Any employee, employee organization or employer may file with the Board agent an application for joinder as a party in a

case. Service and proof of service of the application pursuant to Section 32140 are required.

(b) The application for joinder shall be in writing, signed by the representative filing it and contain a statement of the extent to which joinder is sought and a statement of all the facts upon which the application is based. The Board shall allow each party an opportunity to oppose the application.

(c) The Board may allow joinder if it determines that the party has a substantial interest in the case or will contribute substantially to a just resolution of the case and will not unduly impede the proceeding.

(d) The Board may order joinder of an employer, employee organization or individual, subject to its jurisdiction, on application of any party or its own motion if it determines that:

(1) In the absence of the employer, employee organization or individual, as a party, complete relief cannot be accorded; or

(2) The employer, employee organization or individual has an interest relating to the subject of the action and is so situated that the disposition of the action in their absence may:

(A) As a practical matter impair or impede their ability to protect that interest; or

(B) Leave any of the parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of said interest.

PERB Regulation 32164(d) authorizes PERB to order joinder of a party if the party has an interest in the subject matter of the proceeding. (*Bay Area Air Quality Management District* (2007) PERB Decision No. 1927-M.) There is no showing that the employee organization has any substantial interest that would be impaired if it is not joined in this case. Instead, Jones seeks to join the employee organization in order to revive his unilateral change charge set forth in Case No. SF-CE-988-M, which was dismissed based upon the Board agent's determination that Jones lacked standing to file such a charge. Jones voluntarily dismissed his appeal from that determination, and it is now final. Thus, there is no pending matter before the Board for

which joinder would be necessary or appropriate. Moreover, there is no basis for ordering joinder of the employee organization at this late stage in Case No. SF-CE-646-M. Accordingly, Jones's request for joinder is denied.

ORDER

The administrative appeal of Melvin Jones, Jr. from denial of his third request for reconsideration in Case No. SF-CE-646-M is hereby DENIED.

Chair Martinez and Member Winslow joined in this Decision.