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-411-M April 18, 2014
MELVIN JONES JR., Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-988-M

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

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

HUGUENIN, Member: These cases are before the Public Employment Relations Board (PERB or Board) on appeals by Melvin Jones, Jr. (Jones) from administrative determinations by the PERB's Appeals Assistant, denying, respectively, Jones' request for reconsideration of PERB Order No. Ad-398-M, and Jones' request for reinstatement of an appeal in Case No. SF-CE-988-M.[1] For the reasons stated herein, we affirm each administrative determination and deny each appeal.

[1] These cases are consolidated for the purpose of efficiency.

PROCEDURAL HISTORY

On March 19, 2013, Jones filed "Request for reconsideration of ORDER # Ad-398-M due to prejudicial error of fact there, AND request that ruling on this motion is done AFTER the outcome (as to reinstatement of appeal case #SF-CE-988-M)." On March 26, 2013, PERB's Appeals Assistant issued an administrative determination denying the request. On April 2, 2013, Jones timely appealed the administrative determination to the Board itself.

On March 19, 2013, Jones filed "Notice of Reinstatement of APPEAL as to case #SF-CE-988-M (as said appeal was NOT withdrawn with prejudice)." On March 26, 2013, PERB's Appeals Assistant issued an administrative determination denying the request. On April 2, 2013, Jones timely appealed the administrative determination to the Board itself.

FACTUAL SUMMARY

These cases have their genesis in 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)[2] by terminating his probationary employment in retaliation for having engaged in protected activity.[3] The crux of Jones's argument was that he was on an approved leave of absence when the County terminated his employment in part for being absent without leave. This is Jones' fifth attempt to obtain Board review of that employment action. A complete procedural history is set forth in *County of Santa Clara* (2012) PERB Decision No. 2267b-M (*Santa Clara*), and summarized in *County of Santa Clara* (2013) PERB Order No. Ad-398-M (*County of Santa Clara*). Thus, we here reiterate only the most pertinent procedural and additional facts.

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

[3] 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.

In Case No. SF-CE-646-M, PERB's 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. Thereafter, on August 12, 2012, the Board denied Jones' 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.[4] (*Santa Clara*, *supra*, PERB Decision No. 2267b-M.) On December 6, 2012, Jones filed a "Motion/Request (3rd) for Reconsideration [with affidavit filed concurrently]," and a "Request in the alternative" to join Service Employees International Union, Local 521 (SEIU) to enable Jones to pursue a unilateral change theory. On December 13, 2012, in an administrative determination, PERB's Appeals Assistant denied the request, finding that, under PERB Regulation 32410,[5] a party cannot repeatedly file requests for reconsideration. On March 8, 2013, the Board issued a decision denying Jones' requests under standards applicable to requests for reconsideration and

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

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

to applications for joinder of parties. (*County of Santa Clara, supra,* PERB Order No. Ad-398-M.) Jones now seeks reconsideration of that decision.

On August 8, 2012, after the Board had issued its decision affirming the ALJ's dismissal of the complaint in Case No. SF-CE-646-M, Jones filed a second unfair practice charge over essentially the same set of facts (Case No. SF-CE-988-M).[6] In his second 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.) Jones now seeks to reinstate that previously withdrawn appeal.

DISCUSSION

We consider first Jones' appeal from the administrative determination denying his request for reconsideration of *County of Santa Clara, supra,* PERB Order No. Ad-398-M, and then address Jones' appeal from the administrative determination denying his request for reinstatement of his appeal in Case No. SF-CE-988-M.

[6] The Board takes official notice of the case file in Case No. SF-CE-988-M.

Standard of Review

In an appeal from an administrative determination, the moving party must demonstrate how and why the administrative decision being challenged departs from the Board's precedents or regulations. Here the governing PERB Regulations are 32410 (request for reconsideration); 32164 (application for joinder of parties), and 32136 (late filing). We review the challenged administrative determinations in light of these regulations and our precedents thereunder.

Request for Reconsideration of *County of Santa Clara, supra,* PERB Order No. Ad-398-M

In *County of Santa Clara, supra,* PERB Order No. Ad-398-M, the Board considered and rejected Jones' request for reconsideration and his application for joinder of parties. We review each issue once more.

1. Request for Reconsideration

In *County of Santa Clara, supra,* PERB Order No. Ad-398-M, the Board reviewed its regulation concerning requests for reconsideration (PERB Reg. 32410),[7] and reaffirmed its

[7] PERB Regulation 32410 provides:

> (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

prior holding in *Bassett Unified School District* (1979) PERB Order No. Ad-67, limiting parties to one request for reconsideration of a Board decision. The Board stated:

> 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.

(*County of Santa Clara, supra,* PERB Order No. Ad-398-M, p. 5.)

In this case, the Board has three times denied requests to reconsider the same decision, to wit, *Santa Clara, supra,* PERB Decision No. 2267b-M. Jones had a full opportunity to litigate his case before the ALJ in that case and a full appeal thereof to the Board, which sustained the ALJ. He also had a full opportunity to present a related case (Case No. SF-CE-988-M) to the Office of the General Counsel and to appeal to the Board from the General Counsel's dismissal of that case. Instead he withdrew his appeal. Having withdrawn his appeal, he cannot use this proceeding to reopen that case.

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

2. Application for Joinder of Parties

In *County of Santa Clara, supra,* PERB Order No. Ad-398-M, the Board reviewed its regulation concerning applications for joinder of parties (PERB Reg. 32164),[8] stating:

> 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.)

[8] PERB Regulation 32164 provides:

> (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.

(*County of Santa Clara,* p. 6.) The Board then assessed Jones' request for joinder of SEIU in Case No. SF-CE-988-M, determining that joinder was not appropriate.

Nothing has changed. Jones has made no showing that the employee organization has any substantial interest that would be impaired if it is not joined in this case. As before, Jones seeks joinder in order to revive his unilateral change allegation in Case No. SF-CE-988-M. That allegation was dismissed by the Office of the General Counsel, because Jones lacked standing to make the allegation. Following the dismissal, Jones appealed the dismissal to the Board, and voluntarily withdrew his appeal. The Board approved the withdrawal. Thus, the withdrawal is now final and binding on Jones.

Jones urged below that he intended the withdrawal of his appeal to be "without prejudice." However, this claim is unavailing. The Board has no procedure under which an appeal, once withdrawn, may be later reasserted at the discretion of the appellant. Moreover, if such a procedure existed, which it does not, the original time line for the appeal would apply, to wit, 20 days from the date of issuance of the dismissal of the charge. The charge was dismissed on October 12, 2012, thus placing the due date for a timely appeal in November 2012, which is long past. Currently, 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.

In sum, we affirm the administrative determination of the Appeals Assistant to deny Jones' request for reconsideration of *County of Santa Clara, supra,* PERB Order No. Ad-398-M. We turn now to Jones' other request, namely, for reinstatement of his appeal in Case No. SF-CE-988-M.

Request for Reinstatement of Appeal in Case No. SF-CE-988-M

In *County of Santa Clara* (2012) PERB Decision No. 2292-M, the Board approved Jones' request to withdraw his appeal from the dismissal by the Office of the General Counsel of his unfair practice charge in Case No. SF-CE-988-M. Jones seeks to reinstate his previously withdrawn appeal on the ground that the withdrawal was not "with prejudice."

This matter was addressed in *County of Santa Clara, supra,* PERB Order No. Ad-398-M, and is discussed above. As there indicated, PERB has no procedure for a party to withdraw an appeal "without prejudice," and then to reinstate or reassert the appeal at a later time. Moreover, even if such a procedure did exist, which it does not, appeals are governed by time lines. Where a party fails to file a timely appeal, the appeal is barred unless the Board finds good cause to excuse the failure. Jones proffers as good cause his belief that his withdrawal of his appeal was without prejudice and that withdrawal would not bar later reinstatement. We are not persuaded.

PERB Regulation 32136 provides that the Board may excuse a late filing for good cause. The Board has found good cause when the explanation for the late filing was "reasonable and credible" and the delay did not cause prejudice to any party. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.)[9] The Board, however, has ruled that ignorance of the law is no excuse and, therefore, insufficient to warrant a finding of good cause. (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010)

[9] The Board has historically excused late filings caused by "honest mistakes" such as mailing or clerical errors. (See, e.g., *Kern Community College District* (2008) PERB Order No. Ad-372 [clerical employee served appeal on respondent but did not file appeal with PERB]; *Trustees of the California State University* (1989) PERB Order No. Ad-192-H [mailroom employees incorrectly set postage meter causing exceptions to be filed late]; *San Francisco Unified School District* (2009) PERB Decision No. 2048 [late filing excused as a result of clerical error in counsel's office].)

PERB Decision No. 2133 (*Grossmont-Cuyamaca*); citing *Public Employees Union Local 1 (Coleman)* (2005) PERB Decision No. 1780-M (*Coleman*).)

Here, having voluntarily abandoned his appeal in Case No. SF-CE-988-M, Jones urges that his erroneous impression of PERB's procedures should operate as good cause to excuse his compliance with PERB's appeal procedures. We decline to extend the concept of good cause that far. (*Grossmont-Cuyamaca, supra,* PERB Decision No. 2133; *Coleman, supra,* PERB Decision 1780-M.)

In sum, we affirm the administrative determination of the Appeals Assistant to deny Jones' request for reinstatement of his appeal in Case No. SF-CE-988-M.

ORDER

The administrative appeal of Melvin Jones, Jr. to the Appeals Assistant's denial of his request for reconsideration of *County of Santa Clara* (2013) PERB Order No. Ad-398-M is hereby DENIED.

The administrative appeal of Melvin Jones, Jr. to the Appeals Assistant's denial of his request for reinstatement of his appeal in Case No. SF-CE-998-M is hereby DENIED.

Chair Martinez and Member Winslow joined in this Decision.