

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



LORI E. EDWARDS et al.,

Charging Parties,

v.

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-6082-E

Request for Reconsideration
PERB Order No. Ad-446

PERB Order No. Ad-446a

May 15, 2018

Appearances: Lori E. Edwards, Representative, for Lori E. Edwards et al.; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on a request by the Lake Elsinore Unified School District (District) for reconsideration of the Board's decision in *Lake Elsinore Unified School District (2017)* PERB Order No. Ad-446 (PERB Order No. Ad-446), and on a motion for sanctions by Lori E. Edwards, David Pickett, Victoria Pickett and Kimberly A. Rosales, who are the Charging Parties in the underlying unfair practice case against the District.¹ In PERB Order No. Ad-446,

¹ The unfair practice complaint in this case alleges that the District violated the Educational Employment Relations Act (EERA) by discriminating against Charging Parties for their protected activities. (EERA is codified at Gov. Code, § 3540 et seq.) The District denies any violation. On November 29, 2016, a PERB Administrative Law Judge dismissed all allegations in the complaint. Charging Parties filed a statement of exceptions, which they later attempted to amend, and the District eventually filed a response thereto. Charging Parties' statement of exceptions is currently pending before the Board, while their amendment to the statement of exceptions and the District's response were both rejected by PERB's Appeals Office as untimely. Following administrative appeals, we upheld the Appeals Office's

the Board denied the District's appeal from an administrative determination, in which PERB's Appeals Office had rejected as untimely the District's response to Charging Parties' statement of exceptions. As grounds for reconsideration, the District asserts that PERB Order No. Ad-446 contains prejudicial errors of fact.

Charging Parties oppose the District's request as an improper attempt to use the reconsideration process to re-litigate issues that have already been decided. They argue that because the District's request lacks even arguable merit and was brought in bad faith, the Board should sanction the District by ordering it to compensate Charging Parties for their lost vacation time and other expenses incurred in responding to the District's request.

We have reviewed the District's request for reconsideration, Charging Parties' motion for sanctions and the entire case file in light of applicable law. Based on this review, and for the reasons set forth below, we deny the District's request for reconsideration as contrary to the language and purpose of PERB's Regulation² governing reconsideration and Board precedent. We also deny Charging Parties' request for sanctions.

DISCUSSION

1. The District's Request for Reconsideration is Procedurally Defective

There are only two grounds for reconsideration authorized by PERB Regulations: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party requesting reconsideration has newly discovered evidence which was not previously available

determinations that both filings were untimely and had failed to show good cause to excuse the untimeliness. In addition to PERB Order No. Ad-446, which is the subject of the District's request for reconsideration, see *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-449 (rejecting Charging Parties' administrative appeal).

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

and could not have been discovered with the exercise of reasonable diligence. (PERB Reg. 32410, subd. (a); *City of Palmdale* (2011) PERB Decision No. 2203a-M, pp. 9-11; *California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S, pp. 10-11, fn. 11.) The “extraordinary circumstances” warranting reconsideration are thus limited to asserted errors or omissions *of fact*. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M (*NUHW*), p. 8.) Purported errors of law, including the Board’s application of its own Regulations, or a reversal of Board precedent, are not grounds for reconsideration. (*City of Palmdale, supra*, at p. 11, *CSEA (Hard, et al.), supra*, at pp. 6, 10-11, fn. 11; see also *County of Tulare* (2016) PERB Decision No. 2461a-M, pp. 3-4.)

Because of the “extraordinary circumstances” requirement, the Board applies the regulatory criteria strictly when reviewing a request for reconsideration. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H, p. 5; *King City Joint Union High School District* (2007) PERB Decision No. 1777a, pp. 3-4.) 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.” (*Redwoods Community College District* (1994) PERB Decision No. 1047a, pp. 2-3; *Chula Vista Elementary School District* (2004) PERB Decision No. 1557a, p. 2.)

As explained in *Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405a (*Crowell*), reconsideration is also limited by the procedural posture of the case. The Regulation’s focus on prejudicial error of *fact* or newly-discovered *evidence* indicates that the reconsideration procedure is limited to Board decisions based on a proposed decision and developed *factual record* following a formal hearing or stipulated record. (*Id.* at p. 13.) Because the Regulation is concerned solely with errors or omissions in a developed

factual record, in *Trustees of the California State University (East Bay) (Liu)* (2013) PERB Order No. IR-56a-H, the Board held that reconsideration is not available for a Board decision granting or denying a request for injunctive relief, where the moving party's factual allegations are presumed true, and resolution of factual disputes is reserved for a formal hearing. In *Crowell*, the Board similarly reasoned that a dismissal/refusal to issue a complaint on an unfair practice charge is also not the type of Board decision that lends itself to the reconsideration process, because, during the initial investigation of an unfair practice charge, the charging party's factual allegations must be accepted as true and, again, resolution of factual disputes is deferred to a formal hearing. (*Id.* at pp. 4-5; see also *NUHW, supra*, PERB Decision No. 2249a-M, p. 6.) More recently, in *Regents of the University of California and Teamsters Clerical Local 2010 (Polk)* (2016) PERB Order No. Ad-437a-H (*Regents (Polk)*), we applied the same reasoning to administrative appeals, which, by definition, do not entail a proposed decision or developed factual record following a formal evidentiary hearing or stipulated record. (*Id.* at p. 4; see also PERB Reg. 32350; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 11.)³ We concluded that the limited scope of PERB's reconsideration regulation deprived the Board of jurisdiction to reconsider its prior decision in an administrative appeal. (*Regents (Polk), supra*, at p. 4.)

The District's request for reconsideration arises from a Board decision denying an administrative appeal. As in *Regents (Polk), supra*, PERB Order No. Ad-437a-H, the administrative determination that is the subject of the District's request for reconsideration was not a proposed decision and it involved no developed factual record resulting from a

³ The definition of an "administrative decision" expressly excludes "a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to Section 32215." (PERB Reg. 32350, subd. (a)(3).)

formal evidentiary hearing or stipulated record. The District's request for reconsideration is thus not the kind of Board decision that is subject to reconsideration under PERB Regulation 32410. The District's request does not acknowledge or attempt to distinguish *Regents (Polk)*, or make any argument for extending, modifying, or reversing existing Board law or for establishing new law. It is therefore unnecessary to consider the grounds asserted by the District for reconsideration, and its request is summarily denied.

2. Charging Parties' Motion for Sanctions is Denied

PERB precedent requires that, 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 (*City of Alhambra I*), p. 19; *City of Alhambra* (2009) PERB Decision No. 2037-M (*City of Alhambra II*), p. 2.) 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"].)

We agree with Charging Parties that the District's request for reconsideration was without even arguable merit. It failed to comply with the basic requirements of the reconsideration regulation and recent PERB decisional law directly on point, and it included no serious argument for extending, modifying, or reversing existing law or for establishing new law to permit reconsideration of administrative determinations.

However, while no reasonable attorney would have filed the request for reconsideration under the circumstances, PERB will award attorney fees only if the charge is *both* without arguable merit *and* pursued in bad faith. For the purposes of this test, the term “bad faith” includes conduct that is dilatory, vexatious or otherwise an abuse of process. (*City of Alhambra I, supra*, PERB Decision No. 2036-M, p. 19.)

Showing that an action or tactic was undertaken in “bad faith,” does not require showing that the party and/or attorney necessarily acted with an evil motive. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) Prosecution of a patently frivolous action may itself be evidence supporting a finding of subjective bad faith, as might other forms of “discourteous” or “unprofessional” conduct which a party or attorney knows or reasonably should know will unreasonably or unnecessarily cause delay or harass or injure an opposing party or representative, or impede the tribunal’s own process. (*Id.* at pp. 702-703, quoting *In re Marriage of Gumabao* (1984) 150 Cal.App.3d 572; see also *City of Alhambra II, supra*, PERB Decision No. 2037-M, adopting proposed decision at p. 17.) Nevertheless, under Code of Civil Procedure section 128.5, which is the standard followed by PERB, *some* showing of subjective bad faith is required, even if it must be inferred from circumstantial evidence viewed over the course of the litigation. (*West Coast Development v. Reed, supra*, 2 Cal.App.4th at pp. 704-705; *Levy v. Blum, supra*, 92 Cal.App.4th at pp. 635-636.) Because Charging Parties have pointed to no evidence that the District or its representative acted with subjective bad faith when filing the District’s request for reconsideration, we deny the motion for sanctions.

ORDER

The Public Employment Relations Board (Board) hereby DENIES the request by the Lake Elsinore Unified School District (District) for reconsideration of the Board's decision in *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-446 and DENIES the motion for sanctions filed by Lori E. Edwards et al. in opposition to the District's request for reconsideration in Case No. LA-CE-6082-E.

Chair Gregersen and Member Winslow joined in this Decision.