



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

LOS ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY,

Employer,

and

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
LOCAL 3634,

Exclusive Representative.

Case No. LA-UM-1025-T

Request for Reconsideration
PERB Decision No. 2916-T

PERB Decision No. 2916a-T

November 15, 2024

Appearances: Liebert Cassidy Whitmore by Adrianna Guzman and Kelsey Ridenhour, Attorneys, and Joanne Nielsen, Principal Deputy County Counsel, for Los Angeles County Metropolitan Transportation Authority; Bush Gottlieb by Dana S. Martinez and Adrian R. Butler, Attorneys, for American Federation of State, County & Municipal Employees, Local 3634.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request by Los Angeles Metropolitan Transportation Authority (Metro) to reconsider our decision in *Los Angeles Metropolitan Transportation Authority* (2024) PERB Decision No. 2916-T (*LA Metro*). There, we affirmed the administrative determination of PERB's Office of the General Counsel (OGC) granting a unit modification petition filed by American Federation of State, County & Municipal Employees, Local 3634 (AFSCME) to add Accounting Supervisors employed by Metro to its supervisory employee bargaining unit. As part of that

decision, we held that OGC did not err in declining to make findings related to the community of interest factors enumerated at section 99565 of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA).¹ (*LA Metro, supra*, pp. 23-24.) Metro's request for reconsideration asserts that PERB erred in reaching this conclusion. AFSCME opposed Metro's request for reconsideration and requested attorney fees as a litigation sanction.

A party may ask the Board to reconsider a final decision only if the party: (1) asserts that the decision includes prejudicial errors of fact; or (2) presents 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); *County of Riverside* (2018) PERB Decision No. 2591a-M, p. 3.) A party therefore 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 Unified School District* (2015) PERB Decision No. 2450a, p. 3.) "Because reconsideration may only be granted under the 'extraordinary circumstances' specified above, the Board [strictly] applies the regulation's criteria." (*Id.* at p. 2.) Furthermore, reconsideration is available only where the underlying Board decision reviewed a proposed decision based on a developed factual record. (*Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405a, p. 14 (*Crowell*).) Reconsideration is therefore not permitted when the

¹ TEERA is codified at Public Utilities Code section 99560 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Board reviews an administrative determination which involves no evidentiary hearing or factual record. (*Regents of the University of California and Teamsters Clerical Local 2010 (Polk)* (2016) PERB Order No. Ad-437a-H, p. 4 (*Polk*).)

We deny Metro's request for reconsideration for two reasons. First, *LA Metro, supra*, PERB Decision No. 2916-T, involved no evidentiary hearing or factual record and therefore reconsideration is not available. (*Polk, supra*, PERB Order No. Ad-437a-H, p. 4.) Second, Metro's request for reconsideration objects to the Board's legal analysis and not an assertedly prejudicial mistake of fact or newly discovered, outcome-determinative evidence. (PERB Reg. 32410, subd. (a); *County of Riverside, supra*, PERB Decision No. 2591a-M, p. 3.) We also deny AFSCME's request for attorney fees as unwarranted here.

DISCUSSION

I. Metro's Request for Reconsideration

Requests for reconsideration are subject to PERB Regulation 32410, which provides:

“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. 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.”

(*Id.*, subd. (a).)

In *Crowell*, *supra*, PERB Decision No. 2405a, the Board observed that despite the broad language at the outset of this regulation, its references to “record” and “hearing” limit its application. (*Id.* at pp. 4, 7.) We held that reconsideration was not available for Board decisions upholding OGC’s dismissal of an unfair practice charge, because such a decision concerns whether the allegations in the charge state a prima facie case as a matter of law. (*Ibid.*) In *Polk*, *supra*, PERB Order No. 437a-H, a party sought reconsideration of a Board decision affirming an administrative determination by PERB’s Appeals Assistant denying an extension of time. (*Id.* at pp. 1-2.) The Board held that because the underlying administrative determination involved no evidentiary hearing or factual record, the rule from *Crowell* applied, and reconsideration was not available. (*Id.* at p. 4.)

Metro acknowledges this authority and its applicability to its own request for reconsideration in this case. However, Metro asks us to revisit our precedents, contending that the “broad” language of Regulation 32410 should be interpreted to permit reconsideration of administrative determinations. In making this request, although Metro cites *Bellflower Unified School District* (2019) PERB Order No. Ad-475a, it ignores its teaching that “[p]urported errors of law, including the

Board's alleged improper application of its own Regulations, or a reversal of Board precedent, are not grounds for reconsideration." (*Id.* at p. 3.)

We decline to overrule *Crowell, supra*, PERB Decision No. 2405a, *Polk, supra*, PERB Order No. 437a-H, and other cases holding that reconsideration is only available for Board decisions where there has been an evidentiary hearing or factual record. We also hold that, consistent with these cases, reconsideration is not available for a Board decision reviewing an administrative determination to grant or deny a petition for unit modification, as by definition, an administrative determination is not based on a formal hearing or a stipulated record, and no proposed decision is issued. (*Grossmont Union High School District* (2018) PERB Order No. Ad-466, pp. 4-5.)

First, we reaffirm that limitations on reconsideration requests derive from the text of Regulation 32410, subdivision (a) itself. In *Crowell, supra*, PERB Decision No. 2405a, the Board observed that the Regulation expressly permits only two grounds for reconsideration "because of extraordinary circumstances": 1) prejudicial errors of fact in the Board's decision; and 2) discovery of new, outcome-determinative evidence that could not have been discovered and/or presented earlier with reasonable diligence. (PERB Reg. 32410, subd. (a).) Because decisions to affirm the dismissal of an unfair practice charge do not contain factual findings or the weighing of evidence, neither ground for reconsideration can be established. (*Crowell, supra*, at pp. 4-5.) Reconsideration is therefore not available unless the decision is based on findings from an evidentiary hearing or stipulated factual record. (*Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 4; *Polk, supra*, PERB Order No. Ad-437a-H, p. 4.)

A Board agent's administrative determination to grant or deny a request for unit modification by definition is not based on an evidentiary hearing or stipulated factual record. (PERB Reg. 32350, subd. (a)(3).) Board agents investigating representation petitions have broad discretion to determine what procedures they deem necessary and efficient to decide the questions raised by the petition. (PERB Reg. 32786, subd. (a).) Board agents need not conduct a formal evidentiary hearing to resolve unit appropriateness disputes if, based on the parties' submissions, no material dispute of fact exists. (*Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, p. 17 (*Children of Promise*).) The Board agent may employ an order to show cause to solicit argument and verified factual allegations to determine whether a material factual dispute exists in a case. (*Id.* at pp. 17-18.) If a party is unable to submit verified factual information that would be sufficient to support its position, the Board agent may properly resolve the dispute without a formal hearing. (*Ibid.*)

An administrative determination to grant or deny a representation petition is in some respects akin to a decision to dismiss an unfair practice charge for failure to state a prima facie case. Unfair practice charge investigations entail a similar level of complexity as unit determination investigations. Both consider the sufficiency of factual allegations as they relate to any number of legal questions. But, as the Board noted in *Crowell, supra*, PERB Decision No. 2405a, OGC's dismissal of an unfair practice charge is based on a determination that the factual allegations fail to state a prima facie case as a matter of law. Similarly, when a Board agent grants or denies a representation petition based on the parties' submissions, it is because a party has failed to submit sufficient information to warrant a formal hearing, or at least has not

done so “in the manner required,” such as via “declarations on personal knowledge showing the actual job duties” of the disputed classifications or positions. (*Children of Promise, supra*, PERB Order No. Ad-402, pp. 17-18.) The Board agent granting or denying a representation petition without a formal hearing does not resolve outcome-determinative conflicts of fact, if each side has adequately supported its factual contentions. For the same reasons observed by the Board in *Crowell, supra*, PERB Decision No. 2405a, administrative determinations granting or denying representation petitions are not subject to reconsideration under Regulation 32410.

The specific grounds for Metro’s request in this case illustrate why reconsideration is not available. Metro contends that the Board erred in determining that the Board agent was not required to conduct a community of interest analysis based on Metro’s response to the order to show cause. We affirmed the Board agent because Metro’s response stated, “there is no need to engage in a community of interest analysis,” and “[t]he only relevant question is whether Accounting Supervisors must be excluded from AFSCME because the position is confidential or managerial or professional.” (*LA Metro, supra*, PERB Decision No. 2916-T, p. 23.) Metro claims that other language in its response “should have made it clear that [Metro] was arguing a lack of community interest,” and that PERB thus had an obligation to conduct a formal hearing to gather facts relating to that issue.

Metro’s argument is based on the language of TEERA section 99565, subdivision (a), which states, “In each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board shall take into consideration all of the following criteria,” followed by descriptions of unit appropriateness criteria,

including the community of interest among employees. (Emphasis added.) The Board has long interpreted the same language appearing in other statutes under our jurisdiction to mean that Board agents need not consider unit appropriateness criteria not put into issue by the objecting party. (*Hemet Unified School District* (1990) PERB Decision No. 820, p. 10.) We agreed with the Board agent that Metro had declined to raise a community of interest dispute, both by expressly stating, “there is no need to engage in a community of interest analysis,” and also by never citing to TEERA’s community of interest factors or alleging facts relating to them. (*LA Metro, supra*, PERB Decision No. 2916-T, pp. 23-24.) We therefore held that the Board agent did not err in refraining from making community of interest findings. (*Ibid.*)

The purported “error” identified by Metro is therefore not a factual error. Rather, Metro’s failure to present facts or argument relating to community of interest in response to the OSC, “in the manner required,” with specific arguments and verified facts, meant that community of interest was not an issue in the investigation. (*Children of Promise, supra*, PERB Order No. Ad-402, pp. 17-18.) The Board agent afforded Metro multiple opportunities to put facts and argument relating to community of interest into issue, but Metro has consistently stopped short of doing so. Even were we to find that administrative determinations are subject to reconsideration, as Metro urges us to do, Metro’s request is based on the Board’s legal conclusion regarding Metro’s statements concerning the necessity of a community of interest analysis, and not on a purported factual error. Permitting a second Board review under these circumstances “delays finality... , is of no measurable benefit to the parties, ... and diverts Board resources away from cases” where fact-intensive hearings are

necessitated. (*Crowell, supra*, PERB Decision No. 2405a, pp. 13-14 [stating reasons weighing against reconsideration for dismissals of unfair practice charges].)

We therefore deny Metro's request for reconsideration because it does not and cannot allege any factual error or newly discovered evidence as required by PERB Regulation 32410.

II. AFSCME's Request for Attorney Fees

A party to a PERB matter seeking attorney fees and costs as a litigation sanction for conduct litigating the same case before PERB must normally prove that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11.) Metro's repeated attempts to distort its response to the OSC to mean the opposite of what it said ("there is no need to engage in a community of interest analysis") are certainly questionable. However, Metro's arguments concerning the availability of reconsideration under these specific procedural circumstances are non-frivolous, though we deny them *ante*. Because of this, we do not find Metro's conduct in requesting reconsideration of our decision in *LA Metro, supra*, PERB Decision No. 2916-T meets the sanctions standard. (See *Pasadena Area Community College District* (2024) PERB Order No. Ad-518, pp. 21-22.)

ORDER

The Public Employment Relations Board hereby DENIES the request by Los Angeles County Metropolitan Transportation Authority for reconsideration of the Board's decision in *Los Angeles Metropolitan Transportation Authority* (2024) PERB

Decision No. 2916-T and DENIES the request for sanctions filed by American Federation of State, County & Municipal Employees, Local 3634 in opposition to Metro's request for reconsideration.

Chair Banks and Member Krantz joined in this Decision.