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

| | | |
|---|---|---|
| DEBORAH NEWTON COOKSEY,<br><br>Charging Party,<br><br>v.<br><br>SAN BERNARDINO TEACHERS ASSOCIATION, CTA/NEA,<br><br>Respondent. | ) | Case No. LA-CO-808<br><br>Request for Reconsideration PERB Decision No. 1387<br><br>PERB Decision No. 1387a<br><br>September 13, 2000 |

Appearance: Deborah Newton Cooksey, on her own behalf.

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on a request by Deborah Newton Cooksey (Cooksey) that the Board grant reconsideration of San Bernardino Teachers Association, CTA/NEA (Cooksey) (2000) PERB Decision No. 1387 (San Bernardino TA). In San Bernardino TA, the Board dismissed the unfair practice charge, which alleged that the San Bernardino Teachers Association, CTA/NEA (Association) breached its duty of fair representation in violation of sections 3544.9 and 3543.6(a) of the Educational Employment Relations Act (EERA) and discriminated against Cooksey in violation of EERA section 3543.6(b).[1]

[1]EERA is codified at Government Code section 3540 et seq. EERA section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in

After reviewing the entire record, the Board hereby denies the request for reconsideration.

DISCUSSION

In San Bernardino TA, the Board concluded that many of the allegations in the unfair practice charge were untimely. For those that were timely filed, the Board held that Cooksey had failed to state a prima facie case of a violation of the duty of fair representation.

Reconsideration requests are governed by PERB Regulation 32410.[2] PERB Regulation 32410(a) states:

> (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. . . . 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 or law which was not previously available and could not have been

---

the appropriate unit.

Section 3543.6 provides, in relevant part:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

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

> 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.

Cooksey now seeks reconsideration of the Board's decision in San Bernardino TA based on two grounds. First, she repeats the "continuing violation" theory raised in her appeal and argues that the charge was timely filed. Second, she offers "new substantive evidence." These grounds will be discussed in turn.

Timeliness

Cooksey argues that the Board's decision should be reconsidered based on application of the "continuing violation" theory. She also raised this argument in her appeal and the Board did not find it convincing.

In reviewing requests for reconsideration, the Board has strictly applied the limited grounds included in the regulation, specifically to avoid the use of the reconsideration process to reargue or relitigate issues which have already been decided. (Redwoods Community College District (1994) PERB Decision No. 1047a; State of California (Department of Corrections) (1995) PERB Decision No. llOOa-S; Fall River Joint Unified School District (1998) PERB Decision No. 1259a.) In numerous request for reconsideration cases, the Board has declined to reconsider

matters previously offered by the parties and rejected in the underlying decision. (California State University (1995) PERB Decision No. 1093a-H; California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043a-S; California Faculty Association (Wang) (1988) PERB Decision No. 692a-H; Tustin Unified School District (1987) PERB Decision No. 626a; Riverside Unified School District (1987) PERB Decision No. 622a.)

Based on this precedent, we decline to reconsider San Bernardino TA's treatment of the timeliness issue.

New Evidence

Cooksey also offers new evidence in support of her request for reconsideration. She states, in part, that:

> On May 24, 2000 an Administrative Hearing was held in San Bernardino, CA as a result of false charges brought against me by my former employer San Bernardino City Unified School District. At the crux of this charge was the District's assertion that I had used Extended Sick Leave Benefits improperly. At the hearing [a District representative] testified under oath that I, indeed, was entitled to use Extended Leave Benefits during an accommodation leave. This vindication supports my claim that my Union Representative, Mr. Ohlson, who negotiated a settlement for me in exchange for my resignation, rushed to judgment when he presumed that I was guilty of professional misconduct instead of considering me innocent until proven guilty.

PERB Regulation 32410 is quite specific regarding reconsideration requests based on offers of new evidence. It states, in pertinent part:

> 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.

Although the first four requirements are arguably met here, the fifth is not. Cooksey's offer of evidence, i.e., a recent hearing at which she was vindicated, would only constitute grounds for reconsideration if it would impact or alter the decision of the previously decided case. Even with the new evidence, Cooksey's case contains a fatal flaw.

As stated in San Bernardino TA, the duty of fair representation is limited to contractually based remedies under the Association's exclusive control. (San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544 (Chestangue).) PERB has long held that a union has no duty to represent an employee where it does not have the exclusive right to act. (See, e.g., Chestangue [no obligation to represent teacher in a dismissal proceeding pursuant to the Education Code].)

Cooksey's offer of the new "vindication" evidence arises in the context of an unspecified "administrative hearing." In order to satisfy the fifth requirement in the regulation, Cooksey must establish that the "vindication" evidence impacts or alters the decision of the previously decided case. It is not clear that

the hearing or vindication arose in the context of a process over which the Association possesses exclusive control. Hence, Cooksey's request does not establish that the duty of fair representation was triggered or violated, and the result in the case does not change. Accordingly, the Board cannot grant reconsideration.[3]

ORDER

Deborah Newton Cooksey's request for reconsideration of the Board's decision in San Bernardino Teachers Association, CTA/NEA (Cooksey) (2000) PERB Decision No. 1387 is hereby DENIED.

Members Dyer and Baker joined in this Decision.

[3]If a record of Cooksey's vindication exists, she may have access to remedies in other forums. For the reasons explained in the warning and dismissal letters attached to San Bernardino TA and in this Decision, those remedies lie outside PERB's jurisdiction.