STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF TULARE, Respondent.	Case No. SA-CE-782-M Request for Reconsideration PERB Decision No. 2461-M PERB Decision No. 2461a-M February 29, 2016

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521; Renne, Sloan, Holtzman & Sakai by Charles D. Sakai and Erich W. Shiners, Attorneys, for County of Tulare.

Before Huguenin, Winslow and Gregersen, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by Service Employees International Union, Local 521 (SEIU) of the Board's decision in *County of Tulare* (2015) PERB Decision No. 2461-M. In that decision the Board affirmed an administrative law judge's (ALJ) dismissal of a complaint alleging that the County of Tulare (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to bargain in good faith when it, among other things, declared impasse after SEIU repeatedly declined to accept the County's offer of a one-time wage increase. Instead of imposing this last, best and final offer (LBFO), the County made no

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

changes in wages, hours or working conditions. The Board agreed with the ALJ that the County had not bargained in bad faith in failing to implement its LBFO or in any other manner in which it conducted negotiations over the proposed bonus.

The Board has reviewed SEIU's request for reconsideration and supporting documentation and the County's response thereto, and has taken official notice of its case files in this case. Based on this review, the Board denies SEIU's request for reconsideration for the reasons discussed below.

DISCUSSION

Requests for reconsideration of a final Board decision are governed by PERB Regulation 32410, subdivision (a) which states:

> 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.

Because reconsideration may only be granted under the "extraordinary circumstances" specified above, the Board applies the regulation's criteria strictly in reviewing requests for

reconsideration. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H; *King City Joint Union High School District* (2007) PERB Decision No. 1777a, pp. 3-4.) Reiterating the same facts and arguments made on appeal does not satisfy the requirements of PERB Regulation 32410(a). (*San Leandro Unified School District* (2007) PERB Decision No. 1924a; *Oakland Unified School District* (2004) PERB Decision No. 1645a.) Purported errors of law are not grounds for reconsideration. (*California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S, p. 6; *Apple Valley Unified School District* (1990) PERB Order No. Ad-209a.)

SEIU asserts as the ground for reconsideration the failure of Board Member Mark Gregersen to disqualify himself from the Board's deliberations and ruling on SEIU's exceptions to the proposed decision of the ALJ. According to SEIU, Member Gregersen's alleged disqualification arises from his previous employment with Renne Sloan Holtzman Sakai LLP (Renne Sloan), the law firm that represented respondent County of Tulare in this dispute. In making this claim, SEIU attempts to use the reconsideration process as a substitute for a motion for the recusal of Member Gregersen. While it is conceivable that a request for reconsideration could, in some circumstances, be the appropriate method by which to move for the recusal of a Board member post hoc, it is not appropriate in this case, as we explain below.

SEIU was on notice as of February 6, 2015, the date of Member Gregersen's appointment to PERB, that it was possible he could be assigned to a panel that considered this case. It could have filed a motion for his recusal pursuant to PERB Regulation 32155, subdivision (f), which provides in relevant part: "Any party to a case before the Board may file directly with the Board member a motion for his or her recusal from the case when exceptions are filed with the Board or within ten days of discovering a disqualifying interest provided that

such facts were not available at the time exceptions were filed." SEIU's counsel states in her declaration that SEIU could not have discovered the fact of Member Gregersen's failure to disqualify himself prior to October 30, 2015, when the Board issued its decision in this case.

However, SEIU need not have known that Member Gregersen was in fact a member of the panel in order to trigger the time limits in PERB Regulation 32155, subdivision (f). This is made clear in PERB Regulation 32155, subdivision (g), which states in relevant part:

> Within ten days after the filing of a motion for recusal, the Board member alleged to be disqualified shall render a decision stating the reasons therefore. *If the Board member is not on the panel assigned to hear the case*, he or she shall so inform the parties and indicate that he or she does not intend to participate in the case.

(*Ibid*; emphasis added.)

The italicized language indicates that the event triggering the time limits in PERB Regulation 32155, subdivision (f) is simply the *possibility*, not a *certainty*, that the board member in question may be on a particular panel. The italicized language would be superfluous if, under SEIU's interpretation, it could have waited until the Board issued the decision in this case before requesting that Member Gregersen recuse himself. SEIU was on notice as of February 6, 2015 that Member Gregersen might be a member of this or any other panel considering a matter pending before the Board itself in which SEIU was a party or a party-in-interest and Renne Sloan represented the employer. Such notice was the event triggering the time limits in PERB Regulation 32155, subdivision (f).

While we do not believe that a request for reconsideration is the appropriate procedural vehicle to move for the recusal of a Board member, it is in the best interest of PERB and its constituents to address the merits of SEIU's assertions that Member Gregersen should have recused himself from this case.

SEIU asserts that three subdivisions of PERB Regulation 32155 require Member Gregersen's recusal and reconsideration of the decision: subdivisions (a)(3), (a)(4), and (e).[2] None of these grounds require Member Gregersen's recusal.

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[2] PERB 32155, "Disqualification of Board Agent or Board Members," states in relevant part:

> (a) No Board member, and no Board agent performing an adjudicatory function, and no mediator or conciliator employed within the State Mediation and Conciliation Service, shall decide or otherwise participate in any case or proceeding:
>
> [¶ . . .¶]
>
> (3) When, in the case or proceeding, he or she has been attorney or counsel for any party; or when he or she has given advice to any party upon any matter involved in the proceeding before the Board; or when he or she has been retained or employed as attorney or counsel for any party within one year prior to the commencement of the case at the Board level.
>
> (4) When it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her.
>
> [¶ . . .¶]
>
> (e) Whenever a Board member shall have knowledge of any facts which, under the provisions of this rule, disqualify him or her to consider any case before the Board, it shall be his or her duty to declare the disqualification to the Board immediately upon learning of such facts. This declaration shall be made part of the official record of the Board. The Board member shall then refrain from participating and shall attempt in no way to influence any other person with respect to the matter.
>
> (f) Any party to a case before the Board may file directly with the Board member a motion for his or her recusal from the case when exceptions are filed with the Board or within ten days of discovering a disqualifying interest provided that such facts were not available at the time exceptions were filed. The motion shall be supported by sworn affidavits stating the facts constituting the ground for disqualification of the Board member. Copies of the

PERB Regulation 32155, subdivision (a)(3)

According to SEIU, Member Gregersen was required to disqualify himself under PERB Regulation 32155, subdivision (a)(3) from this matter because his former employer, Renne Sloan, was retained as counsel by the County within one year prior to SEIU's filing of exceptions with the Board. SEIU also avers that as of November 24, 2014, when SEIU filed exceptions to the proposed decision, and since 2013, Member Gregersen was employed by Renne Sloan as a "consultant."

SEIU contends that the term "counsel" in PERB Regulation 32155, subdivision (a)(3) includes a consultant who is not an attorney. Therefore, according to SEIU, Member Gregersen is disqualified to hear this case because he was "retained or employed as attorney or counsel for" the County within one year prior to the commencement of the case at the Board level. It is well-established that the terms "counsel," "attorney" and "lawyer" have the equivalent meaning. (See, e.g., Black's Law Dictionary (10th ed. 2014), definition of "counsel" ["One or more lawyers who, having the authority to do so, give advice about legal matters; esp., a courtroom advocate"]); *Hogue v. Johnson* (5th Cir. 1997) 131 F.3d 466, 496 ["What has been pursued is ineffective assistance of counsel, yet this portion of the sixth state habeas petition makes no reference whatever to *'counsel,' 'attorney,' 'lawyer,' or the*

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motion and supporting affidavits shall be served on all parties to the case.

(g) Within ten days after the filing of a motion for recusal, the Board member alleged to be disqualified shall render a decision stating the reasons therefore. If the Board member is not on the panel assigned to hear the case, he or she shall so inform the parties and indicate that he or she does not intend to participate in the case. In the event that the Board member decides to participate, he or she shall render a decision on the motion for recusal before doing so.

equivalent . . ." (emphasis added)].) SEIU's argument that Renne Sloan's website characterized its "management consulting services" as being "fully integrated with the Firm's legal services team" provides no basis to expand the clear and limited meaning of the term "counsel" in PERB's regulations.

Regulation 32155, subdivision (a)(3) describes three conditions requiring recusal, two of which apply to attorneys or "counsel" and one which applies to any person who has given advice to a party "upon any matter involved in the proceeding before the Board." Thus, an "attorney or counsel for any party" must recuse himself or herself from a case in which he or she has represented a party in the "case or proceeding." Likewise, a person who "has been retained or employed *as attorney or counsel* for any party within one year prior to the commencement of the case at the Board level" is subject to recusal. (Emphasis added.) Because Member Gregersen is not an attorney or counsel, the one-year interdiction on participating in cases does not apply to him. No evidence was produced, nor argument made, that Member Gregersen gave advice to any party upon any matter involved in the proceeding before the Board, i.e. the County of Tulare. None of the circumstances contemplated by PERB Regulation 32155, subdivision (a)(3) are applicable to this case. Member Gregersen's recusal is not required by this subdivision.

<u>PERB Regulation 32155, subdivision (a)(4)</u>

In SEIU's view, Member Gregersen was also disqualified from participating in this case under PERB Regulation 32155(a)(4), which requires recusal when it is made to appear probable that by reason of prejudice a fair and impartial consideration of the case cannot be had before him. The sole basis for the alleged prejudice asserted by SEIU is the fact that Respondent County of Tulare was the client of Member Gregersen's former employer.

According to SEIU, this past association means that Member Gregersen "is prejudiced against SEIU Local 521 in this case," and such prejudice "makes it appear probable that SEIU Local 521 was denied a fair and impartial consideration of the exceptions it filed." (Request for Recon., p. 3.) We reject this contention.

In *Gonzales Union High School District* (1985) PERB Decision No. 480, PERB held that "for bias or prejudice to be found, there must be evidence of a 'fixed anticipatory prejudgment' against a party by the judge." (*Id.* at p. 5; citations omitted; see also *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, p. 24 [judge's opinion on a question of law or an error of law or factual findings adverse to a party are not grounds for a charge of bias or prejudice]; *Inlandboatmans Union of the Pacific* (2012) PERB Decision No. 2297-M, p. 3 [claim of bias rejected in the absence of facts indicating that ALJ was unable to impartially consider the merits of the case by reasons of prejudice]; *Apple Valley Unified School District* (1992) PERB Decision No. 963, p. 2.)

SEIU provides no facts indicating that Member Gregersen had a "fixed anticipatory prejudgment" either in favor of the County or against SEIU. Yet it argues that a board member, by virtue of his or her past employment, must be considered automatically prejudiced in favor of a client of his or her former employer, and against any adversary of that client. There is no authority for such a proposition, and we decline to embark on this road that would lead to the recusal of each and every board member who comes from either a labor or management background.

Although not dispositive, our holding is consistent with the standard in California for disqualifying a state court judge for cause because of doubts about the judge's impartiality. (See, e.g., *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391 ["The California

Supreme Court has cautioned that a party raising the issue has a heavy burden and must clearly establish the appearance of bias. The appearance-of-partiality standard must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice. A judge has a duty to decide any proceeding in which he or she is not disqualified. Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified."] [Citations and internal quotation marks omitted; italics in original].)

PERB Regulation 32155, subdivision (e)

SEIU also implies that Member Gregersen was obligated to disqualify himself under PERB Regulation 32155, subdivision (e) due to his former employment with Renne Sloan. (Request for Recon., p. 3.) Presumably, this former employment caused Member Gregersen to have knowledge of facts which would disqualify him to consider any case before the board. In the absence of any facts supplied by a sworn declaration, we reject this contention. Mere past association with a law firm that represents the respondent does not establish that Member Gregersen had knowledge of any facts pertaining to this case.

In sum, Member Gregersen's former employment with Renne Sloan prior to joining the Board does not satisfy any of the relevant predicate conditions for a violation of PERB Regulation 32155, subdivision (e), viz., PERB Regulation 32155, subdivisions (a)(3) and (a)(4).

Request to strike language

In addition, SEIU requests that when the Board reissues its decision, it strike certain language in the decision that SEIU refers to as "unjustified characterizations of SEIU Local

521's exceptions and supporting arguments" and "derogatory commentary." (Request for reconsideration, p. 1) Since the Board denies SEIU's request for reconsideration and will not be reissuing a new decision in this case, it will not strike any language in it

ORDER

Service Employees International Union Local 521's request for reconsideration of the Public Employment Relations Board's decision in *County of Tulare* (2015) PERB Decision No. 2461-M is hereby DENIED.

Members Huguenin and Gregersen joined in this Decision.