

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PATRICIA L. WOODS,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS & REHABILITATION),

Respondent.

Case No. SA-CE-1640-S

Administrative Appeal

PERB Order No. Ad-382-S

December 30, 2009

Appearances: Patricia L. Woods, on her own behalf; State of California (Department of Personnel Administration) by Kevin A. Geckeler, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Patricia L. Woods (Woods) of an administrative determination rejecting Exhibit A to Woods' statement of exceptions because it was not properly served on the respondent, State of California (Department of Corrections & Rehabilitation) (CDCR).

The Board has reviewed the administrative determination and the record in light of Woods' appeal, CDCR's response and the relevant law.¹ Based on this review, the Board affirms the Appeals Assistant's rejection of Exhibit A to Woods' statement of exceptions for the reasons discussed below.

¹ Woods filed a reply brief in this matter. The Board has discretion to allow the filing of a reply brief when a response to an appeal "raises new issues, discusses new case law or formulates new defenses to allegations." (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408.) Because CDCR's response to Woods' appeal did none of these, the Board declines to accept Woods' reply brief.

BACKGROUND

On October 5, 2009, Woods filed a statement of exceptions to the administrative law judge's (ALJ) proposed decision in this case, along with a supporting brief and declarations. The filing also included a sealed envelope labeled "Exhibit A." A cover letter to the statement of exceptions said that "'Exhibit A' is being placed under seal to the Board." Page 46 of the statement of exceptions stated, in relevant part:

- b. **Filing of Confidential/Under Seal Materials (on December 16, 2008) Prior to the PERB's Agent Decision and Allegations of Fixed Anticipatory Prejudgment, Omissions, and Deletion of Witness Testimony and other Relative Evidence from the PERB's Hearing Transcript and Records**

(Exhibit A) – Part of Charging Party's-Statement of Exceptions (ON APPEAL).

On October 8, 2009, counsel for CDCR phoned the Appeals Assistant to request a copy of Exhibit A because it was not included with the statement of exceptions and supporting documents served on CDCR. The Appeals Assistant informed CDCR's counsel that it could not provide a copy of Exhibit A because it was filed under seal.²

On October 15, 2009, the Appeals Assistant notified Woods by letter that Exhibit A would not be included in the record on appeal because it was not properly served on CDCR. The letter cited PERB Regulations 32295, 32300 and 32140³ as the basis for the denial.

² Woods asserts that during this telephone call CDCR's counsel made an oral motion to exclude Exhibit A from the record on appeal. Nothing in the record supports this assertion. Instead, the record establishes that CDCR's counsel merely requested a copy of Exhibit A.

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

DISCUSSION

1. In Camera Review of Documents Filed Under Seal

In her appeal, Woods states she filed Exhibit A under seal for in camera review⁴ by the Board to determine whether the exhibit is relevant to issues on appeal and, if so, whether the exhibit should be “unsealed” and shared with CDCR. Woods contends the regulations cited in the October 15, 2009 Appeals Assistant’s letter do not apply to Exhibit A because service pursuant to those regulations would defeat the purpose of submitting it to the Board under seal for in camera review.

PERB Regulation 32300 sets forth the procedure for filing exceptions to a Board agent’s decision. Subdivision (a) of the regulation states, in relevant part: “Service and proof of service of the statement and brief pursuant to Section 32140 are required.” PERB Regulation 32140, subdivision (b) states, in full:

Whenever ‘service’ is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

PERB has not adopted regulations permitting in camera review of documents by Board agents or the Board itself. In the absence of such regulations, Woods urges the Board to conduct in camera review of her sealed documents just as the courts would. Specifically, Woods asks the Board to follow Evidence Code section 915, which states, in relevant part:

(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege; provided, however, that in any hearing

⁴ In camera: “A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom.” In camera inspection: “Under certain circumstances, a trial judge may inspect a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use.” (Black’s Law Dict. (6th ed. 1990) p. 760.)

conducted pursuant to subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) [stating in camera review is allowed only when the claim of privilege is based on official information, identity of informer or trade secret, or involves attorney work product, and the court cannot rule on the privilege claim without reviewing the content of the communication at issue].

Evidence Code section 915 applies to administrative agency proceedings. (*Southern Cal. Gas. Co. v. Public Utilities Comm.* (1990) 50 Cal.3d 31, 45, fn. 19.) However, this section does not allow in camera review of Exhibit A for two reasons. First, as Woods admits, she is not claiming that Exhibit A is protected from disclosure to CDCR by any privilege contained in the Evidence Code. Second, even if Woods claimed a statutory privilege, Evidence Code section 915, subdivision (b) allows in camera review of the content of a communication only when the claim of privilege is based on one of the three bases listed in that subdivision or involves attorney work product. (*Costco Wholesale Co. v. Superior Court* (November 30, 2009, S163335) __ Cal.4th __ at *19-20.) Because Exhibit A does not meet these statutory criteria, it cannot be reviewed in camera pursuant to Evidence Code section 915.

Woods argues, nonetheless, that Exhibit A should be treated as a privileged document because “Charging Party’s purpose in submitting it under seal upon counsel for the State was mainly to avoid potentially embarrassing information becoming completely public.” When confidentiality or privacy concerns exist over documents to be filed in court litigation, a party may request by separate, public motion that the documents be filed under seal. (Cal. Rules of Court, rule 8.160; *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 788.) Unlike the California Rules of Court, PERB regulations do not provide for the filing of documents under

seal. PERB cannot modify its regulations by decisional law. (*UPTE, CWA Local 9119 (Booth, et al.)* (2006) PERB Decision No. 1831-H.) It necessarily follows that PERB cannot modify its regulations governing the filing of documents to include filings under seal without following the rulemaking procedure set forth in the Administrative Procedure Act.⁵ Unless and until PERB completes that procedure, documents may not be filed under seal with PERB.

2. Ex Parte Communications

Woods asserts that the phone call by CDCR's counsel to the Appeals Assistant regarding Exhibit A violated the prohibition on ex parte communications set forth in PERB Regulation 32295, which states in full:

No party shall communicate with the Board itself, any member of the Board itself or any legal adviser to a member of the Board, orally or in writing, about any matter pending before the Board except as provided for in these regulations.

The October 8, 2009 phone call did not violate this regulation because it was not made to the Board itself, a Board member or a Board member's legal adviser but to the Board's Appeals Assistant. Further, even if the phone call constituted an ex parte communication, any violation was cured by the October 15, 2009 Appeals Assistant's letter, which disclosed the substance of the communication to Woods and provided her an opportunity to respond. (Gov. Code, § 11430.40; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1318.)

PERB Regulation 32295 does, however, support the Appeals Assistant's rejection of Exhibit A. Woods states in her appeal that she is asking the Board to rule on the relevance of Exhibit A. Because Exhibit A is a communication to the Board itself, it may only be made as provided for in PERB regulations. As noted, PERB regulations do not provide for in camera

⁵ The rulemaking provisions of the Administrative Procedure Act are codified at Government Code section 11340 et seq.

review of documents by the Board or filing of documents under seal. Thus, the only applicable regulations are those requiring service of filings on all parties, namely PERB regulations 32300 and 32140.

Additionally, acceptance of Exhibit A would violate the purpose behind PERB Regulation 32295. Prohibitions on ex parte communications are intended to protect a party's due process rights by preventing the adjudicator from basing a ruling on evidence not presented to that party. (*Mathew Zaheri Corp.*, *supra*, 55 Cal.App.4th at p. 1319.) Ruling on the relevance of Exhibit A without providing CDCR the opportunity to see or respond to the evidence would violate CDCR's right to a fair hearing. Such a result is exactly what PERB Regulation 32295 is intended to prevent.

3. Estoppel

Finally, Woods argues that the Board is required to accept Exhibit A because she previously filed documents under seal for in camera review by the ALJ and neither the ALJ nor CDCR objected to the practice. The Board is not bound by the conduct of its agents; rather, Board agents are bound by the Board's articulation of binding precedent. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506.) Nor does a party's inaction divest the Board of its duty to apply the statutes it is charged with administering. (See *Apple Valley Unified School District* (1990) PERB Order No. Ad-209 [on appeal, Board may consider "legal issues not raised by the parties when necessary to correct a serious mistake of law"].) Thus, neither the ALJ's acceptance of documents under seal nor CDCR's failure to object estops the Board from rejecting Exhibit A.

Nonetheless, given the Board's prior lack of guidance on this issue, equity counsels that the Board provide Woods an opportunity to serve Exhibit A in compliance with PERB Regulation 32140 within 20 days of service of this decision on the parties. Should Woods

avail herself of this opportunity, CDCR will have 20 days from the date Exhibit A is served on CDCR to respond to the filing pursuant to PERB Regulation 32310.

ORDER

The administrative determination that Exhibit A to Patricia L. Woods' statement of exceptions in Case No. SA-CE-1640-S was not properly served on CDCR is hereby AFFIRMED, without prejudice, to Woods refiling Exhibit A in compliance with PERB Regulation 32140 within 20 days after this decision is served on the parties.

Members Neuwald and Wesley joined in this Decision.