

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATEWIDE UNIVERSITY POLICE)	
ASSOCIATION and GILBERT A.)	
WASHINGTON, JR.,)	
)	Case No. S-CE-35-H
Charging Parties,)	
)	Request for Reconsideration
V.)	PERB Decision No. 845-H
)	
CALIFORNIA STATE UNIVERSITY,)	PERB Decision No. 845a-H
FRESNO,)	
)	February 13, 1991
Respondent.)	

Appearances: Mastagni, Holstedt & Chiurazzi by Mark R. Kruger, Attorney, for Statewide University Police Association and Gilbert A. Washington, Jr.; William B. Haughton, Attorney, for California State University, Fresno.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration filed by the California State University, Fresno (CSU) of PERB Decision No. 845-H, which issued on October 4, 1990. Having duly considered the request for reconsideration, the Board denies the request for the reasons that follow.

In PERB Decision No. 845-H, the Board found that CSU violated section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA or Act)¹ when it

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 provides, in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

unlawfully discriminated against Gilbert A. Washington, Jr. (Washington) because of his exercise of protected activity. Specifically, the Board found that CSU rejected Washington from probation in retaliation for his having testified at a PERB formal hearing involving a fellow campus police officer, John Moseley.

DISCUSSION

PERB Regulation 32410(a) provides, in relevant part:

Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

In its request for reconsideration, CSU asserts that the Board's decision contains four prejudicial errors of fact.

(a) 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.

For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

This section was subsequently amended, effective January 1, 1990. This change has no impact on the disposition of this case.

Specifically, CSU excepts to the Board's findings regarding:

- (1) the loud confrontation with Sergeant Maria Silva (Silva);
- (2) the disruption of the Bush security briefing;
- (3) Washington's derogatory reference to Silva; and
- (4) Washington's past employment history.

In regard to the loud confrontation with Silva, CSU argues the Board's statement that "there is no reference in either the informal evaluation or memo to Washington's alleged loud confrontation" constitutes a prejudicial error of fact. However, CSU admits there is no reference in Washington's informal evaluation to any loud confrontation. There is also no mention in the memo of a "confrontation." However, the June 7, 1988 memo, prepared by Silva pursuant to Lieutenant Steven King's (King) instructions, does mention Washington's conduct during the March 23, 1988 informal evaluation meeting.² The memo describes Washington's reaction to the discussion regarding his informal evaluation. The memo simply states "he was upset, loud, and

²The Board notes the factual summary erroneously states the memo did not mention Washington's conduct during the informal evaluation meeting. However, in its discussion, the Board accurately states there is no reference in the memo to Washington's loud confrontation. Additionally, Silva testified the confrontation occurred on April 9, 1988 during an informal evaluation discussion. Accordingly, the Board's reference to the March 23, 1988 informal evaluation meeting is incorrect. The Board also stated Sergeant James Myers (Myers) and Investigator Michael O'Reilly (O'Reilly) testified they heard Washington shouting at Silva. The Board notes this fact was elicited during Silva's and Myers' testimony. O'Reilly did not testify regarding this fact. As these errors are not prejudicial to our decision, these errors do not constitute grounds for reconsideration.

pouted."³ The Board's conclusion that the memo does not refer to a "loud confrontation" is supportable. The fact that Washington may have been loud and upset does not necessarily compel a conclusion that there was a "loud confrontation." The fact that Silva, when reporting about the meeting, did not mention to King that Washington had been threatening or verbally abusive towards her further supports the Board's finding that there was no "loud confrontation" that would justify Washington's rejection from probation. Finally, CSU's argument that the Board's use of the words "allegedly" and "alleged" "creates a prejudicial implied finding that the loud confrontation may not have taken place" is without merit.

With regard to the disruption of the Bush security briefing, CSU simply disagrees with the Board's reading of the testimony. CSU states, "any fair reading of the transcript requires a resolution of the conflicting testimony against Washington." This statement admits there is conflicting testimony. In addition to the conflicting testimony, CSU admits the incident

³While CSU refers to an "Exhibit P" attached to the June 7, 1988 memo, the record only consists of the June 7, 1988 memo. Apparently, the attachments to the June 7, 1988 memo were not part of the document entered into evidence. As "Exhibit P" is not part of the record, CSU's argument regarding this attachment is irrelevant.

was not included in Washington's performance evaluation.⁴ As the Board's resolution of the conflicting evidence does not constitute a prejudicial error of fact, CSU's argument does not constitute grounds for reconsideration.

CSU next argues that the administrative law judge's (ALJ) conclusion, regarding Chief William Anderson's (Anderson) honest belief that Washington made derogatory statements regarding Silva, is entitled to deference by the Board. This argument is without merit. The fact that the ALJ found Chief Anderson had an honest belief that such statements were made is irrelevant to a determination whether such statements were made by Washington. Since the testimony was inconsistent, the ALJ never determined whether the statements were actually made by Washington. As the ALJ did not make a credibility determination, the Board was free to make its own findings of fact and conclusions of law based on the evidence.

Finally, CSU argues the Board should have relied upon Washington's past employment history to find an operational justification. As this argument does not constitute a prejudicial error of fact or newly discovered evidence or law, this argument does not constitute an appropriate basis for granting CSU's request for reconsideration.

Although CSU asserts this incident was included in Attachment I of the June 7, 1988 memo, the attachments are not part of the record. Also, the Board did not refer to this memo in its decision. Rather, the Board stated this "incident was not included in Washington's performance evaluations." CSU admits this statement is correct. Thus, this argument is without merit.

ORDER

There being no proper grounds for reconsideration stated, the request for reconsideration of PERB Decision No. 845-H is hereby DENIED.

Members Shank and Camilli joined in this Decision.