

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

OXNARD ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2010011186

ORDER TO SHOW CAUSE AS TO
WHY SANCTIONS SHOULD NOT BE
INITIATED

In an order dated February 2, 2010, the Office of Administrative Hearings (OAH) notified Student, through counsel, and Oxnard Elementary School District (District) that the telephonic Prehearing Conference (PHC) in this due process matter was scheduled to take place at 10:00 a.m. on February 17, 2010. The order reminded all parties that written PHC statements, containing specified information, must be filed with OAH at least three business days prior to February 17, 2010. The order also provided all parties with information regarding continuance requests. OAH served this order on Student's counsel and the District's Special Education Director, Ron Moon, by United States Mail.

The parties did not file PHC statements. They were not initially available when the undersigned Administrative Law Judge (ALJ) attempted to hold the PHC.

APPLICABLE LAW

An ALJ has the authority to shift expenses from one party to another, when a party acts in bad faith. (Gov. Code, § 11455.30 [hereinafter, section 11455.30].) Section 11455.30 provides that the ALJ may:

[O]rder a party, the party's attorney, or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

Cases applying California Code of Civil Procedure section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding the sanctioned party's conduct reflected tactics or actions were performed in bad faith and that they were frivolous, designed to harass, or

designed to cause unnecessary delay. (*Childs v. Painewebber Incorporated* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.). Bad faith is shown when a party engages in actions or tactics that are without merit, frivolous, or solely intended to cause unnecessary delay. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) However, the bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*Id.*, at page 702).

California Code of Regulations, title 1, section 1040 provides in part:

(a) The ALJ may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

[¶] . . . [¶]

(b) Before imposing sanctions against a party, the ALJ shall provide that party notice and an opportunity to be heard.

Moreover, California Code of Regulations, title 5, section 3088, [hereinafter, section 3088] also authorizes the presiding hearing officer to issue contempt sanctions pursuant to the applicable provisions of Government Code sections 11455.10 and 11455.20 of the Administrative Procedure Act. Section 3088, subdivision (e), allows for an ALJ to order the parties to an action to pay reasonable expenses, including cost of personnel, to OAH. However, section 3088 treats contempt sanctions differently from sanctions shifting expenses from one party to another. Section 3088, subdivision (c), requires that, "Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education."

DISCUSSION

The PHC statements in this case were due on February 11, 2010. On February 16, 2010, OAH staff contacted the parties to inform the parties that OAH had not received a PHC statement from either party. Student's counsel informed OAH staff that the parties were filing a joint request for continuance (JRFC). However, by the time of the PHC on February 17, 2010, OAH had not received a PHC statement or a JRFC from either party.

On February 17, 2010, when the undersigned ALJ initiated the PHC teleconference call, Student's counsel's office informed the ALJ that counsel was unavailable; and, District staff informed the ALJ that Mr. Moon no longer worked at the District and Mr. Moon's replacement, Ms. Joanne Abhold, was unavailable. The parties' respective offices were told that the teleconference would be reinitiated and they needed to have a representative available. Shortly thereafter, when the phone teleconference was reinitiated, Student's counsel and Mr. Shawn Goldman, Assistant Superintendent, appeared for the parties.

Neither party was prepared to move forward with the PHC. The parties stated that while they had exchanged a JRFC, it had not been filed with OAH. They confirmed that neither party had filed a PHC statement. Their oral JRFC was taken under submission, subject to a written JRFC being filed later in the day, and the teleconference was terminated without a PHC being held. OAH later granted the JRFC.

In light of the above, OAH issues this Orders to Show Cause as to Why Sanctions Should Not be Initiated (OSC).¹ The parties shall submit written responses to this OSC, including any supporting declarations, showing why sanctions should not be initiated.

ORDER

The parties shall file a written response, including supporting declarations, as to the OSC within five days of the date of this order.

Dated: March 3, 2010

/s/

BOB VARMA
Administrative Law Judge
Office of Administrative Hearings

¹ On February 17, 2010, Student submitted a declaration of Student's counsel, Mr. Eric Menyuk. The declaration will be considered, along with any response submitted by District, in the ruling on this OSC.