BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2022050576

ORDER FOLLOWING ORDER TO SHOW CAUSE HEARING IMPOSING SANCTIONS AND SHIFTING OAH EXPENSES

AUGUST 18, 2022

On June 28, 2022, the Office of Administrative Hearings, called OAH, issued an Order to Show Cause why OAH costs should not be shifted to the parties and/or the parties' attorneys for their failure to participate in this case, or respond to OAH orders and communications, after Student filed his due process hearing request in this matter on May 12, 2022. On July 22, 2022, Administrative Law Judge Robert G., Martin conducted the Order to Show Cause hearing. Marc Levine, Attorney at Law, appeared on behalf of Student. Daniel Gonzalez, Attorney at Law, appeared on behalf of William S. Hart Union High School District, called Hart. The hearing was recorded. Each party filed a response to the Order to Show Cause.

PROCEDURAL HISTORY

The following relevant procedural history is based on the case file, the parties' responses to OAH's June 28, 2022 Order to Show Cause, and discussion with the parties' attorneys at the July 22, 2022 Order to Show Cause hearing.

On January 29, 2022, Student filed a due process hearing request with OAH, naming Hart, in OAH Case no. 2022010823.

On May 12, 2022, Student filed this matter 2022050576 against Hart.

On May 16, 2022, Student and Hart agreed to settle both matters.

On May 17, 2022, OAH served the scheduling order in this matter on both parties, setting the prehearing conference for this matter on June 20, 2022, and hearing on June 28, 29, and 30, 2022. The scheduling order stated at page 10: "If the parties reach settlement in the case, OAH must be notified as soon as possible. Notification is to be in writing. . . . The matter will remain on calendar and will not be dismissed until OAH receives the proper notification."

On May 18, 2022, Levine emailed Gonzalez a copy of the scheduling order, confirming the case number for this recently filed matter. Levine asked Gonzalez to reference this matter in the final settlement agreement Gonzalez was preparing, and stated he would dismiss this matter after approval of the settlement by Hart's school board.

Based on the settlement, and Levine's representation Student would dismiss this matter, Gonzalez notified Hart that this matter was settled. Hart never appeared in this matter, or communicated with OAH, until July 19, 2022, when Gonzalez filed a notice of representation on Hart's behalf. OAH served the scheduling order and all other

documents in this action on Hart administrators designated by Hart to receive documents in which an attorney for Hart had not yet appeared.

After May 12, 2022, neither party filed any document with OAH until July 19, 2022, despite receiving numerous OAH communications and orders requesting a response.

On June 16, 2022, OAH emailed both parties electronic invitations to the videoconference PHC.

On June 18, 2022, OAH emailed both parties electronic invitations to the Case Center online service for the parties to upload electronic hearing exhibits.

Neither party filed a PHC statement, as required. Neither party appeared at the June 20, 2022 PHC.

On June 20, 2022, OAH served on both parties an Order to Show Cause why this case should not be dismissed for inactivity. OAH ordered Student to immediately send in a request to dismiss the case, if the case should be dismissed, or to show cause in writing no later than June 22, 2022, at 5:00 PM as to why this matter should not be dismissed for lack of activity. The June 20, 2022 order set a videoconference hearing of the order to show cause for June 24, 2022, at 10:00 AM.

Student did not file a dismissal or any response to the order to show cause why the matter should not be dismissed for inactivity.

On June 22, 2022, OAH staff contacted both parties by telephone and left voice messages asking if the hearing set for June 28, 2022, was expected to proceed.

On June 23, 2022, OAH emailed both parties electronic invitations to the videoconference order to show cause. Neither party filed any document with OAH, or contacted OAH.

On June 24, 2022, the ALJ opened the videoconference link for the order to show cause hearing from 9:59 AM to 10:30 AM. Neither party appeared for the videoconference hearing on the order to show cause.

On June 28, 2022, OAH served on the parties the order continuing the hearing of this matter to August 9, 10, and 11, 2022, and Order to Show Cause why OAH expenses should not be shifted to the parties and/or their attorneys. Hart forwarded the Order to Show Cause to attorney Gonzalez.

The parties' failure to participate in this case or respond to OAH caused OAH to incur costs in the amount of $2,573.75 preparing for a June 20, 2022 prehearing conference in this matter that neither party attended, creating an electronic evidence file for the parties to upload hearing exhibits for the hearing of this matter, preparing for a June 24, 2022 order to show cause hearing why the matter should not be dismissed for inactivity that neither party attended, and preparing the June 28, 2028 Order to Show Cause why OAH expenses should not be shifted.

This included a total of 7.75 hours of ALJ time, billed to the California Department of Education at a rate of $325 per hour, and a $55 electronic evidence fee incurred in setting up the electronic evidence file. The hearing ALJ billed 0.5 hours on June 16, 2022 reviewing the complaint, scheduling the videoconference for the PHC, and emailing the parties invitations with a link to the videoconference. The ALJ responsible for setting up the electronic evidence file for hearing of the matter billed 0.5 hours on June 17, 2022, and the $55 electronic evidence fee was incurred the same date. The hearing ALJ on

June 20, 2022, billed 1.25 hours in prehearing conference preparation, including one hour preparing a draft order following PHC, and fifteen minutes on the videoconference PHC itself, waiting to see whether the parties would appear at the PHC, which they did not. Following the PHC on June 20, 2022, the hearing ALJ billed 0.75 hours preparing an order to show cause why Student's case should not be dismissed for inactivity, and the presiding ALJ billed 0.25 hours reviewing the order before it issued. On June 23, 2022, the hearing ALJ billed 1.0 hour scheduling the videoconference for the order to show cause re dismissal for inactivity, emailing the parties invitations with a link to the videoconference researching, and researching and preparing a draft order dismissing Student's case for inactivity. On June 24, 2022, the hearing ALJ billed 1.0 hour preparing for the order to show cause hearing, including 15 minutes on the videoconference order to show cause hearing itself, waiting to see whether the parties would appear, which they did not, and 15 minutes completing a draft order dismissing Student's case for inactivity. On June 27, 2022, the hearing ALJ spent 2.5 hours researching and preparing the Order to Show Cause why expenses should not be shifted, issued on June 28, 2022.

Student's response to OAH's Order to Show Cause, and the supporting sworn declaration of Attorney Levine, explained that Attorney Levine received a telephone call from OAH staff on June 23, 2022, and told staff this matter had been settled. Because the staff member did not indicate any additional action was necessary to remove this case from OAH's active list, Levine believed that the telephone call was sufficient. Thereafter, Levine did not respond to further OAH communications and Orders because he believed they involved only OAH housekeeping as part the process of dismissing the cases following the school board’s approval.

At the July 22, 2022 Order to Show Cause hearing, Attorney Levine apologized sincerely to OAH and to Hart's attorney for not filing written notice of the settlement of

this case, and for failing to respond to OAH's communications and Orders. Levine acknowledged his conduct was mistaken, but stated he did not intend to be disrespectful to OAH or Hart, and had not acted willfully, in bad faith, frivolously, or with the intent to cause unnecessary delay. Attorney Levine took responsibility for the parties' failure to notify OAH of the settlement of the action, and asked that OAH not include Hart or its attorneys in any sanctions issued.

APPLICABLE LAW

In certain circumstances, an ALJ presiding over a special education proceeding may shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With prior approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH "as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Code, § 11455.30, subd. (a).) Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).)

An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (Id.) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g).)

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).)

A finding of "bad faith" under section 128.5 does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast*).) An attorney may be sanctioned because he or she fails to call the court and opposing counsel to alert them to his or her inability to attend a hearing. (*Ibid.*) Such conduct is "discourteous . . . and not in good faith" and Section 128.5 "does not require willfulness to be an aspect of the [improper] actions or tactics." (*Id.*, at p. 702-703, citing *In Re Marriage of Gumabao* (1984) 150 Cal.App.3d 572, 577 (*Gumabao*).)

Multiple California cases have found the failure to notify the court and opposing counsel of the intent not to appear to be sanctionable conduct. In *Mungo v. UTA French Airlines* (1985) 166 Cal.App.3d 327, an attorney requested a trial continuance that was denied. He appeared at trial and again requested a continuance, and when that was denied, he dismissed the case. The appellate court found that counsel had the

responsibility not to lead the court and opposing counsel to believe that there would be a trial on the day scheduled, and such conduct indicated bad faith. (*Id*. at p. 333.)

Similarly, in *West Coast*, attorneys for one party engaged in an "inadvised series of events" that culminated in requiring opposing counsel to prepare for and travel to the courthouse for trial when they knew or should have known that the matter would not go to trial. The appellate court noted that the attorneys' actions abused both the opposing party and the court, and was sanctionable under section 128.5 as bad faith conduct for the sole purpose of harassing the other party. (*West Coast*, *supra*, 2 Cal.App.4th at p. 704.)

In *Gumabao*, the attorney had a trial scheduled to begin, but had not completed an ongoing trial. He left a note for his secretary to notify the other court on the morning of trial that he would appear at 11:00 a.m. rather than 9:00 a.m. as scheduled. The ongoing case continued into the afternoon, and the attorney notified the other court that he would appear by 2:30 p.m. The pending trial was trailed to 2:00 p.m. and then continued to another day.

The trial court-imposed section 128.5 sanctions on the attorney, consisting of the costs of opposing counsel's appearance on the day of trial. The appellate court upheld the award, finding that section 128.5 empowers a trial court to award attorney's fees as sanctions against an attorney who was aware of his inability to appear at the time set for trial, had an opportunity to but failed to take appropriate steps to notify opposing counsel of such inability, and failed to adequately inform the court of the reasons for his or her delay in appearance. (*Gumabao*, *supra*, 150 Cal.App.3d at pp. 573-574.)

The Court of Appeal in *Gumabao* rejected the attorney's contention that his actions were not willful, and found that his failure to notify the court and opposing

counsel that he would not be able to appear, or the reasons for the nonappearance, were properly construed by the trial court as a delaying tactic. (*Id.* at p. 577.) It reasoned that even if being engaged in another trial was a valid excuse for not appearing, his discourteous act of not notifying opposing counsel and the court was not in good faith, was frivolous and caused unnecessary delay, and justified being held responsible for the attorney's fees of the opposing party. (*Ibid.*) The court held that sanctions may be imposed under section 128.5 even where actions are not willful since that section does not require willfulness to be an aspect of actions or tactics. (*Ibid.*)

The State Bar Act and the Rules of Professional Conduct apply to proceedings before the Office of Administrative Hearings. OAH is a "court" within the meaning of Business and Professions Code section 6103, which authorizes sanctions for an attorney's dereliction of duties. (*Matter of Moriarty* (Cal. Bar Ct., Apr. 20, 2017) 5 Cal. State Bar Ct. Rptr. 511, 522) Under rule 3-110(a) of the Rules of Professional Conduct, "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Attorneys have a fiduciary duty to their clients to "maintain adequate management and accounting procedures for the proper operation of a law office . . . ." (*In re Valinoti* (Cal. Bar Ct., Dec. 31, 2002) 2002 WL 31907316 at p. 15; 03 Cal. Daily Op. Serv. 1322002.) "At a minimum, respondent was required to develop and maintain procedures for . . . calendaring court hearings and filing deadlines [and] tracking court hearing dates and filing deadlines to insure they are not missed . . . ." (*Ibid.*)

LEGAL CONCLUSIONS

This case was filed by Student, and while OAH's scheduling order directed both parties to notify OAH of a settlement, only Student could withdraw the case. Hart failed to hire an attorney or appear in this action based on a reasonable belief the matter was

settled as of May 18, 2022. Thereafter, although Hart's administrators of record improperly failed to monitor the completion of the settlement, and failed to respond to communications and Orders from OAH, the responsible administrators were not attorneys or officers of the court, and are not held to the same standard of knowledge or conduct as an experienced attorney. Hart is directed in the future to respond to all communications and Orders from OAH, regardless of whether Hart believes the matter is settled, or to forward the communication or order to its attorneys if Hart is unsure whether a response is required, or how to respond. OAH believes this direction, and the possibility of sanctions if the direction is not followed, should be sufficient to deter Hart, or other similarly situated local educational agencies, from repeating such conduct.

Attorney Levine did not act with actual malice, or an intent to cause harm to Hart or OAH, when he failed to respond to numerous OAH communications and orders. However, his conduct caused OAH to incur substantial unnecessary expense preparing for a prehearing conference, a due process hearing, and an order to show cause hearing regarding dismissal. Attorney Levine is an experienced special education attorney who appears frequently before OAH. He is, or should be, aware of OAH's requirement that a party must file a written notice of settlement or request for dismissal before pending dates in a matter can be vacated. This requirement is stated in every OAH scheduling order and order following prehearing conference. He also is, or should be, aware that parties are legally required to respond to OAH Orders, and that timely responses to communications and Orders are necessary for OAH to manage and conserve its administrative resources for the benefit of the special education Students and local educational agencies OAH serves.

Although Attorney Levine's conduct was not willful, it was "discourteous . . . and not in good faith" under *West Coast*, *supra*, and warrants the imposition of sanctions to

discourage future similar conduct. Therefore, Section 128.5 sanctions of $2,573.75 are imposed on Attorney Levine, reflecting the cost to the California Department of Education resulting from his failure to notify OAH of the settlement of this action, and failure to respond to OAH communications and Orders.

Levine & Maybaum, LLP is jointly and severally responsible for the violations committed by its attorney, and will be held jointly and severally liable for the sanctions imposed.

The amount of these expenses, which were the result of Attorney Levine's bad faith actions, should be sufficient to deter Attorney Levine, or other attorneys similarly situated, from repeating of such conduct.

This order has been approved by the General Counsel of the California Department of Education.

ORDER

1. Within 30 days, Attorney Marc Levine and Levine & Maybaum, LLP shall pay the Office of Administrative Hearings, 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, Attn: Poh-Ling Oon, by certified check the sum of $2,573.75 as cost sanctions. These sanctions are imposed on Marc Levine and Levine & Maybaum jointly and severally. These costs may not be passed on to Student or Parents.
2. Failure to comply with this order may result in a civil judgment or finding of contempt.
3. A copy of this order shall be provided to the State Bar of California as required by subdivision (a)(3) of Business and Professions Code section 6086.7.

IT IS SO ORDERED.



Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings