OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010865
R. BURNINGHAM	)
	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	R. Burningham
For Respondent:	David J. Kowalczyk, Tax Counsel
For Office of Tax Appeals:	Andrew Jacobson, Tax Counsel III

A. ROSAS, Administrative Law Judge: On April 30, 2019, this panel held an oral hearing on this matter. Our July 18, 2019 opinion (Opinion) sustained the action of respondent Franchise Tax Board for the 2013 tax year. Appellant R. Burningham timely filed a petition for rehearing (PFR) under Revenue and Taxation Code (R&TC) section 19048.

A rehearing may be granted where one of the following grounds exists, and the substantial rights of the complaining party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law. (Cal. Code of Regs., tit. 18, § 30604(a)-(e); see also *Appeal of Do*, 18-OTA-002P; *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654.) We find that the grounds set forth in appellant's PFR do not meet these requirements.

Regarding an alleged irregularity in the appeal proceedings or an accident or surprise, appellant argues that the Office of Tax Appeals (OTA) "has no appearance of independence, no

appearance of impartiality, no appearance of transparency, and no appearance of fairness." This argument echoes the objections appellant made in his March 3, 2019 letter, in which he objected to the use of "any and all" Administrative Law Judges (ALJs) to adjudicate his appeal. In the *Order Overruling Appellant's Objection to Panel* dated March 5, 2019, we overruled appellant's objections for three reasons. First, appellant did not allege or establish that any of the ALJs should be disqualified for bias, prejudice, or interest in the proceeding. (Cal. Gov. Code, § 11425.40(a).) Second, the OTA regulations do not provide for peremptory challenges to an ALJ assigned to hear an appeal; thus, there is no authority that would allow a party to request a new ALJ without a showing of cause. (Cal. Code Regs., tit. 18, § 30411.) Third, a disqualification of every single ALJ employed by OTA would prevent the existence of a quorum qualified to act in this appeal.

Appellant also argues that he had only a limited amount of time to discuss a "criminal complaint" against respondent. The *Prehearing Conference Minutes and Orders* dated April 11, 2019, resulted in the issuance of five orders, one of which required that the parties comply with specific time limits during the oral hearing and provided appellant with a total of 25 minutes to argue his case, whereas it provided respondent with only 15 minutes. During the April 30, 2019 oral hearing, these five orders were summarized into the record, the parties agreed that these were accurate summaries of the *Prehearing Conference Minutes and Orders*, and appellant did not object to his allotment of 25 minutes to present his case.

Therefore, as to his arguments about the ALJs and the time allotted for oral argument, we find that appellant has failed to raise any valid concerns regarding an irregularity, or an accident or surprise, in the appeal proceedings. (Cal. Code Regs., tit. 18, § 30604(a), (b).)

In his PFR, appellant also makes other allegations, including the allegation that there was insufficient evidence to justify the written opinion or that the opinion is contrary to law. However, appellant merely repeats the same or similar arguments and contentions that he made to the panel during the initial appeal, which, as set forth in our Opinion, we have already considered and rejected. Appellant has the burden on appeal of proving error in respondent's assessment, and he cannot satisfy the requirements for granting a rehearing by presenting the same or similar arguments that he advanced during the initial appeal. In addition, a PFR is not an opportunity to raise new issues or arguments that could have been addressed prior to the

issuance of our Opinion.[1] Therefore, we find that appellant has failed to show that there was insufficient evidence to justify the opinion or that the opinion is contrary to law. (Cal. Code Regs., tit. 18, § 30604(d).)

Accordingly, we find that appellant has not shown good cause for a new hearing based on any of the regulatory grounds required, and we deny his PFR.

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

Date Issued: 3/19/2020

[1] Respondent issued appellant a Frivolous Submission Penalty Notice dated March 10, 2017, which imposed a frivolous submission penalty of $5,000 pursuant to R&TC section 19179. Appellant raises the imposition of this penalty as an issue in his PFR. However, because the imposition of this penalty may not be reviewed in any administrative or judicial proceeding, we do not discuss the frivolous submission penalty. (R&TC, § 19179(e)(3).)