

On March 2, 1983, ALJ James W. Tamm sent CSEA a letter warning that if it failed to file a "Request for Hearing - At Issue Declaration" on or before the close of business March 29, 1983, the charge would be dismissed without further notice. A copy of a standard at-issue declaration was enclosed, so that CSEA could simply fill in the blanks and return it to PERB if it so desired.

CSEA neither filed the at-issue declaration nor communicated with PERB in any other manner regarding the charge by March 29, 1983. On April 5, 1983, the ALJ issued the Notice of Dismissal of Complaint which is challenged in the instant appeal.

CSEA's Exceptions

CSEA contends that its failure to comply with PERB regulation 32635 should be excused due to the existence of "extraordinary circumstances" within the meaning of PERB regulation 32136. In the alternative, CSEA contends that PERB regulation 32136 is invalid because it establishes a higher standard for excuse of a late administrative filing than is "currently recognized by the courts of this state."

DISCUSSION

PERB regulation 32652 (Cal. Admin. Code, tit. 8, part III) states, in pertinent part:

et seq. All references are to the Government Code unless otherwise noted.

If a request for hearing is not filed within six months from the date of issuance of the complaint, the complaint will be dismissed unless good cause is shown.

Regulation 32136 provides as follows:

A late filing may be excused in the discretion of the Board only under extraordinary circumstances. A late filing which has been excused becomes a timely filing under these regulations.

CSEA contends that the following facts constitute extraordinary circumstances in this case:

At the time of the ALJ's warning letter and the due date for the at-issue memorandum:

- (1) CSEA's entire operation was in great turmoil due to CSEA's decision to withdraw from the UC representation case;
- (2) Marilyn Sardonis, the field representative who was handling the case for CSEA, was in the process of transferring her files to another field representative, Toni Jones;
- (3) CSEA laid off Toni Jones on the day that Sardonis¹ files, including the instant case, were transferred to her.

CSEA argues that:

As a result of this confluence of events, Tamm's letter of March 2, 1983, was filed away without having been read by anyone until after PERB had already dismissed the charge.

Based upon the above, CSEA contends that it should be excused from its obligation to comply with applicable PERB regulations.

In Ocean View School District (6/10/80) PERB Decision No. 131, PERB held that the fact that petitioner's counsel experienced chest pains on the day prior to the deadline for filing exceptions did not constitute "extraordinary circumstances" to excuse the filing of exceptions which were one week late.

In Regents of the University of California (8/24/83) PERB Decision No. 340-H, PERB rejected a late filing of an "at-issue" memorandum such as that involved herein, finding that the existence of pending settlement discussions did not constitute extraordinary circumstances.

CSEA cites no case for the proposition that the factors described above constitute "extraordinary circumstances" within the meaning of rule 32136.

In Anaheim Union High School District (7/17/78) PERB Order Ad-42r, PERB noted, at p. 3, that the newly-adopted "extraordinary circumstances" standard for acceptance of late filings was a higher standard than its predecessor, "sufficient cause." The Board went on to state:

. . . extraordinary circumstances means exactly that - out of the ordinary, remarkable, unpredictable situations or occurrences far exceeding the usual which prevent a timely filing.

It is clear from the facts as alleged by CSEA that the failure to file the at-issue memorandum was occasioned in the instant case by circumstances entirely within CSEA's control.

We decline to hold that a party's own neglect, inadvertent or otherwise, constitutes "extraordinary circumstances" sufficient to excuse a late filing under our regulations.

We find CSEA's alternative argument similarly unpersuasive. CSEA argues that PERB's regulation 32136 is invalid because it imposes a higher standard to excuse a late filing than that "currently recognized by the courts of this state." CSEA argues that:

The appellate courts of this state have repeatedly held that administrative agencies must excuse a short delay in filing an administrative appeal if the delay is for 'good cause'¹ and there has been no prejudice to the agency.

This assertion is simply incorrect. What courts have done is to interpret the standard "good cause" to allow late filings occasioned by "excusable neglect" of counsel. None of the cases cited by CSEA deal with the higher standard which PERB has adopted in its current regulations, that of "extraordinary circumstances."

Rather, those cases involved either situations in which the agency regulations in question expressly permitted receipt of late filings upon the lesser showing of "good cause" [Gibson v. Unemployment Ins. Appeals Bd. (1973) 9 Cal.3d 494; Flores v. Unemployment Ins. Appeals Bd. (1973) 30 Cal.App.3d 681] or in which no express standard was prescribed in agency regulations, in which cases the court adopted the "good cause" standard and found that it was met [Faulkner v. Public Employees' Retirement

System (1975) 47 Cal.App.3d 731; Gonzales v. California State Personnel Board (1977) 76 Cal.App.3d 364].

There is no indication in any of the cases cited by CSEA that the courts would have invalidated a higher standard such as "extraordinary circumstances" had the agencies in question adopted it.

Even if PERB were to adopt a "good cause" standard, we would not find that the circumstances of the instant case would constitute "excusable inadvertence" within the meaning of the cited cases. The time limit in this case was a full six months, as opposed to the far more stringent time limits involved in the cited cases (Gibson and Flores, 10 days; Faulkner, 30 days; and Gonzales, 20 days). In Gibson, the three-day delay was due to the failure of a secretary in a legal aid office to note a filing deadline on the office calendar. In Flores, the three-day delay was occasioned by a secretarial backlog in a legal aid office. In Faulkner, a four-day delay was occasioned by confusion resultant from a partnership dissolution and attendant personnel changes in petitioner's attorney's office. In Gonzales, a trial court found that a breakdown in communications between petitioner and his attorney occasioned by the strain of dealing with parallel criminal proceedings of a serious nature constituted good cause for the six-day delay in filing. In each of the above cases, the delay was discovered and filings were quickly submitted by petitioner. None of the aggrieved parties received prior

warning from the agencies involved regarding the upcoming filing deadline.

In this case, on the other hand, CSEA had six months in which to file the "at-issue memorandum," and did not realize that it had failed to meet the deadline until it received notification of the dismissal from PERB. Further, CSEA was served with a warning letter by PERB 27 days prior to the deadline, reminding it that the case would be dismissed if it failed to file the required memorandum and providing it with a form by means of which it could do so. The CSEA representative assigned to the instant case admits in her declaration that she saw the warning letter and opened it, but that she did not read it.

To summarize, we do not find that the circumstances noted by CSEA constitute "extraordinary circumstances" sufficient to excuse a late filing under PERB Regulation 32136. Further, we do not find that PERB is mandated by California decisional law to adopt the lesser standard of "good cause" to excuse late filings.

ORDER

On the basis of the foregoing Decision and the record as a whole, it is hereby ORDERED that the charge in case No. SF-CE-125-H be DISMISSED.

Members Jaeger and Morgenstern joined in this Decision.