

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LORI E. EDWARDS,

Charging Party,

v.

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-5908-E

PERB Decision No. 2561

April 27, 2018

Appearances: Lori E. Edwards, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Banks, Shiners and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Lori E. Edwards (Edwards) to the proposed decision of a PERB administrative law judge (ALJ), dismissing all allegations in the complaint and Edwards' unfair practice charge against the Lake Elsinore Unified School District (District). The complaint alleged that the District violated the Educational Employment Relations Act (EERA)¹ by involuntarily reassigning Edwards from first grade to kindergarten, and by placing a number of students in her kindergarten class that exceeded the limit set forth in the collective bargaining agreement between the District and the Lake Elsinore Teachers Association, which is the exclusive representative of the District's certificated employees, including Edwards.

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The ALJ dismissed the complaint's retaliation allegations for lack of proof. He also denied Edwards' renewed motion for repugnancy review of an arbitrator's decision, declined to consider an allegation of interference with protected rights, which Edwards had raised in her closing brief but which was not set forth in the complaint, and denied the District's motion for attorney's fees as sanctions against Edwards for her allegedly dilatory conduct at the hearing.

Edwards' statement of exceptions and supporting brief assert 22 errors in the proposed decision, including the ALJ's denial of her motion for repugnancy review, various findings and conclusions supporting the dismissal of the complaint's two retaliation allegations, and the ALJ's refusal to consider unalleged matters argued in Edwards' post-hearing brief. The District contends that Edwards' exceptions were untimely filed with PERB, fail to comply with PERB Regulations,² and are without merit.

The Board has reviewed the proposed decision, Edwards' exceptions and supporting brief, and the District's response and supporting brief in light of applicable law. Based on our review, we have determined that Edwards' statement of exceptions and supporting brief were untimely filed with PERB without good cause, and therefore will not be considered. In the absence of timely filed exceptions from either party, we conclude that, as of June 6, 2017, the proposed decision and order dismissing the complaint became final and binding on the parties. (PERB Regs. 32305, subd. (a), 32215; *Regents of the University of California* (1990) PERB Decision No. 806-H, pp. 2, 5.) We explain our reasoning below.

DISCUSSION

Pursuant to our regulations, documents are considered "filed" with the agency, when either of the following conditions is satisfied. First, documents are considered filed "when the

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

originals, and the required number of copies, if any, are *actually received* by the appropriate PERB office during a regular PERB business day.” (PERB Reg. 32135, subd. (a), emphasis added.) Alternatively, documents are also considered filed “when received during a regular PERB business day by facsimile transmission at the appropriate PERB office together with a Facsimile Transmission Cover Sheet,” or when received by electronic mail in accordance with PERB Regulation 32091. (PERB Reg. 32135, subd. (b).)³ When there is no electronic or facsimile version, the original and any other hard copies must be “actually received” by the appropriate PERB office within the deadline to be considered timely filed.

PERB Regulation 32130 provides, in relevant part, that a five-day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California. (PERB Reg. 32130, subd. (c).) Read together with the “actually received” requirement, Regulation 32130 provides an additional five days for the original and any copies to be delivered to PERB, but it does not alter the “actually received” requirement. That is, the documents must still be “actually received” by PERB within the five-day extension. A document deposited in the mail on the final day of the five-day extension and delivered the following day would not be “actually received” by the agency until after the deadline for filing and, absent good cause, will not be considered. (PERB Reg. 32136; see also *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-446, pp. 8-12.)

³ A party filing documents by facsimile transmission or by electronic mail “must also deposit the original, together with the required proof of service and the required number of copies in the U.S. mail or with a delivery service for delivery to the appropriate PERB office.” (PERB Reg. 32135, subd. (c).)

In this case, the ALJ served the proposed decision by mail on April 11, 2017,⁴ and the original deadline for filing exceptions with the Board was therefore May 8, 2017. On April 24, 2017, Edwards requested an extension of time to file exceptions. The following day, PERB's Appeals Assistant notified the parties that Edwards' request had been granted, and that May 29, 2017, was the new deadline for Edwards to file exceptions to the proposed decision with the Board. Because the Appeals Assistant's notice was served by mail, Edwards was entitled to an additional five days pursuant to PERB Regulation 32130, subdivision (c). However, because the fifth day after May 29th was June 3, 2017, a Saturday, Edwards' deadline for filing exceptions was further extended to the following Monday by operation of PERB Regulation 32130, subdivision (b).⁵ Accordingly, any exceptions and supporting brief must have been "actually received" by PERB no later than the close of business on June 5, 2017. According to the proof of service forms included with Edwards' statement of exceptions and brief, the documents were deposited in the mail on June 5, 2017. More importantly, they were not actually received by PERB until June 7, 2017, and were therefore not timely filed.

Under these circumstances, the customary practice would be for PERB's Appeals Office to notify the parties that the filing had been rejected as untimely, a determination which could then be appealed to the Board itself pursuant to PERB Regulations 32350 and 32360.

⁴ The proposed decision was incorrectly dated April 11, 2016, rather than 2017. However, there is no indication in the file that this error caused any confusion or prejudice to either party, and we therefore disregard the editing oversight as harmless. (*Fremont Unified School District* (2003) PERB Decision No. 1528, pp. 2-3.)

⁵ Subdivision (b) provides in relevant part: "Whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code Sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day." This extension is applied after any other applicable extension of time, including the five-day extension for service by mail. (*Lake Elsinore Unified School District* (2017) PERB Order No. Ad-449, p. 8.)

However, for reasons that are unclear, PERB's Appeals Office did not notify Edwards that her exceptions and supporting brief were untimely, and, the issue was therefore raised for the first time in the District's response to Edwards' exceptions, which was filed with the Board on June 26, 2017. Nevertheless, the District's response includes proof of service, and there is no indication that Edwards was not properly served. Under similar circumstances, we have held that all parties had adequate notice of the issues and could have requested leave to file a reply brief in order to be heard on any issues raised for the first time in the response, even if a party chose not to avail itself of the opportunity. (*Lake Elsinore Unified School District, supra*, PERB Order No. Ad-449, p. 5.)⁶

In this case, Edwards has not requested leave to file a reply to the District's response nor provided the Board with evidence that her late filing was due to excusable neglect, misinformation or other circumstances beyond her control. Nor is there any indication in the file that she at least made a conscientious effort to comply with the June 5, 2017 deadline. Consequently, there is no good cause for the Board to excuse her late filing. (PERB Reg. 32136; *Lake Elsinore Unified School District, supra*, PERB Order No. Ad-446, pp. 8-9.) We therefore decline to consider Edwards' exceptions and supporting brief.

PERB Regulation 32305, subdivision (a), provides that, "Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final on the date specified therein." PERB Regulation 32215 also provides, in relevant part, that, "Unless expressly adopted by the Board itself, a proposed or final Board agent decision, including

⁶ While PERB Regulations neither expressly permit nor preclude filing reply briefs, Board decisional law has long held that acceptance of a reply brief may be appropriate to aid the Board in its review of the underlying dispute, particularly where a response has raised new issues, discussed new case law or formulated a new defense. (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408, pp. 4-5; see also *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14.)

supporting rationale, shall be without precedent for future cases.” Because neither Edwards nor the District⁷ has excepted to the proposed decision, it became final and binding as of June 6, 2017, but without precedential effect for future cases.

ORDER

Lori E. Edwards’ exceptions to the proposed decision in Case No. LA-CE-5908-E are hereby DISMISSED.

Members Shiners and Krantz joined in this Decision.

⁷ Although the District’s response disagrees with the ALJ’s conclusion that Edwards’ involuntary reassignment constituted an adverse action, this disagreement is not identified as an exception (or cross-exception), nor specifically urged as such. The issue is therefore waived. (PERB Reg. 32300, subd. (c).) Moreover, even if urged as an exception, this issue would not affect the result in this case. Regardless of whether Edwards’ reassignment was objectively adverse to her employment, the ALJ found no evidence of nexus for this, or any other retaliation allegation and, accordingly dismissed the complaint in its entirety. Because the District was the prevailing party, there is no basis for the Board to consider an exception from the District on this issue (*Fremont Unified School District, supra*, PERB Decision No. 1528, pp. 2-3), and the District has not excepted to the ALJ’s denial of its motion for sanctions or any other aspect of the proposed decision.