STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHULA VISTA CITY SCHOOL DISTRICT, Employer, and CHULA VISTA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA, Employee Organization, APPELLANT.	Case No. LA-CE-73 PERB Order No. Ad-29 Administrative Appeal April 4, 1978

Appearances: Charles R. Gustafson, Attorney, for Chula Vista Elementary Education Association, and Arlene Prater, Deputy County Counsel, for Chula Vista City School District.

Before Gluck, Chairman; Cossack Twohey and Gonzales, Members.

OPINION

This is an appeal by Chula Vista Elementary Education Association, CTA/NEA (Association) from the rejection by the Executive Assistant to the Board of its exceptions to the hearing officer's recommended decision. The Executive Assistant to the Board rejected the Association's exceptions as untimely filed pursuant to Rule 35030.[1]

FACTS

Pursuant to an unfair practice charge filed by the Association, a hearing was held before a PERB hearing officer. A recommended decision was issued dismissing the charge in its

[1]Repealed and superseded, effective March 20, 1978.

entirety and stating that pursuant to Rule 35029[2] the recommended decision would become final on October 17, 1977 unless timely exceptions were filed.

Rule 35029[3] stated:

> 35029. Decision. The recommended decision shall become final fifteen calendar days after it is served on all parties or on the date specified in the decision, whichever is earlier, provided no party files a statement of exceptions to the recommended decision as provided in Section 35030.

Rule 35030[4] stated, in pertinent part,

> 35030. Statement of Exceptions to Recommended Decision.
>
> (a) Within seven calendar days after service of the recommended decision a party may file a statement of exceptions to the recommended decision or any part of the record or proceedings.

The recommended decision was served on October 3, 1977. Exceptions were therefore due on October 10, 1977, a state holiday on which PERB offices were closed. The exceptions were deposited in the mail on October 10, 1977; they were received in the Sacramento headquarters offices on October 14. On October 18 the Executive Assistant to the Board rejected the exceptions as untimely filed and returned them to the Association.

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[2] Id.

[3] Id.

[4] Id.

The Association timely appealed the Executive Assistant's rejection. The appeal is based, among other things, on "mistake, inadvertence and excusable neglect of counsel."

In an unrefuted affidavit submitted in support of the appeal, the Association's attorney states that it is his standard practice to both mail exceptions to the Board's Sacramento office and deliver them to the Los Angeles regional office on or before the seventh day following service of the recommended decision. The affidavit further states that on October 10 a temporary secretary was employed who apparently, although she gave no such indication, did not understand the instructions to deliver the exceptions to the regional office. The temporary secretary is no longer employed by the attorney. In reviewing the file following the Executive Assistant's rejection of the exceptions, the attorney learned that they had not been delivered to the regional office.

DISCUSSION

In Gibson v. Unemployment Insurance Appeals Board[5] the California Supreme Court held that it was reversible error for an agency to automatically and mechanically reject late-filed appeals without regard to, among other things, the excusability of the error. In the instant case, had the temporary secretary employed by the Association's attorney followed instructions, the

[5] 9 Cal.3d 494, 108 Cal.Rptr. 1, 509 (1973).

Association's exceptions would have been timely filed.[6] The secretary was instructed to deliver the exceptions to the regional office but failed to do so. Excusable neglect by the Association's attorney[7] is grounds to waive the time requirements and failure to do so is an abuse of the Board's discretion and reversable error.[8] Accordingly, we reverse the Executive Assistant and entertain the Association's exceptions.

ORDER

The decision of the Executive Assistant is reversed.

Appellant Association may resubmit its rejected exceptions to the recommended decision within seven (7) calendar days of receipt of this decision. Within seven (7) calendar days after service of the statement of exceptions the Respondent District may file a response and supporting brief.

By: Jerilou Cossack Twohey, Member

Harry Gluck, Chairman

Raymond J. Gonzales, Member, dissenting:

I dissent from the majority opinion on several grounds. First, it is arguable that the Board in its appellate capacity

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[6]While the letter accompanying the recommended decision states that exceptions should be filed in Sacramento, it has been an administrative practice of the Board to accept exceptions timely filed in a regional office because of the limited time within which exceptions must be filed pursuant to the Board's then existing rules and regulations.

[7]Cf. Anaheim Union High School District, PERB Order No. Ad-27, March 16, 1978.

[8]See also Gonzales v. State Personnel Board, 76 Cal.App.3d 364, ___Cal.Rptr___ (1977).

lacks jurisdiction to consider the appellant's case on its merits due to an untimely filing of appeal. Second, assuming that the Board possesses jurisdiction, the majority's acceptance of counsel's argument that inadvertence by a temporary secretary should be viewed as excusable grounds for overcoming the late filing of its exceptions is totally unsustainable for several reasons. Lastly, the Board fails to recognize that in this area of the law, a higher standard of compliance with time requirements is not only justifiable, but preferable, in contrast to other areas of the law.

A preliminary issue which the majority opinion completely overlooks is whether or not the failure of the Chula Vista Elementary Education Association (Association) to file a timely appeal of the hearing officer's recommended decision deprives the Board itself of jurisdiction to decide the case on its merits. In a most recent case, City of Santa Barbara v. California Coastal Zone Commission,[1] the Court noted that failure to file a timely appeal in an administrative proceeding, as with the court, precludes the appellate body from considering the case on the grounds of lack of jurisdiction. In that case, the California Coastal Zone Conservation Commission's older regulations failed to clearly define where and when an appeal was to be filed and whether filing was deemed complete on mailing or actual receipt.

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[1](1977) 75 Cal.App.3d 572.

The Court acknowledged the adoption by the Commission of subsequent regulations which clarified the ambiguities just mentioned. In reference to the new regulations, the Court stated:

> The presently effective regulations clearly specify both the time and place and the manner in which appeals from decisions of Regional Commissions must be filed... By [these regulations], appellants are clearly advised not only when but where their appeal must be filed. So long as these regulation[s] remain in effect, appeals not filed in accordance therewith will be beyond the jurisdiction of the Commission.[2]

Former section 35030(a) of the Board's rules,[3] in effect at the time in question, provided the time period within which an exception to a hearing officer's recommended decision was to be filed. Additionally, former section 35002(b), falling under the label of "Filing," clearly referred to the act of filing in the context of actual receipt by the appropriate regional office. There can be no doubt that the rules adopted by this Board were clear on their face. Further, former section 35030(b) stated, "The filing of the statement of exceptions submits the case to the Board itself." Such language reflected a consistency with the quasi-judicial model which the Board itself had assumed and still assumes in the area of appeals. Specifically, the Board since its initial stages has viewed itself as an appellate body that would review cases on their merits provided a statement of exceptions had been filed. Thus, the filing of an appeal, as

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[2] Id., at p. 576. See also Van De Veer v. Dept. of Alcoholic Beverage Control (1957) 155 Cal.App.2d 817, 820-21.

[3] The Board's rules are published in California Administrative Code, title 8, section 31100 et seq.

distinguished from other types of filings, is not merely a procedural step. Rather it is the necessary step the parties must take to enable the Board itself to exercise its appellate functions. Thus, if the parties fail to take such a step, the Board lacks jurisdiction to hear the appeal. See Hollister Convalescent Hosp. Inc. v. Rico (1975) 15 Cal.3d 660, 666.

But assuming for the sake of argument that the failure to file a timely appeal is not the jurisdictional flaw argued above, other reasons exist for rejecting the Association's appeal.

The majority accepts counsel's contention that inadvertence by a temporary secretary in filing the appellant's statement of exceptions constitutes excusable neglect.[4] I find the majority's position weak for two reasons. First, my colleagues fail to assess critically whether counsel's declaration factually constitutes excusable neglect justifying a reversal of the Executive Assistant's decision. Second, my colleagues' decision in this case results in a confusing and irrational application of two different standards where exceptions have been untimely filed.

Regarding counsel's declaration, the majority's most significant error is finding that but for the temporary secretary's failure to follow instructions, the Association's exceptions would

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[4]Counsel also claims confusion as to the service and filing requirements of this agency, citing a form letter of the agency's General Counsel as the source of such confusion. The form letter advises the parties as to the filing of exceptions. It defines "service" but not "filing." To this extent, perhaps, the letter is deficient. Nonetheless, the rules delineated filing requirements as noted above in the text. Moreover, in his very appeal, counsel, who is known to have practiced before this agency since its early stages, acknowledges the fact that it has been the office practice to file exceptions on or before the seventh day as required by our former rules. Given the foregoing, I find it incredible that counsel would now claim confusion.

have been timely filed. Counsel states in his declaration:

> The normal practice of this office is to file the exceptions in the regional office of EERB on or before the seventh day and to also mail same to the Sacramento Office of EERB at the same time. In reviewing the file I find no evidence that the exceptions in this case were filed in the Los Angeles office of EERB as I had instructed my secretary. On October 10, 1977, we were employing a temporary secretary, who is no longer with this office, and apparently she did not understand my instructions though she gave no such indication. (Emphasis added.)

I would note from the above-quoted portion of counsel's declaration counsel's statement that he had instructed a temporary secretary to "file" the Association's exceptions with the regional office. The majority equates "file" with "deliver," which I think is a fair reading of what counsel meant, particularly since he used the term "mail" in the same breath in his declaration. As such, it would have been impossible for the temporary secretary to comply with the counsel's instructions since the regional office was closed on October 10, 1977, a state holiday, and personal delivery could not have occurred on that date.

Of course, it may be that the instructions given to the temporary secretary were to deliver the exceptions to the regional office prior to October 10, 1977. Counsel's declaration, however, does not state this and I do not think this assumption can or should be made by the Board. Moreover, the impression one receives in reviewing counsel's declaration is that instructions were given to the temporary secretary to deliver the exceptions on October 10, 1977. Alternatively, it may be that counsel's instructions to the temporary secretary were to place the exceptions in the mail on October 10, 1977, hoping that delivery would occur in the regional office on October 11, 1977. But, again, since counsel's declaration is

relatively cryptic on the nature of given instructions, the most we can do is glean from the tone of his declaration and certain phrases a strong suggestion that counsel used the term "file" to mean "personal delivery" as distinguished from "mail delivery."

But even assuming counsel did intend "file" to mean "mail delivery," it appears to me rather imprudent on his part to have placed the exceptions in the mail the day before they were actually due, October 11, 1977. He could have easily waited until that day to assure proper filing of the exceptions[5] by personal delivery rather than improvidently assuming that the exceptions would be received by mail in the regional office that day.[6] Counsel does not explain, however, why he failed to consider filing on October 11, 1977.

Finally, it seems to me that counsel was imprudent in failing to check on the secretary's filing of the Association's exceptions

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[5]Code of Civil Procedure section 12, subdivision (a), provides in pertinent part:

> If the last day for the performance of any act provided or required by law to be performed within a specified period of time shall be a holiday, then such period is hereby extended to and including the next day which is not a holiday.

[6]This is not unlike the situation in the Board's recently issued Anaheim Union High School District, (March 16, 1978) PERB Order No. Ad-27, where the appellant argued excuse on the grounds of postal delay even though its appeal was postmarked a day before the filing due date.

to ensure its timely filing given the fact that she was a temporary secretary and it was reasonably foreseeable that she could have misunderstood his instructions.

On the basis of the foregoing, I cannot find counsel's declaration to merit reversal of the Executive Assistant's decision on a theory of excusable neglect. I think it is clear that counsel has even failed to act as "a reasonably prudent person would under the same circumstances," the applicable test in excusable neglect cases.[7]

My second criticism of the majority opinion concerns the implicit application of a low standard of proof in this case[8] despite (1) the fact that the Board's rules and regulations in effect at the time this appeal was filed offered no standard whatsoever for excusing an untimely filing of exceptions to hearing officers' proposed or recommended decisions, and (2) the fact that the Board has recently adopted new regulations, effective March 20, 1978, wherein a late filing of exceptions to hearing officers' decisions may be excused only under "extraordinary circumstances," a much higher standard.[9]

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[7] Dingwall v. Vangus, Inc. (1963) 218 Cal.App.2d 108; Fidelity Federal Sav. & Loan Assn. v. Long (1959) 175 Cal.App.2d 149; Elms v. Elms (1946) 72 Cal.App.2d 508.

[8] My colleagues cite to Anaheim Union High School District, supra, PERB Order No. Ad-27, where the Board adopted a "sufficient cause" standard to be applied to appeals of administrative decisions per se and to Gibson v. Unemployment Ins. Appeals Bd. (1973) 9 Cal.3d 494, where the Court interpreted the "good cause" standard set forth in Unemployment Insurance Code section 1328 in view of an administrative rule applied by the California Unemployment Insurance Appeals Board.

[9] California Administrative Code, title 8, section 32133.

The majority fails to realize the confusion it creates by accepting indiscriminately counsel's less than lucid declaration as grounds for proving excusable neglect, thus applying an extremely low standard of proof, when in cases coming before the Board under its new regulations a higher burden will have to be met. How do my colleagues intend to reconcile the application of these two different standards to late-filed exceptions?

Finally, I believe the majority fails to appreciate the importance of requiring an especially high standard of compliance with the Board's time requirements in contrast to time requirements in other areas of the law. Where a delayed filing merely postpones the payment of money (like social welfare benefits) to the party, himself responsible for the delay, the law justly views with liberality excuses for the delay and sets a low standard for timely filings.[10] Since the only injury from the delay accrues to the late party, there is no reason for strictness. This logic is not applicable to the administration of the Educational Employment Relations Act. The EERA was enacted to promote stability in the public school systems of our state by improving personnel management and employer-employee relations. School districts, employee organizations, and the general public all have a vital interest in such a goal. In the interest of promoting that goal, the Legislature and the Board have adopted specific deadlines to ensure that the parties get to the negotiating table and enter into a suitable

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[10] See, e.g., Gibson v. Unemployment Ins. Appeals Bd., supra, 9 Cal. 3d 494.

contract as soon as possible. Both representation and unfair labor practice cases are subject to such timelines. As to the latter, there can be no doubt that an unresolved unfair labor practice charge clouds the process and that its presence threatens stability. All the parties are entitled to a prompt resolution of such charges. Thus, in my view, it is extremely important that such cases be finalized as quickly as possible--either on the merits absent any procedural flaws or because a party has failed to act on its rights in a timely fashion.

On the basis of the foregoing and in view of past decisions issued by this Board[11] where timeliness of filing was the sole issue, I find the majority position in this case to be not only confusing but lacking responsibility.

Raymond J. Gonzales

Raymond J. Gonzales, Member

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[11]Cf. Anaheim Union High School District, supra, PERB Order No. Ad-27, comparing its facts to the present case. See also Hanford Joint Union High School District Board of Trustees (February 1, 1978) PERB Dec. No. 48; Glendale Unified School District and Glendale Community College District (February 1, 1978) PERB Order No. Ad-25; Los Angeles Unified School District (November 8, 1977) EERB Order No. Ad-19; and Santa Ana Unified School District (October 28, 1977) EERB Decision No. 36.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
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October 18, 1977

Mr. Charles R. Gustafson
1125 West Sixth Street
Los Angeles, CA 90017

Re: Chula Vista Elementary Education Association, CTA/NEA, vs. Chula Vista City School District, Case No. LA-CE-73

Dear Mr. Gustafson:

This will acknowledge receipt of the exceptions filed by Chula Vista Elementary Education Association in the above-captioned case. Unfortunately, your documents were not timely filed pursuant to California Administrative Code Section 35030.

With regard to filing exceptions to recommended decisions in unfair practice cases, Section 35030 states that exceptions must be filed within seven calendar days after service. The recommended decision in this case was served on October 3, 1977, making exceptions due on October 10, 1977. Exceptions were filed in this office on October 14, 1977.

As a result of this failure to timely file, the enclosed exceptions cannot be submitted to the Board itself for consideration. Please be advised that while there are no rules to this effect, you are welcome to appeal this rejection of your filing to the Board itself. Should you choose to do so, your appeal should be filed in this office on or before seven calendar days from receipt of this communication.

Sincerely,

Stephen Barber

Stephen Barber
Executive Assistant
to the Board

Enclosure