

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

JESSE VICKERS,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS),

Respondent.

Case No. SA-CE-1384-S

Administrative Appeal

PERB Order No. Ad-328-S

October 1, 2003

Appearance: State of California (Department of Personnel Administration) by Crystal L. Mitchell, Legal Counsel, for State of California (Department of Corrections).

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Corrections) (State) of an administrative determination by the appeals assistant. The administrative determination held that the State's response to the appeal of the dismissal in this case was not timely filed in accordance with PERB Regulation 32635(c).¹

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635(c) provides:

(c) If the charging party files a timely appeal of the dismissal, any other party may file a statement in opposition to the appeal within 20 days following the date of service of the appeal. The original opposition and five (5) copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the filing party. Service and proof of service of the statement pursuant to Section 32140 are required.

The appeal was served on the parties by mail on March 12, 2003.² The response was due to be filed by April 7. The State's response was sent by regular U.S. mail and filed with the Board on April 11, four days late. As a result, in the administrative determination, the appeals assistant found the response to be untimely filed.

On appeal, the State notes PERB Regulation 32142(c)(2), which states:

Whenever a document is required to be "filed" or "served" with any of the below listed entities, the proper recipient shall be:

- (c) An employer
- (2) in the case of a state employer: the Governor or his designated representative on behalf of the State of California.

In its appeal, the State alleges that it served Jesse Vickers (Vickers) with a Notice of Representation on January 2, indicating that Crystal L. Mitchell (Mitchell), legal counsel for the State of California (Department of Personnel Administration), is the State's representative in this matter. The proof of service indicates that Vickers' appeal was served on the "Chief Counsel." Since Vickers did not serve the appropriate person, the State argues that his service is deficient. Mitchell did not receive the appeal until March 17, and requests that the time for service be amended to March 17, so that the response becomes timely filed.

DISCUSSION

PERB Regulation 32135(a) provides that:

- (a) All documents shall be considered "filed" when actually received by the appropriate PERB office before the close of business on the last date set for filing, or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing and addressed to the proper PERB office. (Emphasis added.)

²All dates refer to 2003.

PERB Regulation 32136 allows the Board to excuse a late filing for “good cause.” The Board has previously excused late filings for good cause in various circumstances. For example, the Board has found good cause when the filings have been lost in the mail. (See City of Sacramento (Irish) (2003) PERB Decision No. 1541 (charging party provided proof that amended charge was timely mailed); North Orange County Regional Occupational Program (1990) PERB Decision No. 807 (exceptions were filed before the deadline but sent to the Los Angeles PERB regional office and not to the Sacramento headquarters office)). The Board has also excused filings that were not timely received. (See Los Angeles Unified School District (2003) PERB Order No. Ad-318 (late filing excused when, after inquiry, charging party misunderstood deadline, mailed appeal by first class mail one day before the due date, and the appeal was received only one business day late); The Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H (the University mailed the document on the filing date but it was received three days late); Trustees of the California State University (1989) PERB Order No. Ad-192-H (exceptions sent by certified letter deemed late because the postage meter was incorrectly set). The Board further has excused late filings due to “honest mistakes” such as mailing or clerical errors. (Barstow Unified School District (1996) PERB Order No. Ad-277.) Finally, the Board has excused late filings due to errors on the part of the United States Postal Service. (California School Employees Association (Simeral) (1992) PERB Order No. Ad-233; State of California (Department of Corrections) (1994) PERB Order No. Ad-259-S.)

However, the Board has not found good cause in situations where the party’s attorney was directly responsible for the late filing. (State of California (Water Resources Control Board) (1999) PERB Order No. Ad-294-S; Calipatria Unified School District (1990) PERB Order No. Ad-217.)

In this case, in the State's unverified appeal,³ the State's legal counsel alleges that the appeal was served on the wrong individual, the "Chief Counsel." Whether service was to the Chief Counsel of the Department of Personnel Administration, where the State's legal counsel is employed, or of the Department of Corrections, is not explained. As a result, according to the State's legal counsel, she received the appeal on March 17, five days after it was served by mail, as allowed by PERB Regulation 32140.⁴ Five days is not an unreasonable time within which to receive documents sent by first class mail. The State's response was due April 7, three weeks later. Under PERB Regulation 32132(a),⁵ a party may request an extension of time for filing documents before the original filing deadline. The State's legal counsel did not avail herself of this opportunity. In addition, the State's response was served by first class mail. As mentioned, PERB Regulation 32135(a) provides that documents are filed, if not received by the deadline, "when mailed by certified or Express United States mail, as shown

³The State's appeal did not include any declarations, affidavits, or attachments to support its position.

⁴PERB Regulation 32140 provides in pertinent part:

- (a) All documents referred to in these regulations requiring "service" or required to be accompanied by "proof of service," except subpoenas, shall be considered "served" by the Board or a party when personally delivered or deposited in the first-class mail properly addressed.

⁵PERB Regulation 32132(a) provides:

- (a) A request for an extension of time within which to file any document with the Board itself shall be in writing and shall be filed at the headquarters office at least three days before the expiration of the time required for filing. The request shall indicate the reason for the request and, if known, the position of each other party regarding the extension. Service and proof of service pursuant to Section 32140 are required. Extensions of time may be granted by the Board itself or an agent designated by the Board itself for good cause only.

on the postal receipt or postmark” The State did not use the methods specified by Section 32135(a) to mail its response, but rather, mailed the response by first class mail.

Nonetheless, the State urges the Board to excuse its late-filed response. However, these facts do not provide evidence of good cause. This case is more similar to those cases in which the party’s attorney was directly responsible for the late filing. The State’s legal counsel acknowledged receipt of the appeal well before the deadline and could have requested an extension, if necessary, but did not. Under these circumstances, the Board finds that good cause does not exist to excuse the State’s late filed response.

ORDER

The State of California (Department of Correction) request that the Board accept its late filed response to Jesse Vickers’ appeal in Case No. SA-CE-1384-S is hereby DENIED.

Members Baker and Neima joined in this Decision.