

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



LORI E. EDWARDS, ET AL.,

Charging Party,

v.

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-6082-E

PERB Order No. Ad-446

June 28, 2017

Appearances: Lori E. Edwards, Representative, for Lori E. Edwards, et al.; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Lake Elsinore Unified School District (District) from an administrative determination, in which PERB's Appeals Assistant rejected as untimely the District's response to exceptions to a proposed decision filed by Charging Parties Lori E. Edwards, David Pickett, Victoria Pickett and Kimberly A. Rosales (collectively, Charging Parties) in Unfair Practice Case No. LA-CE-6082-E. As explained in the Appeals Assistant's determination, Charging Parties filed and served by mail their exceptions to the proposed decision on December 27, 2016 and, pursuant to PERB Regulations¹ 32310 and 32130, subdivision (c), any response to Charging Parties' exceptions was therefore due no later than January 23, 2017. On February 7, 2017, fifteen days after the deadline, the District filed its

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

response to Charging Parties' exceptions. The Appeals Assistant notified the parties the same day that the District's response had been rejected as untimely.

Pursuant to PERB Regulations 32360² and 32136,³ the District appeals from the Appeals Assistant's determination and requests that the Board excuse the late filing and consider the District's response to Charging Parties' exceptions when deciding the merits of the underlying unfair practice charge. For the reasons explained below, we find no grounds to excuse the District's late filing and therefore deny the District's appeal.

BACKGROUND

On November 29, 2016, a PERB administrative law judge (ALJ) issued his proposed decision dismissing the complaint and underlying unfair practice charge in this case. The proposed decision was served on the parties the same day with PERB's standard transmittal letter from PERB's Chief ALJ, which describes the Board's processes and deadlines for filing exceptions, responses to exceptions and requests for extensions of time. Exceptions to the proposed decision were due no later than December 27, 2016, which included the 20-day period for filing exceptions pursuant to PERB Regulation 32300, subdivision (a), plus a five-day extension for service by mail within the State of California, pursuant to PERB Regulation 32130, subdivision (c), and Code of Civil Procedure section 1013. On December 27, 2016, Charging Parties sent to PERB as an e-mail attachment a 27-page, single-spaced document captioned "Exception [sic] to Proposed Decision," which included 40 exceptions to the proposed decision. Because December 26, 2016 was a holiday, pursuant to PERB Regulations, the

² PERB Regulation 32360, authorizes appeals to the Board itself from most administrative decisions by the agency and sets forth the criteria for filing such appeals.

³ As discussed in greater detail below, PERB Regulation 32136 provides that a late filing may be excused in the discretion of the Board for good cause.

Appeals Assistant apparently deemed the document filed when received on December 27, 2016, which was the next regular PERB business day.⁴ The filing included proof of service indicating that on December 27, 2016, it had also been served by mail on Attorney Todd Robbins (Robbins), who is the District's designated representative in this matter. The proof of service indicated that the document had been mailed to PERB on December 27, 2016, but did not indicate that it had also been electronically filed with PERB.⁵

On December 28, 2016, Charging Parties electronically filed with PERB a two-page, single-spaced document captioned "Exceptions to Proposed Decision Amended," in which Charging Parties requested to amend Exception No. 39 by adding certain testimony that,

⁴ PERB Regulation 32135, subdivision (b), provides, in relevant part, that documents shall be considered "filed" with the agency "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 Section 32091,*" which provides for electronic filing of documents as e-mail attachments. (Emphasis added). Thus, while a document is only considered "filed" when received *during a regular PERB business day* by facsimile transmission, the portion of the regulation pertaining to electronic filing does not specify whether a document is considered "filed" the same day it is electronically transmitted to PERB, regardless of whether on a holiday or regular business day, or whether an electronically-filed document must also be "received during a regular PERB business day" before it is considered "filed." However, in the present circumstances, we have no need to determine whether the Appeals Assistant correctly deemed Charging Parties' exceptions filed on December 27, 2016, or whether they were already "filed" the previous day by virtue of electronic transmission, since, in either event, the due date for filing was extended to the next regular business day pursuant to PERB Regulation 32130, subdivision (b), which extends the time for filing a document to the next regular PERB business day, "[w]henver the last date to file a document falls on Saturday, Sunday, or a holiday," or whenever "PERB offices are closed."

⁵ PERB's Regulation governing facsimile and electronic filings with the Board provides that the original and required number of hard copies be deposited together with proof of service in the U.S. mail or with another delivery service for delivery to the appropriate PERB office. (PERB Reg. 32135, subd. (c).) The Regulation also requires that a facsimile or electronic filing include, among other things, the date and time of the transmission. (PERB Reg. 32135, subd. (d).) However, these requirements appear in separate subdivisions, and the Regulation does not require that the proof of service accompanying a facsimile or electronic filing specify that the document was also electronically filed with the Board when the document is served by mail on other parties.

according to the filing, had been inadvertently omitted from their previous filing. This filing included proof of service identifying the document as “Amended Exceptions” and indicating that it had been served by mail on Robbins on December 28, 2016. However, like Charging Parties’ previous filing, the proof of service form for Charging Parties “Amended Exceptions” gave no indication that the document had also been electronically filed with PERB.

On December 29, 2016, PERB’s Appeals Assistant notified the parties by mail that Charging Parties’ “Exceptions to Proposed Decision Amended” had been rejected, as it had been filed one day after the December 27, 2016 deadline. That administrative determination is the subject of a separate appeal by Charging Parties.

PERB Regulation 32310 requires that any response to exceptions to a proposed decision be filed within 20 days following the date of service of the exceptions. PERB Regulations also apply a five-day extension of time to any filing made in response to documents served by mail, if the place of address is within the State of California, as was the case here. (PERB Reg. 32130, subd. (c).) Because Charging Parties served their exceptions to the proposed decision by mail on December 27, 2016, pursuant to the Regulation’s 20-day deadline plus five days for service by mail, any response by the District to Charging Parties’ exceptions was due no later than January 23, 2017.

Although mailed separately two days apart, according to a sworn declaration executed by Robbins and filed with the District’s appeal, Charging Parties exceptions to the proposed decision and their attempted amendment to the previously-filed exceptions were each delivered to Robbins’ office on December 29, 2016. The proof of service forms for both filings gave no indication that they had been filed electronically with PERB, and, for reasons that are not explained, Robbins concluded that based on the dates for proof of service, both documents

“appeared to be untimely” on their face. Although Robbins’ declaration does not explain how he made this determination, based on other filings and correspondence in the file, it appears that throughout these proceedings, Robbins was unaware that, like Code of Civil Procedure section 1013, PERB Regulations provide an extension of five days for filings made in response to documents served by mail, if the place of address is within the State of California. (PERB Reg. 32130, subd. (c).)⁶ In any event, PERB Regulations and decisional law provide that a document is considered “filed” with the Board when received at the appropriate PERB office during a regular business day, whether received by mail, facsimile or electronic transmission (PERB Reg. 32135, subds. (a), (b); *Trustees of the California State University* (2014) PERB Decision No. 2384-H, pp. 19-20), and Robbins’ declaration does not indicate that he contacted the Appeals Assistant to determine whether, in fact, either of Charging Parties’ filings was received at the appropriate PERB office within the deadline prescribed by PERB Regulations, before he concluded that both documents “appeared to be untimely.”

⁶ For example, according to exhibits attached to Charging Parties’ response to the District’s appeal, on December 31, 2016, Robbins notified Edwards by e-mail that, in Robbins’ opinion, Charging Parties’ exceptions were “clearly untimely” and to inform Edwards that, unless they were withdrawn immediately, the District would seek an order from PERB directing Charging Parties to reimburse the District for reasonable attorney’s fees and costs expended in preparing and responding to Charging Parties’ exceptions. Robbins’ e-mail message indicates his belief that, because the proposed decision was served on November 29, 2016, Charging Parties’ deadline for filing exceptions was twenty days later, on December 19, 2016. Robbins’ message makes no mention of the additional five days’ extension for service by mail.

The District’s opposition to Charging Parties’ appeal from the administrative determination rejecting Charging Parties’ attempted amendment to their exceptions similarly argues that Charging Parties’ appeal was untimely because it was not filed “within 10 days following the date of service of the decision or letter of determination,” as required by PERB Regulation 32360, subdivision (b), but, again, the District’s calculation of the deadline fails to account for any extension of time for service by mail.

On January 3, 2017, Robbins received the Appeals Assistant's December 29, 2016 correspondence (referenced above) indicating that Charging Parties' "Exceptions to Proposed Decision Amended" had been rejected as untimely. Although the Appeals Assistant's correspondence referenced only Charging Parties' "Exceptions to Proposed Decision Amended" and made no mention of their separate filing captioned "Exception to Proposed Decision," according to Robbins' declaration, he concluded that Appeals Assistant's determination applied to both documents.

On January 17, 2017, Charging Parties filed with PERB their appeal from the administrative determination denying their amended exceptions as untimely. Although filed electronically, as with their previous filings in this matter, the proof of service form accompanying Charging Parties' appeal indicates that a copy was served by regular mail on Robbins, but gives no indication that the document was also filed electronically with the Board. Robbins' declaration makes no mention of Charging Parties' January 17, 2017 appeal, which, on its face, pertained only to the rejection of Charging Parties' "Exceptions to Proposed Decision Amended." Instead, on January 27, 2017, Robbins, on behalf of the District, filed the District's opposition, which acknowledged that the appeal had been filed on January 17, 2017, but, again, argued that *both* Charging Parties' original filing *and* their "Exceptions to Proposed Decision Amended" were untimely, as neither document had been filed within 20 days of service of the proposed decision, i.e., without accounting for any extension of time for service by mail.

According to Robbins' declaration, on or about February 6, 2017, he received correspondence from PERB's Appeals Assistant indicating that, as of January 31, 2017, the filings for this case were complete and that the matter had been placed on the Board's docket. At this point, Robbins contacted the Appeals Assistant who, according to his declaration, informed

him that only one of Charging Parties' filings had been rejected as untimely, as indicated in the Appeals Assistant's December 29, 2016 correspondence. Although he does not explain how, Robbins' declaration also indicates that, on February 6, 2017, he also learned that Charging Parties had filed their "Exception to Proposed Decision" electronically with PERB. According to his declaration, Robbins promptly filed the District's response to Charging Parties' exceptions, which were received at PERB's office on February 7, 2017, fifteen days after the deadline, and rejected as untimely the same day.

Robbins' declaration also asserts that during January 2017, he had to tend to family matters concerning his father's terminal illness, that, he requested and received a lengthy extension of time to submit a post-hearing brief in a separate unfair practice case involving the same parties, and that, under the circumstances, he would have requested a similar extension of time to respond to Charging Parties' exceptions, had he known that the exceptions had been accepted by PERB as timely filed.

THE DISTRICT'S APPEAL

The District's appeal argues that, under the circumstances, the Board should find good cause to excuse the late filing and urges the Board to accept and consider the District's response to Charging Parties' exceptions when deciding the unfair practice issues in this case. The District asserts two grounds for its appeal.

First, it claims that Robbins, its designated representative, was confused by the fact that Charging Parties electronically transmitted their exceptions to PERB on December 27, 2016, which were deemed timely by the Appeals Assistant, and also filed a document captioned "Exceptions to Proposed Decision Amended" on December 28, 2016, which were rejected as untimely, because both documents were received in the mail on the same day, and because,

although both documents included proof of service, neither indicated that they had been filed electronically with PERB. According to the District, because Robbins mistakenly believed that both filings had been rejected by the Appeals Assistant as untimely, and only learned otherwise on February 6, 2017, upon receiving correspondence from the Appeals Assistant indicating that the filings were complete and the matter docketed for consideration by the Board.

Second, the District argues that Robbins' failure to request an extension of time in this matter was due to his honest, but mistaken, belief that both of Charging Parties' filings had been rejected as untimely, as evidenced by the fact that, in January 2017, Robbins had requested an extension of time in a separate PERB case to tend to family matters concerning his father's terminal illness. The District argues that it "should not be punished because of the confusing nature of Charging Parties' filings or because of the unfortunate family circumstances the District's legal counsel was having to attend to."

DISCUSSION

PERB Regulations provide that an untimely filing may be excused at the discretion of the Board but for "good cause only." (PERB Reg. 32136.) If excused, a late filing becomes timely. (*Ibid.*) Consistent with the general policy of law which favors preservation of the right to appeal and hearing of appeals on their merits, "good cause" is a flexible standard, defined and constrained by considerations of fairness and reasonableness. (*Trustees of the California State University* (1989) PERB Order No. Ad-192-H (*Trustees of CSU*), pp. 4-5.)

Generally, the Board has excused a late filing where a non-prejudicial delay of short duration resulted either from circumstances beyond the control of the filing party or from excusable misinformation, where the filing party's explanation was credible on its face or was corroborated by other facts or testimony. (*United Teachers of Los Angeles (Kestin)* (2003)

PERB Order No. Ad-325, pp. 3-4; *Barstow Unified School District* (1996) PERB Order No. Ad-277 (*Barstow*), p. 4; cf. *Oxnard Elementary School District* (2004) PERB Decision No. 1728, p. 1, fn. 2.) If the delay could have been anticipated beforehand, the filing party has a duty to request an extension of time (*Barstow, supra*, at p. 4), and, regardless of the reason(s) for the late filing, the moving party must provide a “reasonable and credible” explanation for its untimely filing or show that it at least made a conscientious effort to comply with the deadline. (*National School District* (2010) PERB Order No. Ad-389, pp. 2-3; *Newport-Mesa Unified School District* (2008) PERB Order No. Ad-373, p. 3; *San Francisco Unified School District* (2009) PERB Decision No. 2048 (*San Francisco*), p. 4.)

For example, the Board has excused late filings caused by “honest mistakes,” such as inadvertent mailing or clerical errors associated with an actual attempt to timely file. (See, e.g., *Kern Community College District* (2008) PERB Order No. Ad-372, p. 3 [clerical employee served appeal on respondent but did not file appeal with PERB]; *Trustees of CSU, supra*, PERB Order No. Ad-192-H, pp. 3-5 [mailroom employees incorrectly set postage meter causing exceptions to be filed late]; *San Francisco, supra*, at pp. 3-4 [late filing excused as a result of clerical error in counsel’s office].) The Board has also found good cause where an “untimely filing was a result of honest error ... resulting from misunderstood communications” with an unrepresented appellant. (*Los Angeles Unified School District* (2007) PERB Order No. Ad-368, p. 4; *Los Angeles Unified School District* (2003) PERB Order No. Ad-318, p. 4; *City of Oakland (Oakland Fire Department)* (2015) PERB Order No. Ad-425-M, pp. 5-6.)

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 (Department of Corrections)* (2003) PERB Order No. Ad-328-S, pp. 3-5; *State of California (Water Resources Control*

Board) (1999) PERB Order No. Ad-294-S, p. 5; *Calipatria Unified School District* (1990) PERB Order No. Ad-217, pp. 11-13; cf. *Los Angeles Unified School District, supra*, PERB Order No. Ad-318, pp. 3-4.) For example, in *Calipatria*, the Board found no good cause to excuse a late filing and expressly rejected a “mistake of law” as grounds for relief, where a party’s attorney reviewed, but misunderstood, PERB’s Regulation governing filing requirements. (*Id.* at pp. 11-13.) In *Water Resources Control Board*, the Board explained that the filing deadlines set forth in PERB Regulation 32135 “would become meaningless if the Board considered an attorney’s misreading of [the] regulation to constitute good cause to excuse a late filing.” (*Id.* at p. 6.)

The Board has also refused to find good cause where, because a party’s attorney fails to seek clarification of the filing deadline or to request an extension of time with PERB’s Appeals Assistant, the party makes no attempt even to file before the deadline. (*Trustees of the California State University* (2016) PERB Order No. Ad-432-H, p. 9; *Los Angeles Unified School District* (1993) PERB Order No. Ad-247 (*Los Angeles USD*), p. 3.) As we recently explained in *Trustees, supra*, PERB Order No. Ad-432-H, “Although the Board may grant extensions of time or excuse late filings for good cause, parties cannot take the filing deadlines into their own hands.” (*Id.* at p. 9.)

The Chief ALJ’s transmittal letter accompanying the proposed decision explains the process for filing exceptions to the proposed decision. The deadlines for filing exceptions and requests for extensions of time are prominent and key elements of the information included in the Chief ALJ’s letter. They are also set forth in PERB’s Regulations, which are readily available on the agency’s website. However, the filings and correspondence in this case indicate that, throughout these proceedings, Robbins was operating under the incorrect belief

that PERB provides no extension of time for filings in response to documents served by mail. Despite the express language of PERB Regulation 32130, subdivision (c), providing a five-day extension for responding to documents served by mail within the State of California, Robbins repeatedly calculated the deadlines for Charging Parties' filings, as if they included no such extension. Because of this failure to follow our Regulations, Robbins concluded, without confirmation from PERB's Appeals Assistant, that Charging Parties' exceptions were "clearly untimely" and apparently, that no response from the District was therefore necessary.

This error was compounded by Robbins' conclusion that the Appeals Assistant had rejected as untimely *both* Charging Parties' original exceptions and their attempted amendment to the exceptions, despite the plain language of the Appeal Assistant's December 29, 2016 correspondence designating *only* the latter filing as untimely and making no mention whatsoever of Charging Parties' original filing. Even after receiving additional filings and correspondence from Charging Parties and the Appeals Assistant indicating that *only* Charging Parties' attempted amendment to their exceptions had been rejected as untimely, Robbins failed to contact the Appeals Assistant to seek clarification or an extension of time, and did not file a response to Charging Parties' exceptions until February 7, 2017, fifteen days after the District's deadline had passed.

Under similar circumstances, the Board has refused to find good cause (see, e.g., *Los Angeles USD, supra*, PERB Order No. Ad-247, p. 3), and the District has offered no compelling reason to reach a different result in this case. We find no good cause to excuse counsel's failure to carefully review PERB Regulations or other materials regarding the filing deadlines, nor counsel's failure to seek clarification or an extension of time from the Appeals

Assistant when confronted with conflicting information as to the status of Charging Parties' filings and, accordingly, we deny the District's appeal.

ORDER

The Public Employment Relations Board (Board) hereby DENIES Lake Elsinore Unified School District's appeal and request that the Board excuse its untimely-filed response to the exceptions to the proposed decision filed by Lori E. Edwards, et al. in Case No. LA-CE-6082-E.

Chair Gregersen and Member Winslow joined in this Decision.