

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



VINCENT E. BUENO,	)	
	)	
Charging Party,	)	Case No. SF-CE-1750
	)	
v.	)	Administrative Appeal
	)	
NORTH MONTEREY COUNTY UNIFIED	)	PERB Order No. Ad-274
SCHOOL DISTRICT,	)	
	)	April 29, 1996
Respondent.	)	
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Appearances: Vincent E. Bueno, on his own behalf; Breon, O'Donnell, Miller, Brown & Dannis, by Laurie S. Juengert, Attorney, for North Monterey County Unified School District.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on a request by Vincent E. Bueno (Bueno) that the Board accept his late filed exceptions to the proposed decision of a PERB administrative law judge (ALJ). In that decision, the ALJ dismissed the unfair practice charge and complaint which alleged that the North Monterey County Unified School District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)<sup>1</sup> when it rejected Bueno during his probationary period.

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

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## BACKGROUND

The ALJ's decision in this case was issued and served on Bueno on October 25, 1995. The decision was accompanied by a cover letter from PERB's Chief ALJ which describes the process and timelines for appealing the proposed decision to the Board. In accordance with PERB regulations and timelines referenced in the cover letter, exceptions to the proposed decision were due to be filed no later than November 20, 1995. As of that date, no exceptions had been filed, and the PERB appeals assistant declared the ALJ's decision to be final.

Bueno filed a statement of exceptions to the proposed decision on December 12, 1995, at PERB's Headquarters Office. The exceptions were dated December 2, 1995, and had been sent to PERB's San Francisco Regional Office, which received them on December 7, 1995. Included in the exceptions is the following statement from Bueno:

This letter is late due to the fact that my mother had a massive heart attack on 11-2-95. I could not get my appeal in on time due to the fact my mother was in serious condition.

This is the only reference in Bueno's exceptions to the untimeliness of the filing. This statement is being considered a request by Bueno that the Board accept his late filed exceptions.

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to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

## DISCUSSION

PERB Regulation 32136<sup>2</sup> states, in pertinent part:

A late filing may be excused in the discretion of the Board for good cause only.

In applying this regulation, the Board has found good cause to excuse late filings when a party has demonstrated that a conscientious effort to timely file was made. In North Orange County Regional Occupational Program (1990) PERB Decision No. 807, the Board found good cause to excuse a late filing which resulted from exceptions being directed to the wrong PERB office. In Trustees of the California University (1989) PERB Order No. Ad-192-H, the Board found that the inadvertent, incorrect use of a postage meter resulting in late delivery represented good cause to excuse a late filing.

However, the Board has considered circumstances relating to the illness of a party's family member and concluded that they did not constitute good cause to excuse a late filing where there was no demonstration of a conscientious effort to timely file. In Pasadena Community College District (1992) PERB Order No. Ad-234 (Pasadena CCD), the Board considered a party's declaration that she spent a great deal of time and energy caring for her seriously ill mother for eight days prior to the filing deadline and, therefore, was unable to timely request an extension of time to file a response to a Board agent's order. The Board determined that the timing of the family illness made

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<sup>2</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

it possible to anticipate the need for an extension of time, and provided the opportunity to make a timely request for such an extension. Since no conscientious effort to make a timely request had been made, the Board concluded that good cause did not exist to excuse the late filing.

This case presents circumstances similar to those considered by the Board in Pasadena CCD. The Chief ALJ's cover letter, served on Bueno on October 25, 1995, clearly describes the process and deadline for filing exceptions to the proposed decision. It also advises Bueno of the opportunity to request an extension of time to file any document with the Board itself, citing PERB Regulation 32132(a).<sup>3</sup> Bueno states that his mother's heart attack occurred on November 2, 1995, well before the November 20, 1995, deadline for filing exceptions. As was the case in Pasadena CCD, it appears that Bueno had ample time to determine that his mother's illness would prevent him from meeting the filing deadline, and request an extension of time.

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<sup>3</sup>Regulation 32132 states, in pertinent part:

(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.

However, Bueno did not request any extension, and provides no explanation of his failure to do so. There simply is no indication that Bueno made a conscientious effort of any kind to comply with the November 20, 1995, filing deadline. Moreover, Bueno provides only the brief reference to the family illness, and offers no specific information as to how that illness prevented his timely filing. Accordingly, the Board finds that good cause has not been shown to excuse Bueno's late filing of exceptions in the instant case.

ORDER

Vincent E. Bueno's request that the Board accept his late filed exceptions in Case No. SF-CE-1750 is hereby DENIED.

Member Dyer joined in this Decision.

Member Garcia's dissent begins on page 6.

GARCIA, Member, dissenting: I disagree with the majority's conclusion and I would find that Vincent E. Bueno (Bueno) has shown good cause to excuse the late filing. My analysis is as follows.

Under the current version of Public Employment Relations Board (PERB or Board) Regulation 32136, the Board has discretion to excuse a late filing "for good cause," which is a subjective concept. An overview of the Board's approach to late filings over time is informative. In Anaheim Union High School District (1978) PERB Order No. Ad-27 (Anaheim), the Board applied the then-current "sufficient cause" test and refused to excuse a one-day delay in filing an appeal, which resulted from a postal delay. Explaining its decision, the Board noted that the appellant had received proper notice of the deadline, yet she waited until nine of the ten days had expired before mailing her request for review.

Four months later, in Anaheim Union High School District (1978) PERB Order No. Ad-42, the Board considered its first untimely filing case under a revised regulation, which provided that "A late filing may be excused in the discretion of the Board only under extraordinary circumstances." Explaining that "extraordinary circumstances" means "out of the ordinary, remarkable, unpredictable situations or occurrences far exceeding the usual which prevent a timely filing," the Board refused to accept a filing that arrived one day late due to a mail delay. Comparing that case to the earlier Anaheim case, the Board noted

that "Since this . . . five-day mail service did not constitute 'sufficient cause' to excuse an untimely filing in Anaheim, it certainly does not constitute 'extraordinary circumstances' in the present case under the new rules." (Id. at pp. 2-3.)

Therefore, the Board viewed the extraordinary circumstances test as imposing an even greater burden on the party seeking to be excused from a late filing than the "sufficient cause" standard.

In 1989 the Board changed the late filing regulation, replacing the phrase "extraordinary circumstances" with the present "good cause" wording. Examining the Board cases that interpret the current language, it is evident that the good cause threshold is easier to meet than the extraordinary circumstances test. As the majority opinion acknowledges, the Board has excused various types of "honest mistake" and other unremarkable occurrences (such as postal delays and clerical errors) under the good cause version of the regulation.

Court decisions on late filings also apply a more lenient threshold than the "extraordinary circumstances" test; if the excuse is reasonable and credible, they then focus on whether permitting a late filing would be prejudicial to the opposing party.<sup>1</sup> PERB's opinions have been consistent with the court

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<sup>1</sup>See, e.g., Putnam v. Clague (1992) 3 Cal.App.4th 542 [5 Cal.Rptr.2d 25] (Putnam), which discussed the need to weigh all factors. The court gave great weight to the fact that the defendant had not shown actual prejudice from the delay and held that:

If the excuse is credible and not clearly unreasonable . . . the court should consider all other factors, including prejudice to the

cases on this point.<sup>2</sup> One reason courts are willing to exercise some leniency in this area is the well-established principle of law that an appellate body is generally reluctant to permit minor procedural defects to preclude an examination of an actual controversy on its merits.<sup>3</sup> Therefore, applying the rules of appellate case law, it is appropriate for the Board to weigh numerous factors on a case by case basis to determine whether or not "good cause" exists to excuse a late filing.

In this case, the following factors were important. First, the reason for the delay is reasonable and credible. It is understandable to most observers that Bueno would be distressed

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defendant, before ordering dismissal. . . .  
[Id. at 557.]

Furthermore, the court refused to imply prejudice to the defendant from a mere delay in service, since prejudice may be inferred only from an unjustified and protracted delay in service, particularly when the defendant has actual knowledge of existence of the action. Discussing the defendant's failure to show prejudice, the court noted that the defendant could not show that a single item of evidence was lost due to the delay, nor that a single witness was unable to recall material events: "All he has actually shown is that time has passed . . . and 'the trial court may not presume prejudice simply by the passage of time.'" [Id. at 565-566; citations omitted.]

<sup>2</sup>See, for example, University of California, Los Angeles (1992) PERB Decision No. 961-H, where the Board allowed a late filing because, among other reasons, doing so posed no prejudice to opposing counsel.

<sup>3</sup>See Pesce v. Dept. Alcoholic Bev. Control (1958) 51 Cal.2d 310, 313 [333 P.2d 15]. This principle is also followed in administrative agencies. Gibson v. Unemployment Ins. Appeals Bd. (1973) 9 Cal.3d 494 [108 Cal.Rptr. 1] discusses cases which hold that "whether good cause is shown for relief from an appeal deadline depends upon the factual circumstances of each case." (Id. at 498, fn. 5; citations omitted.) See also, Flores v. Unemployment Ins. Appeals Bd. (1973) 30 Cal.App.3d 681 [106 Cal.Rptr. 543]).

and drop everyday matters to help deal with the emergency of his mother's heart attack. The emergency could easily have contributed to the misdirection of the late appeal, especially for a party that is not experienced in filing documents with PERB, as in this case.<sup>4</sup> Second, this illness was unanticipated and beyond Bueno's control. Third, the delay was not protracted. Fourth, there is no showing that the North Monterey County Unified School District's (District) interests were prejudiced by the relatively brief time delay, especially since the District had actual knowledge of the case and there is no claim that witnesses or evidence had become unavailable in the interim. Prejudice will not be presumed simply by the passage of time (Putnam, supra, at 566).

I disagree with the majority's comparison of the case at bar to Pasadena Community College District (1992) PERB Order No. Ad-234 (Pasadena CCD) since that case bears only a superficial resemblance to this case. A close reading of Pasadena CCD reveals that the Board's rationale for deciding not

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<sup>4</sup>I would like to point out that Bueno first attempted to file his exceptions as early as December 2, 1995 (12 days after the filing deadline), when he sent his exceptions to the wrong PERB office. It was December 12 before his statement of exceptions was filed with the correct PERB office. As the majority opinion notes, the Board has found good cause to excuse a late filing which resulted from exceptions being directed to the wrong PERB office (citing North Orange County Regional Occupational Program (1990) PERB Decision No. 807). Although Bueno's lateness in the case at bar was not solely a result of misdirecting his exceptions to the wrong PERB office, since we are dealing with a discretionary standard, this factor carries some weight because it shows that an attempt was made to file close to the deadline.

to excuse the late filing was that it did not believe the party's assertion that it had made a conscientious effort to file on time:

. . . the response the Teamsters claim to have misdirected to the Los Angeles office was never received. . . . The Teamsters assert that a response to the Board agent's Order was filed by express mail to the Los Angeles PERB office on July 23, 1992. The Los Angeles office, however, received no such filing, and the Teamsters submitted no proof of service relating to this filing or any further evidence that it ever occurred. As a result, the Board concludes that no response was filed, contrary to the assertion. [Id. at p. 5; emphasis added.]

Here, by contrast, there is no indication that Bueno's excuse is not credible. Also, in Pasadena CCD the Board found that the cause of delay offered was one which could have been anticipated, yet no extension was requested, a situation that further weakened the credibility of the excuse.<sup>5</sup>

Review of appellate case law and Pasadena CCD illustrates the need for a discretionary, case by case approach when testing for good cause rather than imposing a rigid standard. Cases like this do not lend themselves to bright line rules or rote adherence to prior decisions with similar fact patterns, since each late filing situation is the product of a unique combination

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<sup>5</sup>Although the argument can be made that Bueno could have requested an extension of time, I think it is worthwhile to note that he is inexperienced in PERB procedure, whereas the party seeking relief from a late filing in Pasadena CCD was experienced in PERB procedure, whose business agent had family illnesses that prevented her from filing on time. Although we do not have all the facts before us, presumably the business agent in Pasadena CCD could have requested other experienced union representatives to assist her in meeting the filing deadline.

of facts and circumstances. This is a major reason that the regulation was framed as a discretionary tool. I would also emphasize that although the Board has discretion in this area, that does not mean that parties may ignore deadlines without penalty. To the contrary, the Board has the obligation to ensure that all aspects of its process are administered as fairly as possible, and filing deadlines must be respected and enforced except in the rare cases where good cause is shown. Under longstanding court approved appellate practice, the good cause approach would not permit abuse of timelines, yet it would be forgiving in justifiable circumstances.

I conclude that, based on all the facts of this case, good cause to excuse the late filing has been shown.