

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE UNIVERSITY
EMPLOYEES UNION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

Case No. LA-CE-1232-H

Administrative Appeal

PERB Order No. Ad-432-H

February 11, 2016

Appearance: Leslie V. Freeman, Labor Relations Manager, for Trustees of the California State University.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Trustees of the California State University (University) from an administrative determination (attached). In her administrative determination, PERB's Appeals Assistant concluded that the University had not complied with the time limits set forth in PERB regulations, when it filed its opposition to an appeal from dismissal of an unfair practice charge brought by the California State University Employees Union (CSUEU) against the University.¹ In the present appeal from the administrative determination, the University argues that its failure to timely file its opposition papers should be excused for good cause, pursuant to PERB regulations and decisional law. Alternatively, the University asks the Board to refuse to consider CSUEU's appeal from dismissal of the unfair practice charge because CSUEU

¹ Disposition of CSUEU's appeal from the dismissal/refusal to issue a complaint with respect to the unfair practice charge is the subject of a separate, non-precedential decision of the Board itself, pursuant to PERB Regulation 32320, subdivision (d). (PERB regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

failed to serve its appeal on the University's designated representative in accordance with PERB regulations. CSUEU has taken no position on the University's appeal from the administrative determination.

We have reviewed the case file in this matter in its entirety and conclude that the administrative determination was issued in accordance with PERB regulations and Board precedent. We deny the University's appeal from the administrative determination and decline to consider the University's untimely opposition to CSUEU's appeal in the underlying unfair practice proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

PERB Regulation 32142 provides in relevant part that if the employer in an unfair practice case is the Trustees of the California State University, the proper recipient for service is "the Office of the General Counsel of the California State University." (PERB Reg. 32142, subd. (c)(3)(C).) Since January 12, 2012, University Counsel Marc D. Mootchnik (Mootchnik) has been the person designated by the University to receive unfair practice charges filed at all campuses.² According to the letterhead of Mootchnik's correspondence with PERB's Office of the General Counsel, Mootchnik's street address is: Office of the General Counsel, 401 Golden Shore, 4th Floor, Long Beach, CA 90802-4210. According to Mootchnik's correspondence with PERB, his email address is mmootchnik@calstate.edu.

On November 13, 2014, CSUEU filed an unfair practice charge alleging that the University had violated various provisions of the Higher Education Employer-Employee

² PERB may take official notice of matters within its own files and records. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; see also *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.) We take official notice of a letter, dated January 12, 2012, to PERB's Office of the General Counsel in which Mootchnik identified himself as the person designated to receive unfair practice charges on behalf of the University.

Relations Act (HEERA).³ According to a proof of service form included with the charge, CSUEU's Lead Labor Relations Representative Brian Young (Young) served the charge on the University by mailing a copy to "CSU/OGC, 401 Golden Shore, Long Beach, CA 90802." The proof of service form also indicates that Young served the charge electronically by transmitting a copy from Young's email account, though it does not provide the email address of a University representative to whom the charge was sent nor indicate that the University has consented to electronic service in this matter.

On, December 3, 2014, the University filed with PERB a notice of appearance form executed by Mootchnik which designated Labor Representatives John A. Swarbrick (Swarbrick) and Leslie Freeman (Freeman) as the University's representatives by mail. (University Appeal, Ex. 1.) The notice of appearance form indicated the University's consent to service by U.S. mail on Swarbrick and Freeman at the following address: CSU, Trustees, 401 Golden Shore, 4W, Long Beach, CA 90802. The notice of appearance form also consented to electronic service at Freeman's University email address. (*Ibid.*)

On Friday, December 19, 2014, Freeman contacted the Board agent assigned to this case to request an extension of time in which to respond to the charge. According to Freeman's correspondence, "the press of other PERB matters" caused her to be unable to prepare the University's position statement, which was due Monday, December 22, 2014. Freeman's correspondence also noted that, in addition to closure of University offices over the holidays and her own previously-scheduled vacation days, the University official familiar with CSUEU's dispute was already out of the office and would not return until January 5, 2015. Although no response from the Board agent was included in the file, it appears from other materials in the file that the requested extension of time was granted until January 12, 2015.

³ HEERA is codified at Government Code section 3560 et seq.

On January 12, 2015, Freeman again contacted the Board agent and advised her that, although the University's position statement was due later that day, she had received a settlement demand from CSUEU and was therefore requesting that the matter be placed in abeyance to allow the parties to explore the possibility of a settlement. The Board agent responded by granting a one-week extension, thereby making the University's position statement due on January 20, 2015.

On January 15, 2015, the University and CSUEU jointly requested that the matter be placed in abeyance for 30 days to allow additional time to discuss settlement. Pursuant to this request, the Board agent notified the parties the same day that the matter would remain in abeyance through February 17, 2015.

On February 9, 2015, CSUEU requested that the charge be removed from abeyance "at the earliest possible opportunity," and that the Office of the General Counsel proceed with its investigation of the charge. (Dismissal letter, p. 1.)

After thus requesting and receiving multiple extensions of time, on February 16, 2015, the University filed with the Office of the General Counsel a position statement in which it denied any wrongdoing and asserted various affirmative defenses.

Upon investigation by the Office of the General Counsel, on June 8, 2015, CSUEU was advised of various deficiencies in the charge and, on July 2, 2015, CSUEU filed an amended charge. The proof of service form for the amended charge indicates that Young attempted service by U.S. mail at the same address where Young had sent the initial charge: CSU/OGC, 401 Gold Shore, Long Beach, CA 90802.

The proof of service form and accompanying documentation also indicate that, on the same day the amended charges was filed, Young attempted service by sending an electronic copy to Mootchnik's University email address, notwithstanding the University's notice of

appearance form indicating its consent to electronic service in this matter at Freeman's, rather than Mootchnik's, University email address. PERB's case file gives no indication that the University objected or advised Young that service was defective. Nor does the University claim that it did not receive the amended charge.

After further investigation, on July 30, 2015, the Office of the General Counsel dismissed the amended charge for failure to state a prima facie case.

On August 19, 2015, CSUEU appealed the dismissal to the Board itself. The proof of service form included with CSUEU's appeal indicates that Young attempted service on the University the same day by mailing the appeal to: "Office of the General Counsel" at "401 Golden Shore, Long Beach CA, 90802." Additionally, Young again attempted to serve the appeal by electronic mail to Mootchnik's University email address, rather than to Freeman's email address, as provided on the University's notice of appearance form.

On September 15, 2015, the University filed its opposition to CSUEU's appeal.

On September 17, 2015, PERB's Appeals Assistant issued her administrative determination advising the University that its opposition was untimely, inasmuch as it was due September 14, 2015, but was not filed until one day later, and no request for an extension of time had been received or granted.

On September 24, 2015, the University appealed the administrative determination to the Board itself. CSUEU has filed no response to the University's appeal.

THE ADMINISTRATIVE DETERMINATION

PERB Regulation 32635 provides, in relevant part, that within 20 days from the date of service of a dismissal, the charging party in an unfair practice case may appeal the dismissal to the Board itself. (PERB Reg. 32535, subd. (a).) Service on all parties to the case and proof of service are required. (*Ibid.*; PERB Reg. 32140; *Los Angeles Community College District* (1984) PERB Decision No. 395 (*Los Angeles*), pp. 5-6.) If the charging party files a timely

appeal from the dismissal, any other party to the case may file a statement in opposition to the appeal within 20 days of the date of service of the appeal. (PERB Reg. 32635, subd. (c).) A five-day extension of time is applied automatically 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).)

The administrative determination noted that CSUEU's appeal was served electronically and by regular mail on August 20, 2015, and, by computing 20 days, plus 5 days for mailing, determined that the University's deadline to file its opposition was September 14, 2015. Because the University's opposition was not electronically filed and mailed until September 15, 2015, the Appeals Assistant advised the University that its filing was untimely and would not be accepted, subject to appeal to the Board itself.

THE UNIVERSITY'S APPEAL

The University contends that CSUEU failed to properly serve its appeal either by U.S. mail or by electronic service on the University's designated representatives because of several discrepancies between the information on the proof of service included with CSUEU's appeal and the information provided on the University's notice of appearance form. These discrepancies include: (1) the envelope containing CSUEU's appeal was addressed to "Office of the General Counsel" rather than to Swarbrick and Freeman at "CSU, Trustees"; (2) CSUEU's proof of service form omitted the abbreviation "4W" from the correct street address, i.e., it was sent to "401 Golden Shore" rather than to "401 Golden Shore, 4W" in Long Beach, California; and (3) CSUEU attempted electronic service at Mootchnik's University email address instead of at Freeman's email address, as indicated on the notice of appearance form.

The University notes that service must comply with PERB regulations, which require, among other things, that documents served by mail be "properly addressed," and that

electronic service be accomplished at “the electronic mail address at which the party agrees to accept service.” (University’s Appeal, p. 2; PERB Regs. 32635, subd. (a), 32140, subds. (a) and (b).) Because CSUEU’s appeal from dismissal was not properly addressed and served on the representatives designated on the University’s notice of appearance form, the University argues that its opposition to CSUEU’s appeal *never* became due and was thus not untimely and/or that any untimeliness should be excused because of defective service. Alternatively, the University urges the Board to refuse to consider CSUEU’s appeal from dismissal because it was not properly served on the University.

DISCUSSION

In an appeal from an administrative determination, the moving party must demonstrate how and why the decision being challenged departs from Board precedent or regulations. (*County of Santa Clara* (2014) PERB Order No. Ad-411-M, p. 5.) The University’s appeal presents two issues: (1) whether the University has shown good cause for the Board to excuse the late filing of the University’s opposition to CSUEU’s appeal; and (2) whether the Board should refuse to consider CSUEU’s appeal for defective service.

Whether the University has Shown Good Cause to Excuse its Untimely Filing

PERB regulations provide that a late filing may be excused at the discretion of the Board but “for good cause only.” (PERB Reg. 32136.) If excused, a late filing becomes a timely filing. (*Ibid.*) Consistent with the general policy of law which favors preservation of the right to appeal and hearing of appeals on their merits, the Board’s application of Regulation 32136 to a variety of factual scenarios reveals that “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.) For example, the Board has historically excused late filings caused by “honest mistakes,” such as mailing or clerical errors. (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*, at pp. 3-5 [mailroom employees incorrectly set postage meter causing exceptions to be filed late]; *San Francisco Unified School District* (2009) PERB Decision No. 2048 (*San Francisco*), 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* (2003) PERB Order No. Ad-318, p. 4; *City of Oakland (Oakland Fire Department)* (2015) PERB Order No. Ad-425-M, pp. 5-6.)

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.) However, regardless of the particular reason(s) given, the moving party must provide sufficient factual detail to establish 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, supra*, PERB Decision No. 2048, p. 4.) 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.)

In the present appeal, the University has not provided sufficient facts to establish either a "reasonable and credible" explanation for its untimely filing or to show that it made a conscientious effort to comply with the deadline. Pursuant to the University's regular office procedures, a legal secretary employed in the University's Office of the General Counsel

received, opened and date stamped the mailed copy of CSUEU's appeal on Monday, August 31, 2015, and then forwarded the appeal to Freeman in both paper and electronic format two days later on Wednesday, September 2, 2015.

Despite Young's carelessness and apparent disregard for the contact information provided on the University's notice of appearance form, the University admits that Freeman, its designated representative in this matter, was in possession of CSUEU's appeal as early as September 2, 2015. Although the University's opposition to the appeal was not due until almost two weeks later, Freeman did not file the University's opposition until after the deadline. The University's appeal does not explain why Freeman did not contact PERB to request an extension of time, despite her previous success in obtaining multiple such extensions in this very matter.⁴ Because the University has not provided sufficient factual detail to establish either a reasonable and credible explanation for its untimely filing or that it made a conscientious effort to comply with the deadline by requesting an extension of time, we consider it unnecessary to consider whether excusing the University's untimely filing would cause prejudice.

Additionally, to the extent the University argues that its opposition never became due because service of the appeal was defective, we must reject this contention as well. The one-day delay in the University's filing cannot be the result of defective service given the University's admission that it was in receipt of the appeal approximately two weeks before the deadline for filing its opposition. 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. If the University's

⁴ The University does not deny that CSUEU's appeal was also received on or about August 20, 2015, at Mootchnik's email address, as indicated in the proof of service form signed by Young and filed with PERB. Instead, the University complains only that the electronic version was not properly served on Freeman, the designated representative in this matter, at the email address provided by the University. Because the University admits that it was in receipt of the paper copy of the appeal approximately two weeks before its deadline for responding and never requested an extension of time, we find it unnecessary to determine whether the University was also in receipt of the electronic version of CSUEU's appeal at Mootchnik's email address some ten days earlier.

representative was in doubt as to the deadline or needed additional time to respond, she knew how to contact PERB to seek clarification or to request an extension of time.

Good Cause is Not Required to Excuse Defective Service and the University Admits that it Had Notice of the Issues Well Before the Time Limit for Filing its Opposition Papers

We next consider the University's alternative argument that the Board should refuse to consider CSUEU's appeal for defective service. The service requirements found in PERB's regulations "are not merely ritualistic." Rather, they are "basic to providing due process to the involved parties." (*Los Angeles, supra*, PERB Decision No. 395, pp. 5-6.) A party that disregards the service requirement runs the risk that its filings will be rejected and that it will be dismissed from the action. (*Ibid.*; *Coronado Unified School District* (1989) PERB Order No. Ad-188, p. 6.)

However, the purpose of the service requirement is to protect against stale claims and to provide notice of the issues, so that parties can preserve evidence and prepare their claims or defenses. (*San Diego Community College District* (1988) PERB Decision No. 662, *affd.* in relevant part *sub nom. San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1131-1132; *Fontana Unified School District* (2003) PERB Order No. Ad-324 (*Fontana*), pp. 6-7, citing *Hammer Collections Co. v. Ironsides Computer Corp.* (1985) 172 Cal.App.3d 899, 902.) Our precedents have long followed the policy and practice of California's courts whereby the service requirement is liberally construed and pragmatically applied to ensure adequate notice without depriving them of the opportunity to have their issues heard on the merits. (*State of California (Department of Developmental Services)* (1996) PERB Decision No. 1150-S, pp. 2-3, fn. 2, citing *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778.)

Thus, *unlike* PERB's regulations and decisional law governing whether to excuse a late filing, no showing of "good cause" is required to excuse defective service. (*Fontana, supra*,

PERB Order No. Ad-324, p. 7, fn. 5; *California School Employees Association (Kotch)* (1992) PERB Decision No. 953, p. 2, fn. 2; cf. *California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S, p. 2.) Rather, the service requirement may be excused if all parties have actual notice of the issues and would not be unfairly surprised or unduly prejudiced. (*Fontana, supra*, at pp. 6-7; *Santa Monica-Malibu Unified School District* (1987) PERB Order No. Ad-163, pp. 2-3, fn. 3.)

Here, the University admits that it was in receipt of the hard copy of CSUEU's appeal as early as August 31, 2015, and that a legal secretary forwarded paper and electronic versions to Freeman on September 2, 2015. The University thus had actual notice of the issues almost two weeks before the University's deadline for filing an opposition to the appeal. While CSUEU's service did not conform in every respect to the information provided in the University's notice of appearance form, the University had every opportunity to respond to the appeal and it has not shown that it suffered harm *caused by* any defects in service of CSUEU's appeal. Any confusion about the deadline for responding to CSUEU's appeal could have been resolved by contacting PERB and, if necessary, requesting and obtaining an extension of time, as the University had previously done in this matter on multiple occasions. Because the record reveals no evidence of fraud or intentional misconduct, and nor was there any harm suffered by the University, we excuse CSUEU's defective service in this instance.

For the above reasons, we affirm the administrative determination that the University's filing was untimely and deny the University's request to refuse to consider CSUEU's appeal.

ORDER

The Trustees of the University of California's appeal from the administrative determination in Case No. LA-CE-1232-H is hereby DENIED.

Chair Martinez and Member Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Appeals Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-9425
Fax: (916) 327-7960



September 17, 2015

Leslie V. Freeman, Labor Relations Manager
California State University Chancellor's Office
401 Golden Shore, 4th Floor
Long Beach, CA 90802

Re: *California State University Employees Union v. Trustees of the California State University*
Case No. LA-CE-1232-H

Dear Ms. Freeman:

This letter acknowledges receipt of your filing entitled "CSU Opposition to CSUEU's Appeal of Dismissal" in the case referenced above. Your opposition to the appeal was not timely filed in accordance with PERB Regulation 32635(c).¹

The appeal in this case was served on the parties via e-file and regular mail on August 20. The response was due to be filed no later than September 9, (plus 5 days for mailing, final deadline September 14). Your opposition to the appeal was e-filed and mailed on September 15, one (1) day late. Therefore, your opposition to the appeal must be denied as untimely filed.

Pursuant to Regulation 32360, you may appeal this administrative determination to the Board itself. If you choose to do so, your appeal is due ten (10) days following service of this letter. Service and proof of service of the administrative appeal is required.

Sincerely,

Hanah E. Stuart
Appeals Assistant

cc: Brian Young, Labor Relations Representative

¹ PERB Regulations are codified at are codified at California Code of Regulations, title 8, section 31001 et. seq. and may be found on the Internet at www.perb.ca.gov.