STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DEBBIE POLK, Charging Party, v. TEAMSTERS CLERICAL, LOCAL 2010, Respondent.	Case No. LA-CO-528-H PERB Decision No. 2489-H June 30, 2016

Appearance: Debbie Polk, on her own behalf.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Debbie Polk to a proposed decision (PD) (attached) issued by an administrative law judge (ALJ) on August 5, 2015. The complaint alleged that Teamsters Clerical, Local 2010 (Local 2010) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by breaching its duty of fair representation in handling grievances on behalf of Polk, thus violating HEERA section 3571.1, subdivisions (b) and (e).

The ALJ concluded that Polk had not pursued this case with due diligence and that her failures to appear for hearing dates and meet other deadlines were without good cause. Accordingly, the ALJ granted Local 2010's motion to dismiss the case for failure to prosecute, and he dismissed the charge and complaint in this case.[2]

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] Local 2010 filed a motion to have its attorneys' fees and costs for its appearance on July 13 assessed against Polk. The ALJ denied the motion, and Local 2010 did not except to that ruling. That issue is therefore not before us. (PERB Regulation 32300, subd. (c).)

The Board itself has reviewed the administrative record in its entirety and considered Polk's exceptions. The record as a whole supports the findings of fact, and the proposed decision is well-reasoned and consistent with applicable law. Accordingly, the Board hereby affirms the ALJ's rulings, findings and conclusions of law and adopts the proposed decision as the decision of the Board itself, subject to the following discussion of Polk's exceptions.

POLK'S STATEMENT OF EXCEPTIONS

Polk filed a partially hand-written "Partial Statement of Exceptions" with PERB on September 28, 2015,[3] in which she stated:

> Dismissing LA CO 528 H for failure to prosecute is an extremely harsh punishment to impose on the Charging Party for circumstances beyond her control and her demonstrated diligence to work through obstacles, particularly in light of the fact that there was no malicious or improper intent to thwart progress or a delaying tactic on her part, and certainly not to the drastic extent of dismissing charge LA CO 528 H. There are no facts to support a finding of failure to prosecute only argument able [sic] statements.
>
> It is unreasonable for [T]eamsters [L]ocal 2010 to seek failure to prosecute when they were a party to the [d]elay.

[3] We disregard the "Amended Statement of Exceptions" that Polk filed with PERB on or about October 5, 2015 and "Correct Amended Statement of Exceptions" that Polk filed with PERB on or about October 13, 2015. These documents were filed beyond the September 28, 2015, extended filing deadline granted by PERB's Office of Appeals without a showing of good cause. Under PERB Regulation 32136, a late filing may be excused in the discretion of the Board for good cause only. Additionally, the filing of these documents are not authorized by PERB's regulations and therefore were not considered by the Board on appeal. (See PERB Regulations 32300 [Exceptions to Board Agent Decision] and 32310 [Response to Exceptions]; *Trustees of the California State University (San Marcos)* (2015) PERB Decision No. 2407-H at p. 2 fn. 2 [PERB Regulations impose "regulatory constraints on multiple filings by a single party"].)

DISCUSSION

PERB Regulation 32300 states, in relevant part:

> (a) . . . The statement of exceptions or brief shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.
>
> (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.
>
> (c) An exception not specifically urged shall be waived.

Polk's exceptions failed to comply with any of the requirements in PERB Regulation 32300, subdivision (a). On this ground, we reject her exceptions.

Even if Polk's exceptions had satisfied the requirements of PERB Regulation 32300, subdivision (a), we would reject her exceptions, for they point to no error of law or fact in the proposed decision, and we find none.

ORDER

Based upon the foregoing motions, findings of fact, conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CO-528-H, *Debbie Polk v. Teamsters Clerical, Local 2010,* are hereby DISMISSED. All other motions filed by the parties are DENIED.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DEBBIE POLK, Charging Party, v. TEAMSTERS CLERICAL, LOCAL 2010, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-528-H PROPOSED DECISION (August 5, 2015)

Appearances: Debbie Polk, on her own behalf; John Varga, Legal Director, for Teamsters Clerical, Local 2010.

Before Eric J. Cu, Administrative Law Judge.

In this case, a former higher education employee alleges that an exclusive representative violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by breaching the duty of fair representation when handling her grievances. The exclusive representative denies any violation and has moved to dismiss the matter for failure to prosecute with due diligence. This proposed decision also considers other motions filed by the parties.

FINDINGS OF FACT RELATING TO RESPONDENT'S MOTIONS

Pre-Hearing Procedural History

Debbie Polk filed the instant unfair practice charge with Public Employment Relations Board (PERB or the Board) on January 30, 2013, accusing Teamsters Clerical, Local 2010 (Local 2010) of breaching its duty to represent her in grievances. Polk amended her charge seven times during the PERB Office of the General Counsel's investigation. Polk also requested to place the case in abeyance for approximately six weeks. After the abeyance

[1] HEERA is codified at Government Code section 3560 et seq.

period ended, on March 24, 2014, the General Counsel's Office issued a complaint on Polk's behalf alleging that Local 2010's handling of Polk's October 2011 grievance violated HEERA, section 3571.1, subdivisions (b) and (e). On April 14, 2014, Local 2010 filed an answer to the complaint, denying the substantive allegations and asserting affirmative defenses.

A telephonic informal settlement conference was set for May 9, 2014, but was continued at Polk's request. Eventually, the conference was conducted telephonically on or around June 20, 2014. The dispute was not resolved and the matter was assigned to me, as the Administrative Law Judge (ALJ), for formal hearing. I scheduled the formal hearing for October 6-7, 2014. The matter was rescheduled for November 12-13, 2014, at Local 2010's request and with Polk's agreement. In November 2014, Polk requested a subsequent continuance for medical reasons. I granted the request over Local 2010's opposition and rescheduled the case for February 5-6, 2015.[2]

On January 22, Polk filed an eighth amended charge and moved to amend complaint. Polk alleged additional HEERA violations based on Local 2010's handling of two other grievances referenced in some of Polk's underlying charge documents but not included in the PERB complaint. On February 2, I granted Polk's motion over Local 2010's objections.

The Commencement of the Formal Hearing

The formal hearing commenced on February 5. During the hearing, Polk requested that the matter be continued because Local 2010 had failed to produce documents she requested from them. She admitted to not filing any subpoenas for those documents, pursuant to PERB Regulation 32150.[3] At the hearing, Polk stated to Local 2010's counsel "if you had said at that

[2] All dates hereafter refer to 2015 unless specifically stated otherwise.

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

time I need a subpoena, then I would have done such." I denied Polk's request to continue the hearing, reasoning that the hearing had been calendared since November 2014 and that Polk did not provide a persuasive reason for waiting until the morning of the hearing to raise her concerns over the documents. Furthermore, Polk did not subpoena any documents from anyone at Local 2010.

Polk arrived around an hour late to the second day of hearing, on February 6. By the end of the second day, Polk completed her case in chief for all claims and the parties completed their examination of Local 2010's first witness. Both agreed that there was insufficient time remaining in the day to complete Local 2010's final witness, Gregorio Daniel. The parties concurred that one additional day was needed and agreed to appear on March 9.

On March 3, Polk requested to continue the March 9 hearing date due to "an extreme private emergency beyond [her] control[.]" I requested additional information about the nature of her emergency. In a March 4 e-mail to both Local 2010's counsel and myself, Polk said that her travel expenses thus far have exceeded $350, that evidence from Local 2010's case in chief required an "unexpected investigation," and that she was involved in other unidentified legal matters with "unexpected deadlines beyond my control during the same time frame" as the March 9 hearing date. Teamsters e-mailed its opposition to the continuance later that day. I denied Polk's continuance request on March 4, on the grounds that she knew about much of the asserted grounds for her request when she agreed to the March 9 date, and did not demonstrate an adequate unanticipated basis for moving the hearing.

Polk's Failure to Appear on March 9

On Sunday, March 8, Polk e-mailed both Local 2010's counsel and myself stating that the car rental company she contracted with for transportation made a mistake that prevented

her from attending the March 9 hearing. I replied to both sides that day, stating that Polk should both attempt to make alternate arrangements for her appearance and be prepared to prove the statements made in her e-mail. Polk did not respond.

On March 9, at 11:00 a.m., I convened the hearing and opened the record. Counsel for Local 2010 appeared with one witnesses, Daniel, and was prepared to proceed. Polk did not appear. Counsel for Local 2010 stated that he was unaware of Polk's March 8 e-mail message until that morning. A PERB agent contacted Polk via telephone and she confirmed that she would not appear.

Local 2010 then made four motions on the record. First, it moved to commence with its case in chief without Polk, arguing that she did not adequately establish her unavailability and had waived her right to challenge Local 2010's remaining evidence. That motion was denied. Second, Local 2010 moved to dismiss the case arguing that Polk's absence amounted to a failure to pursue the matter. Third, Local 2010 moved to dismiss the case based on Polk's failure to demonstrate a prima facie case for any HEERA violation during her case in chief. Fourth, Local 2010 moved to have attorneys' fees and costs assessed against Polk. Those motions were taken under submission.

The March 9 Order to Show Cause

On March 9, I issued an Order to Show Cause (OSC) as to why the case should not be dismissed due to Polk's failure to prosecute the matter with due diligence. I directed Polk to respond to the OSC by March 23. Local 2010's brief would be due 10 days after Polk's filing, and Polk's final brief would be due 5 days later. I also directed Local 2010 to reduce its remaining motions, i.e., its alternative motion to dismiss the case and its motion for attorneys'

fees, to writing no later than March 23. Polk was directed to file her opposition to that filing within 10 days with Local 2010's reply brief due 5 days after Polk's opposition.

Briefing Over the OSC and Local 2010's Other Motions

Local 2010 filed its motion to dismiss for failure to state a prima facie case and its motion for attorneys' fees on March 23. According to the briefing schedule established in the OSC, Polk's opposition to those motions was due on April 2.

Polk filed her response to the OSC on March 30. According to the briefing schedule established in the OSC, Local 2010's brief was due on April 9. Polk asserted in her filing that she attempted to rent a car on March 8, when she "noticed that the rental rate had increased considerably" from the originally quoted rate and that she "was not prepared to pay the considerably higher rate." Polk stated that she declined that reservation but that the car rental company nevertheless charged her credit card $173.48. Thus, according to Polk, she was unable to rent a vehicle from a different provider.

Polk's Requests to Extend the Briefing Schedule

Between April 1 and 30, Polk filed four requests to extend the remaining briefing schedule regarding the motions pending at the time. Three of the four requests were for medical reasons, namely physical limitations on Polk's ability to type. Most were accompanied by medical documentation of her limitations. Although several of those requests did not comply with the timing requirements in PERB Regulation 32132, subdivision (c), I extended both parties' briefing schedules to accommodate Polk. Local 2010 was directed to file its brief regarding Polk's OSC response by April 20. Local 2010 complied with that deadline. The deadline for all of Polk's own remaining filings was extended until May 11. I noted in a letter dated April 29, that I might order oral argument in lieu of briefing in order to

expedite resolution of the outstanding issues in this case without exacerbating Polk's medical condition. Neither side objected.

Polk did not file any of her briefs on May 11. A week later, on May 18, Polk filed a document entitled "Ex Parte Motion to Stay, Motion for Tolling, Motion for Continuance," where she requested to postpone all activity in the case until July 1 due to what she described as an "unanticipated physical and economic disability." Unlike with prior requests, this filing had no supporting documents, such as a physician's statement outlining Polk's physical limitations.

The May 22 Order

I issued an Order on all the pending motions on May 22. In that Order, I treated Polk's May 18 filing as a request to further extend her remaining filing deadlines. I denied that request as both late and without sufficient support. Because Polk's filing deadlines had already passed, I further determined that briefing on the pending matters was closed. I then denied Local 2010's motion to dismiss for failure to state a prima facie case and its motion for attorneys' fees and costs.

Regarding the motion to dismiss the case for failure to prosecute the matter with due diligence, I found that Polk did not establish "good cause" for failing to appear on March 9. Those findings will be discussed in more detail below. I nevertheless stated that Local 2010's motion would remain under submission because I was not fully convinced that Polk demonstrated a failure to prosecute the matter. I then directed that the formal hearing should be re-calendared. To that end, I ordered the parties to meet and confer over a mutually agreeable hearing date. I stated that, if the parties could not agree upon a date by June 1, then I would unilaterally calendar the hearing for July 13. I also stated that any further continuances

would only be entertained only "under the most **extraordinary** of circumstances." (emphasis in original). I sent the Order by e-mail and regular mail with a standard proof of service form.[4]

The Scheduling of the July 13 Hearing Date

Having not heard from either party over the results of any meet and confer efforts, on June 9, I directed that the hearing be scheduled for July 13. In a letter included with the notice of formal hearing, I stated that closing arguments in the case would be handled orally at the end of the hearing so as not to exacerbate Polk's medical condition.

Polk's Request to Continue the July 13 Hearing

On June 24, Polk e-mailed both Local 2010's counsel and myself, requesting to continue the July 13 hearing date, because she was facing "several critical matters that were consuming [her] entire time and resources." I responded to both parties via e-mail, stating that any request to continue the hearing should comply with PERB Regulations. I also encouraged Polk to be as specific as possible in any continuance request.

On July 7, Polk filed a request to continue the hearing until December. She asserted three justifications for the request. First, Polk stated that there were "several dire situations" affecting the "safety and well being" of herself and her dependents. She was unwilling to provide more specific information for privacy reasons. Second, Polk asserted that a "critical witness" could not attend the hearing. Third, Polk stated that she could not participate in the hearing without certain documents, including the transcripts from the prior days, which she did not possess at the time. Local 2010 opposed the request. On July 9, I denied Polk's continuance request. In doing so, I concluded that her first asserted basis lacked specificity

[4] All documents sent by mail in this case were sent to the address listed by Polk in her charge documents, along with a standard proof of service form. Polk confirmed the accuracy of that address in her March 30 response to the OSC.

and that it was unclear why she could not provide greater detail without compromising what she believed were privacy rights. I further concluded that her second and third reasons were issues she could have anticipated and addressed earlier, noting that the parties had the chance to discuss scheduling during the meet and confer period in May. I noted that Polk had an adequate amount of time to order or review the transcripts in this case[5] and to subpoena or otherwise secure the availability of her witnesses.

The July 10 Telephone Conference

On July 10, at around 3:30 p.m., the parties and I participated in a conference call, at Polk's request, to discuss Polk's continuance request. During the conference, both parties admitted to not complying with my May 22 meet and confer Order. I then gave the parties the opportunity to discuss scheduling, including agreeing to an alternative to the July 13 hearing date, but the parties were unable to agree upon a new date. Polk stated that she had additional information justifying her need for a continuance but was reluctant to discuss it because of the personal nature of that information. She then discussed some of her personal circumstances with the understanding that what she revealed said would remain private. At the conclusion of the call, Local 2010 remained opposed to Polk's continuance request. I declined to continue the hearing. No transcript was made of the conference call.

E-Mail Activity Prior to the July 13 Hearing

After the conference call, at around 8:00 p.m., Polk e-mailed both Local 2010's counsel and myself requesting that I notify her if I intended on disclosing any of the details from the telephone conference publicly. At around 11:42 p.m., I responded to both parties stating that, at the time, I did not intend on discussing the subjects of our conference call further unless

[5] I provided Polk with multiple forms for Polk to order copies of the transcript and have offered to allow Polk to review PERB's own copies multiple times.

those subjects became issues later in the case. I further stated that I would give Polk the opportunity to state her position if I later decided disclosure was necessary.

On Sunday, July 12, at around 8:08 p.m., Polk e-mailed both Local 2010's counsel and myself, stating that she found someone willing to help transport her to the hearing and would appear by 10:00 a.m., the scheduled start time.

On Monday, July 13, at around 8:16 a.m., Polk e-mailed Local 2010's counsel and myself. The content of the message was preceded by the phrase "Off the record." The parties and I had not previously reached any mutual understanding about the confidentiality of Polk's e-mail communications. Polk stated, in relevant part, that she had a "job assignment that is scheduled for this week, including today." Polk then asked if she could appear for the hearing via video conference. I responded to both parties stating that I was not opposed to a video appearance, but that the parties needed to provide the necessary technology, as PERB does not possess any such equipment. In an e-mail to both parties at 8:54 a.m., I asked Polk whether she intended on appearing for the hearing. At 9:55 a.m., Polk e-mailed Local 2010's counsel and myself, stating that she was in a hospital emergency room "due to an allergic reaction to a drug that I was given last night. I am going for a procedure."

The July 13 Hearing

Local 2010 again appeared at the hearing at the scheduled time and place and was again ready to proceed with the remainder of its case in chief. Polk did not appear and the hearing was convened in her absence. I summarized the above-referenced events and e-mails for the record. Local 2010 made a second motion to dismiss the case for failure to prosecute the matter with due diligence. Local 2010 also moved for sanctions in the form of attorneys' fees

and costs for its appearance that day. Those motions were taken under submission and the hearing was adjourned for the day.

The July 13 Order for Oral Argument

Later in the day, on July 13, I issued the parties an Order Re: Oral Argument. In that document, I directed that the parties participate in an oral argument over the three pending motions, i.e., (1) Local 2010's motion to dismiss after Polk's non-appearance on March 9; (2) Local 2010's motion to dismiss after Polk's non-appearance on July 13; and (3) Local 2010's motion for attorneys' fees and costs for its appearance on July 13. I scheduled the oral argument for July 21. I suggested in the Order that Polk provide documents supporting her assertion that she was receiving emergency medical care. I directed that that the parties provide PERB with any documents in support of the argument no later than July 20. I also informed the parties that I anticipated discussing some of the content from both the July 10 conference call and e-mails labeled by Polk as "Off the record." I also stated that Polk would have the opportunity to state her position on disclosure of that content. Finally, I gave both parties the option of participating in the argument via telephone.

The July 13 Order was sent to the parties by both e-mail (as an attachment) and by regular mail with a standard proof of service form. In addition, I included all the salient details referenced above, including the July 20 deadline for providing documents, in the body-text of the e-mail I sent to the parties.

On July 15, at around 9:33 a.m., Polk replied to my July 13 e-mail, with a copy to Local 2010's counsel. Polk stated in her reply that she could not open the attachments included with my e-mail. Immediately below the text of her reply was the body-text of my July 13 e-mail, including my reference to the July 20 deadline. Polk did not either dispute receiving my July

13 e-mail or assert that she could not read the actual text of that message. At around 1:27 p.m., I replied to both parties and included the full text of the July 13 Order Re: Oral Argument in the body of the e-mail itself. I also warned Polk to read the content of the e-mail carefully as it contained important deadlines. My response did not include any attachments.

On July 16, both parties expressed their interest in participating in the oral argument by telephone. At around 12:15 p.m., Polk e-mailed Local 2010's counsel and myself, again stating that she could not open the attachment I sent to her. Polk also requested information about how to participate in the oral argument by telephone. She also stated that she was no longer able to communicate via e-mail because her computer had recently intercepted a virus. At around 12:39 p.m., I left Polk a voice-mail message explaining how the oral argument would proceed and that the matter would be recorded and transcribed. I memorialized the content of that voice-mail in an e-mail to both parties that day.

On July 17, at around 12:37 p.m., I left Polk another voice-mail message indicating that I intended on referring to e-mail communications from July 10 until the present time as part of the oral argument. I stated in the message that she should be in possession of all of the messages I identified, but that she could contact me if she wanted any copies. I memorialized the content of that voice-mail in an e-mail to both parties and offered Local 2010 the same opportunity to request copies of the relevant e-mails. Later that day, Polk contacted me via telephone. During the call, Polk confirmed receipt of my voice-mail messages from July 16 and 17 and requested to continue the July 21 oral argument. I conducted an impromptu conference call with Polk and counsel for Local 2010 and the parties agreed to move the oral argument to July 23.

On July 17, Local 2010 filed a declaration by its legal counsel in support of its motion for attorneys' fees and costs. The declaration specified the time and other expenses incurred by Local 2010's counsel for his appearance on July 13. The declaration also asserted what he believed was a reasonable billing rate for his time based on his experience. Polk did not provide or identify any documents she planned on using for the oral argument by the July 20 deadline.

On July 21, Polk left me a voice-mail message requesting to further continue the oral argument because there was flooding at her home, affecting her access to electricity. I granted that request over Local 2010's opposition and the matter was continued to July 31, at 1:00 p.m., a date suggested by Polk. I provided the parties with notice of the continuance via telephone, e-mail, and regular mail, with a standard proof of service form. I also provided the parties with copies of all the e-mail messages I referred to in my July 16 voicemail to Polk and subsequent e-mail to both parties. Neither side had requested the documents, but I determined that doing so would help facilitate our discussion. For ease of reference, I organized all of the e-mail messages in chronological order, starting with the most recent, and hand-numbered the pages, 1 through 30.[6]

Polk's July 30 Motions

On July 30, at 4:31 p.m., Polk filed a motion "For Order Compelling Response to Demand for Production, Inspection, Copying" of information Polk had previously requested from Local 2010. She also requested sanctions for Local 2010's non-compliance with her earlier requests for that information. The motions are premised on Polk's belief that she is

[6] The parties and I subsequently agreed that certain aspects of Polk's e-mails bearing the label "Off the record:" would not be publicly disclosed. Pursuant to that agreement, I have redacted all the portions the parties agreed not to discuss from PERB's official copies of those e-mails.

entitled to information prior to the PERB hearing under provisions in the Administrative Procedures Act (APA),[7] namely APA Section 11507.6.

The July 31 Oral Argument

On July 31, both parties participated in the scheduled telephonic oral argument over all the pending motions. Pursuant to my authority under PERB Regulation 32170, I gave the parties limited but equal time periods from which to provide their supporting arguments.[8] Before argument began, the parties and I discussed how to handle the information from our July 10 conference call and from the portions of Polk's July 13 e-mails labeled "Off the record." We agreed that we would only consider the following facts: (1) that neither party complied with my May 22 meet and confer Order; (2) that Polk had referred to a job obligation on July 13; and (3) that Polk had requested to appear on July 13 via video conference.

During argument, Local 2010 reasserted its position that Polk did not have good cause for her non-appearance at the March 9 hearing. It also maintained that Polk's explanation for her absence on July 13, lacked credibility, was contradictory, and was not supported by any documents. Local 2010 further asserted that it detrimentally relied upon Polk's representations that the July 13 hearing would go forward and that sanctions should therefore be awarded. Regarding Polk's motions, Local 2010 asserted that Polk did not follow PERB's process for the production of documents at hearing.

[7] The APA is codified at Government Code, section 11340 et seq.

[8] Each party had 12 minutes for its initial argument, followed by a 10-minute rebuttal period. Local 2010 went first. Polk had an approximately 50-minute break before providing her closing remarks in response to all of Local 2010's arguments. The parties' actual argument period exceeded these deadlines because of questions I had and because of statements Polk made after her allotted time ended.

Polk argued that both her March 9 and July 13 absences were caused by circumstances beyond her control and that she remained committed to pursuing this case on the merits. Regarding the July 13 hearing date, Polk said that she had to visit the emergency room on the way to the hearing. She told her treating physician that she "had somewhere [she] had to be," but declined to explain herself to him further. She said her physician believed that all she required was a release to return to work and then directed her to undergo a medical procedure to alleviate her symptoms.

Polk argued that Local 2010's failure to produce the documents she requested, in conjunction with the false testimony of its witness, and the "hiding" of another witness, hindered Polk's ability to pursue this case.

Regarding her failure to discuss scheduling pursuant to my May 22 Order, Polk said that she was waiting to hear about developments in the case, but "had to go away unexpectedly," when my May 22 Order issued. She did not elaborate.

Regarding the July 20 deadline for producing documents in support of the oral argument, Polk originally argued that she was not informed of the deadline until after it had already passed. She requested leave to file the documents late, which I denied due to her failure to establish good cause. The oral argument was recorded for the purposes of transcription, but as of the date that this proposed decision issued, neither party submitted an order for a copy of the transcript. At the end of the oral argument, I informed the parties that the record was closed, under further notice, and that the matter of all the pending motions was considered submitted for decision.

ISSUES

1. Should the charge and complaint be dismissed based on Polk's failure to pursue the matter with due diligence?

2. Should PERB order Polk to pay Local 2010's attorneys' fees and costs for her non-appearance on July 13?

3. Should PERB order Local 2010 to produce documents requested by Polk, pursuant to APA Section 11507.6? If so, should PERB sanction Local 2010 for not producing those documents earlier?

CONCLUSIONS OF LAW

1. Motions to Dismiss for Failure to Prosecute With Due Diligence

a. Legal Standards Relevant to Local 2010's Motions

As explained in the March 9 OSC, PERB ALJs have discretionary authority to dismiss a case for lack of prosecution with due diligence based on delays in the case, absent a showing of "good cause." (*City of Inglewood (Smith)* (2015) PERB Decision No. 2424-M, p. 13, fn. 23; *State of California (Department of Corrections)* (2006) PERB Decision No. 1806-S (*Department of Corrections*), pp. 5-6.) PERB's good cause analysis weighs the charging party's asserted reasons for the delays in the case against the length of the delays and the potential for prejudice against the respondent. (*Id*. at p. 7, citing *California State University* (1984) PERB Decision No. 468-H (*CSU*).) Typically, good cause only exists where the delays or requested delays are based on circumstances that are either unanticipated or beyond the charging party's control. (*Ibid*.) Under that reasoning, the Board in *California School Employees Association (Petrich)* (1989) PERB Decision No. 758, affirmed an ALJ's dismissal of a case after the charging party failed to appear at the formal hearing and offered no reasons

for his absence. (*Id*. at p. 3.) As the Board later found, PERB is "precluded from finding that good cause exits," where a party offers either no justification or only vague reasons for the delay. (*Compton Unified School District* (2008) PERB Order No. Ad-374 (*Compton USD*), p. 4; *Coachella Valley Unified School District* (1998) PERB Order No. Ad-292 (*Coachella Valley USD*), pp. 3-4 [non-specific "postal or clerical delay" was not a good cause justification for a late filing]; see also *State of California (Department of Insurance)* (1997) PERB Order No. Ad-282-S, p. 2.)

In *Department of Corrections*, *supra*, PERB Decision No. 1806-S, the Board declined to find good cause for a six month delay in an individual's prosecution of his case before an ALJ. In doing so, the Board rejected the charging party's assertion that his medical condition limited his ability to pursue the case where he was able to file numerous other documents with both his employer and with PERB during that time. (*Id*. at pp. 7-8; see also *CSU*, *supra*, PERB Decision No. 468-H, pp. 3-4.) The Board also found unpersuasive the claim that he did not receive necessary documents from PERB where the documents were sent to his correct address through the mail with a standard proof of service form. The Board relied upon the generally accepted rebuttable presumption that documents correctly addressed and properly mailed were received by the addressee. (*Department of Corrections*, pp. 8-9, citing Evid. Code, §§ 604, 641; *Craig v. Brown & Root, Inc*. (2000) 84 Cal.App.4th 416.) The Board accordingly affirmed the ALJ's decision to dismiss the case. (*Ibid*.; but see *Washington Unified School District* (1985) PERB Decision No. 549 [finding that the parties' agreement to hold a case in abeyance until related and unsettled legal issues were resolved did not constitute a failure to prosecute].)

In *Service Employees International Union, Local 99, AFL-CIO (Kimmett)* (1981) PERB Decision No. 163 (*Kimmett*), the charging party failed to appear at a scheduled day of hearing and refused to appear at future hearing dates until PERB entertained his request for sanctions against the respondent. (*Id*. at proposed decision, pp. 3-4.) The charging party in that case was warned that the "charge could be heard in the absence of one party, or other sanctions taken if either of the parties again failed or refused to appear." (*Ibid*.) After the charging party's sanctions request was resolved, the charging party again failed to appear at another day of hearing. The ALJ dismissed the case based on the charging party's failure to prosecute. (*Id*. at proposed decision, pp. 5-6.)

In *Los Angeles Unified School District* (1984) PERB Decision No. 464 (*LAUSD*), the charging party failed to appear at the fourth scheduled day of hearing. The hearing date was rescheduled and PERB ordered that "absent extraordinary circumstances, no further continuances or delays will be allowed." (*Id*. at proposed decision, pp. 11-12.) The charging party did not attend and the matter was dismissed for failure to prosecute. (*Id*. at proposed decision, pp. 13-14.)

b. Polk's Failure to Appear for Two Hearing Dates

In applying the above principles to Local 2010's motions to dismiss this case, I find it appropriate to consider the parties' overall conduct to ascertain whether Polk has pursued this case with the required due diligence. Here, as in both *LAUSD*, *supra*, PERB Decision No. 464, and *Kimmett*, *supra*, PERB Decision No. 163, Polk failed to appear for multiple hearing days, despite the warning that her failure to appear could result in dismissal. Polk has furthermore not demonstrated good cause for her absence. Regarding her non-appearance on March 9, Polk asserted that the company she contracted with for transportation increased its quoted rate for a

car rental and that she was "not prepared" to pay the higher rate. She said she could not rent a car from a different company because the first company already erroneously charged her credit card.[9] In my May 22 Order, I rejected that Polk's assertion that those facts demonstrated good cause. In doing so, I found that Polk failed to demonstrate whether she was unable, or simply unwilling, to pay the higher car rental rate.[10] Furthermore, Polk failed to adequately establish that alternative transportation was unavailable. To the contrary, it appears from her communications on March 8, that Polk had already concluded that the car rental issue alone precluded her from attending the hearing. Although she said that she was unable to rent another car for financial reasons, Polk did not adequately explain the extent to which she explored other methods to attend the hearing.

Regarding her absence on July 13, Polk asserted that she could not appear because she was in the emergency room due to an adverse reaction to medication. She said that she requested to leave, but that her treating physician refused. I might have been more inclined to accept these assertions as a good cause justification for her absence had this incident occurred in isolation. However, in this case, Polk has a demonstrated history of requesting emergency relief from PERB without substantiation or support (see e.g., the March 4 continuance request, the May 18 Ex Parte Motion to Stay, Motion for Tolling, Motion for Continuance, and the July 7 continuance request). The same is true with Polk's assertions here and her failure to provide supporting documents for this claim weighs heavily against her assertion of good cause. Polk

[9] During the oral argument, Polk stated that she had newly acquired evidence supporting this assertion. She requested leave to provide that evidence. I deny that request as I find it inconsequential to my determination of whether Polk's overall conduct demonstrates a lack of diligence in pursuing this case.

[10] It is also worth noting that, on March 4, Polk asserted that her travel costs for her appearance at the February 5-6 hearing dates was around $350, roughly double $173.48, the incorrect rate Polk states she was quoted for her one-day appearance on March 9.

did not provide any documentary support for this claim by July 20, as I directed. Nor did she seek to extend this deadline until after it had already passed. During the oral argument, Polk argued that she was not informed of the July 20 deadline. I reject this assertion. As in *Department of Corrections*, *supra*, PERB Decision No. 1806-S, the parties were informed of this deadline through my July 13 Order, which was sent via regular mail with a standard proof of service form, creating a presumption that Polk timely received the document. Polk produced no evidence to rebut that presumption.

In addition, the parties were informed of the July 20 deadline in both the body-text and the attachments from my July 13 e-mail. Polk clearly received this e-mail as Polk responded on July 15, and the text of my message follows hers. Polk was again informed of the deadline in the body-text of another e-mail from me, also from July 15. My reply expressly informed the parties that the documents contained important deadlines.

Polk acknowledged overlooking the deadlines because she did not read my messages carefully. She now requests leave to file those documents late. That request is denied. Under PERB Regulation 32136, late filings may only be excused for good cause. And, as stated above, good cause only exists when occasioned by circumstances that are either unanticipated or beyond the party's control. (*Department of Corrections*, *supra*, PERB Decision No. 1806-S, p. 7, citations omitted.) In *State of California (Water Resources Control Board)* (1999) PERB Order No. Ad-294-S, the Board rejected a party's late-filed response to exceptions from an ALJ's decision. The Board was not persuaded by the filing party's assertion that its attorney "misread or failed to read PERB's regulations and the chief ALJ's letter." (*Id*. at p. 5.) The Board found that accepting the filing party's argument would render PERB's Regulations concerning the "good cause" exception to accept late filings meaningless. (*Id*. at pp. 5-6; see

also *Calipatria Unified School District* (1990) PERB Order No. Ad-217, p. 11.) I find that the same rationale applies here. Polk had undisputable notice of the July 20 deadline. She admitted to not complying with the deadline because she did not read my communications. She also admitted to knowing of the deadline before the July 31 oral argument, and yet she did not request leave to file additional documents until her final remarks, after Local 2010 had completed its argument in full. As I said during the oral argument, I do not find Polk's mistake to constitute good cause and her request to file additional material is denied.[11] In addition, I also conclude that Polk's admitted lack of attention over the July 20 filing deadline, and her failure to state her interest in filing additional documents earlier constitute additional evidence that Polk was not pursuing this case with due diligence. After reviewing all the available information and evaluating the parties' claims, I conclude that Polk did not have a good cause reason for failing to attend the July 13 hearing date.

c. Polk's Other Conduct

While Polk vehemently insisted that she remains interested in pursuing and adjudicating her case against Local 2010, I find that her overall actions in this case thus far demonstrate otherwise. She was an hour late to the February 6 hearing date. Although Polk originally agreed to appear for a third day of hearing on March 9, she later sought to continue the matter based largely on circumstances that she was aware of or could have anticipated while the parties were discussing scheduling. Furthermore, Polk sought multiple extensions to

[11] After the record for the oral argument had closed, Polk also requested the opportunity to file additional supporting documents that she did not have access to before the July 20 deadline. I denied her request because she did not raise that issue or make reference to those documents at any point on the record after being informed that the oral argument was her opportunity to raise all issues pertaining to the pending motions.

her briefing obligations, most of which did not comply with PERB Regulations. Despite the fact that I granted most of Polk's requests, she still failed to file her briefs on time.

Polk also admitted to ignoring my May 22 order to meet and confer over re-calendaring the third and final hearing date. Her only explanation for this was that she "had to go away unexpectedly," without any further detail. As in *Compton USD, supra*, PERB Order No. Ad-374, and *Coachella Valley USD, supra*, PERB Order No. Ad-292, Polk failed to provide an adequate explanation for her failure to abide by this order, which precludes me from finding that her actions were excused for good cause.[12]

d. Prejudice to Local 2010

I also conclude that the delays in this case have prejudiced Local 2010. Counsel for Local 2010 traveled to PERB's Los Angeles Regional Office from Local 2010's location in Oakland, California, twice to complete its case in chief. And as stated in my July 9 Order, some of the claims in this case date back to events from 2011. The frequent and lengthy delays in this case jeopardize the remaining witnesses' ability to recall events with accuracy and to locate documents and other relevant evidence. Polk already completed her case in chief on February 6, and thus preserved the evidentiary record supporting her claims. Accordingly, any disadvantages for the remaining witnesses caused by the significant delays here disproportionately affect Local 2010's case in chief.

e. Polk's Arguments in Opposition to Dismissal

Polk asserted in oral argument that Local 2010 should essentially be estopped from pursuing dismissal due to its own delays in the case. She pointed out that Local 2010 too did

[12] Moreover, as in *Department of Corrections, supra*, PERB Decision No. 1806-S, Polk filed documents with PERB as late as May 18. Polk said during oral argument that she was awaiting further action from PERB, but she did not explain how she became unavailable to participate in the meet and confer process just four days later.

not comply with my May 22 meet and confer Order and argued that Local 2010 therefore waived its right to challenge the scheduling of the July 13 hearing date.[13] I agree, but I also find that Polk's argument applies with equal force to her own inaction. Local 2010's failure to contact Polk first did not prevent her from initiating that process. Neither party pursued any scheduling discussion even after being informed that their failure to do so would result in my calendaring the matter unilaterally for July 13. I further informed the parties that once scheduled, the hearing would only be continued further under extraordinary circumstances.

Polk also asserted that Local 2010 lengthened the hearing by providing false testimony through one of its witnesses and by "hiding" another witness. These arguments lack support and are ultimately unpersuasive. Polk had and used the opportunity to cross examine Local 2010's only witness thus far in this case. There is insufficient information in the record to conclude that the witness testified falsely and Polk provided no support for that assertion. Had Polk attended the third hearing date, she would have had the opportunity to refute Local 2010's evidence in her case in rebuttal. Regarding the alleged "hiding" of a witness, neither party is obligated to identify its witnesses prior to the time of their testimony. Moreover, the witness that was allegedly hidden, Daniel, was present for at least part of the day on February 6. He was also identified as Local 2010's witness in both my March 9 OSC and in Local 2010's April 20 filing. Polk accordingly had sufficient notice that Daniel would testify for Local 2010. Once again, had Polk appeared for the third hearing day, she could have cross-examined

[13] Local 2010 admitted to making no effort to meet and confer with Polk over scheduling. During the July 10 conference call, counsel for Local 2010 represented that he did not see the need to do so because Local 2010 was satisfied with having me schedule the hearing unilaterally for July 13.

Daniel during Local 2010's case in chief, and even called him her own witness in her case in rebuttal.[14]

Finally, Polk asserts that her lack of legal expertise should not be held against her. I recognize that the nuances of legal analysis and administrative procedure may sometimes be challenging to grasp. (But see *Charter Oak Unified School District* (2011) PERB Decision No. 2159, warning letter, p. 4 [holding that the failure to understand the legal significance of one's circumstances does not preclude dismissal].) However, I do not agree that Polk's lack of legal training excuses her actions because the conduct I find most troubling in this case does not involve complex legal concepts. Rather, all parties to a PERB proceeding should be expected to understand the importance of showing up to scheduled events, arriving on time, reading documents carefully, and meeting deadlines. The extensive procedural history in this case points to a prolonged lack of genuine effort by Polk to complete the hearing in this case. She failed to appear at two days of hearing after having had the opportunity to participate in scheduling both of those days. She also failed to establish good cause for either absence. Polk was also more than an hour late to the February 6 hearing. She failed to abide by the briefing schedule for consequential issues in her case, and ignored my order to meet and confer over scheduling without providing a specific justification.

In reviewing all of the parties' conduct, I conclude that Polk has not pursued this case with due diligence and that her absences without good cause and other lengthy delays have harmed Local 2010. Accordingly, Local 2010's motion to dismiss the case for failure to prosecute is GRANTED and the charge and complaint in this case are both DISMISSED.

[14] Polk did not subpoena Daniel or any other witness in this case.

2. Local 2010's Motion for Attorneys' Fees and Costs

Local 2010 also filed a motion to have its attorneys' fees and costs for its appearance on July 13 assessed against Polk. In *Omnitrans* (2010) PERB Decision No. 2143-M, the Board found that an attorneys' fees award against a party is only appropriate when the opposing party's conduct was "without arguable merit and pursued in bad faith." (*Id*. at p. 8.) In that case, PERB denied an attorneys' fees request where the charging party's counsel traveled from San Francisco to Los Angeles for a settlement conference but the respondent's counsel failed to appear. (*Id*. at proposed decision, pp. 18-19.) PERB declined to infer bad faith from the respondent's single non-appearance. (*Ibid*.) On the other hand, repetitive indefensible misconduct may justify an attorneys' fees award in the future. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453, p. 3, citing *Modesto City Schools and High School District* (1985) PERB Decision No. 518.) An attorneys' fees award is typically reserved for particularly egregious conduct such as lying under oath about the fundamental basis for the case. (*City of Alhambra* (2009) PERB Decision No. 2037-M, p. 3.)

In this case, for the reasons articulated above, I conclude that Polk's asserted reason for her absence on July 13 was unsupported and lacks arguable merit. However, I am not persuaded by Local 2010's arguments that Polk's absence was also for bad faith reasons. It is true that she offered no documentary support for her absence and that she also assured Local 2010, as late as July 12, that she would appear. That said, I am reluctant to ascribe what I believe is a lack of genuine effort to pursue this case diligently with intentional misconduct. I do not condone Polk's behavior in this case, but I also find that her conduct was not so egregious as to justify sanctions. For that reason, Local 2010's motion is DENIED.

3. Polk's Motion to Compel the Production of Information and Motion for Sanctions

Polk's motion to compel Local 2010 to produce documents is also DENIED for at least three reasons. First, the motion is moot because I have already determined that this case should be dismissed due to Polk's failure to prosecute the matter with due diligence. Even assuming Local 2010 had some obligation under the APA to produce documents in advance of the PERB hearing, its failure to meet that obligation does not excuse Polk's failure to pursue this case. As this case has been dismissed, I conclude that any right Polk had to receive documents from Local 2010 has been extinguished.

Second, Polk raised this issue during the February 5 hearing date. During that time, Local 2010 stated that it would have responded to any subpoena served by Polk in compliance with PERB Regulation 32150. At that point, Polk appeared to agree that PERB's regulations were the proper avenue for producing her requested documents and even suggested that she would attempt to subpoena the documents at issue. Until her July 30 motion, Polk did not inform either Local 2010 or PERB that she believed she was entitled to those documents through another means. I interpret Polk's decision to raise this issue now, when no hearing dates are calendared, as merely an attempt to delay the proceedings in this case.

Third, Polk's motions are premised on the assertion that the APA's hearing procedures, commencing at Government Code section 11500, apply to PERB unfair practice charge hearings. However, Government Code section 11501 states that that those procedures apply only to agencies either created after 1997, or whose governing statutes expressly apply the APA's hearing procedures. PERB fits neither qualification. PERB was established in 1975 and assumed jurisdiction over HEERA in 1979. (*Anderson v. California Faculty Assn.* (1994) 25 Cal.App.4th 207, pp. 211-212; *Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, p.

804.) Moreover, in HEERA section 3563, the Legislature empowered PERB to create its own rules and regulations over matters, including those covering the production of witnesses, documents, and other records. Nothing in HEERA states that the APA Section 11500 et seq., applies to PERB unfair practice charge hearings.[15] In interpreting Government Code section 3541.3, which is identical to HEERA section 3563 in all relevant ways, the Board expressly held that the procedures contained in Government Code section 11500 et seq., do not apply to PERB unfair practice charge hearings. (*City of Torrance* (2009) PERB Decision No. 2004, p. 8, fn 7; see also 25 Cal.L.Rev.Comm. Reports 55 (1995);[16] West's Ann. Gov. Code (1995 ed. & 2012 supp.) foll. § 3563.) Thus, Polk's assertions that Local 2010 violated Government Code 11507.6 are unpersuasive because those sections do not apply here. As to the assertion that she was entitled to the same information under PERB Regulations, I conclude that Polk did not comply with PERB Regulation 32150, governing subpoenas for witnesses and documents at PERB hearings. For that reason, both of Polk's motions are DENIED.

[15] HEERA section 3563 does specify that Title 2, Division 3, Part 1, Chapter 4.5, of the Government Code applies to PERB unfair practice charge hearings. Government Code Section 11500 et seq., commences in Chapter 5.

[16] In commentary about the 1995 amendments to HEERA section 3563, the authors in this document state:

> Although Section 3563 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Public Employment Relations Board under this chapter. Cf. Gov't Code § 11501 (application of chapter)

PROPOSED ORDER

Based upon the foregoing motions, findings of fact, conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CO-528-H, *Debbie Polk v. Teamsters Clerical, Local 2010*, are hereby DISMISSED. All other motions filed by the parties are DENIED.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required

number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)