

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FONTANA CLASSIFIED EMPLOYEES)
ASSOCIATION/NEA,)
)
Employee Organization,) Case No. LA-D-176
APPELLANT,)
) Administrative Appeal
and)
) PERB Order No. Ad-157
UNITED STEEL WORKERS OF AMERICA, AFL/CIO,)
) July 31, 1986
Employee Organization,)
)
and)
)
FONTANA UNIFIED SCHOOL DISTRICT,)
)
Employer.)
_____)

Appearance: Edward B. Hogenson, Executive Director, for Fontana
Classified Employees Association/NEA.

Before Hesse, Chairperson; Burt, Porter and Craib, Members.

DECISION

CRAIB, Member: This matter is before the Public Employment
Relations Board (PERB or Board) on appeal from an administrative
decision by the executive director rejecting as untimely an appeal
of a Board agent's dismissal of a decertification petition filed
by the Fontana Classified Employees Association/NEA (Association).

The Board agent's decision was served November 18, 1985.
Pursuant to PERB Regulation 32360(b),¹ a timely appeal was

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

Regulation 32360(b) states:

required to be filed in the Board's headquarters office on or before December 2, 1985.² The Association's appeal was served by regular United States mail on November 27, 1985, and was received at the Board's headquarters office on December 4, 1985.³ By letter dated December 12, 1985, the executive director informed the Association that its appeal was rejected as untimely. The Association then filed the instant appeal asking that its late filing be excused due to extraordinary circumstances

An original and 5 copies of the appeal shall be filed with the Board itself in the headquarters office within 10 days following the date of service of the decision or letter of determination.

²November 28 and 29, 1985 were State holidays. November 30 and December 1 fell on a weekend. PERB Regulation 32130(b) states:

Except for filings required during a "window period" as defined in sections 33020, 40130 or 51026, whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day.

³PERB Regulation 32135 provides that:

All documents shall be considered "filed" when actually received by the appropriate PERB office before the close of business on the last date set for filing or when sent by telegraph or certified or Express United States mail postmarked not later than the last day set for filing and addressed to the proper PERB office.

pursuant to PERB Regulation 32136.⁴

Specifically, the Association claims it is "both mysterious and extraordinary" that its appeal was received a full week after mailing. Further, the Association asserts that it made a good faith attempt to comply with the deadline for filing, and that, in any event, the December 4 filing caused no undue delay.

DISCUSSION

First, we note that the Board has recently held that California Code of Civil Procedure section 1013 applies to decisions and orders of PERB. Lake Elsinore School District (1986) PERB Order No. Ad-154. Section 1013 states, in relevant part:

(a) In case of service by mail, . . . the service is complete at the time of the deposit, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California, . . .

Former PERB Regulation 32140(b), which stated that the portion of section 1013 relating to extending the time to respond after service by mail shall not apply, has been repealed.⁵

⁴PERB Regulation 32136 provides that:

A late filing may be excused in the discretion of the Board only under extraordinary circumstances. A late filing which has been excused becomes a timely filing under these regulations.

⁵On May 27, 1986, the Office of Administrative Law approved PERB's emergency filing for repeal of Regulation 32140(b).

Nevertheless, even with an additional five days pursuant to section 1013, the Association's appeal was untimely. Allowing fifteen days from the service of the Board agent's decision on November 18, 1985, the appeal would have been due on December 3.⁶

⁶Our dissenting colleague argues that the five-day extension provided by section 1013 should be added to the December 2 deadline calculated by the Board agent in accordance with Regulation 32130(b). This approach would make the last day for filing December 7. We reject this approach for the following reasons.

The principle relied upon in the dissent, that the courts have applied section 1013 and section 12(b) of the Code of Civil Procedure (which is analogous to Regulation 32130(b)) in whichever order provides the longest time for filing, is not stated in any of the cases cited nor in any other authority. In fact, only in Shoutens v. Superior Court (1950) 97 Cal.App.2d 855 is the application of section 12(b) prior to the application of section 1013 even mentioned. Contrary to the representation made in the dissent, it is not at all clear that the court in Shoutens applied section 12(b) before section 1013. The petitioner in that case urged such an application, and though the court ruled in the petitioner's favor, it did so based on the general policy of liberality with regard to deciding appeals on their merits and did not expressly adopt the petitioner's theory.

Additionally, the plain language of section 1013 and Regulation 32130(b) supports our approach, i.e., that section 1013 must be applied first and Regulation 32130(b) last. Section 1013 extends by five days the right to respond "within any prescribed period or on a date certain" after service by mail. By its terms, section 1013 is immediately triggered by the service of a document by mail and operates upon the response time provided by statute, regulation or court rule for the type of filing involved. In contrast, Regulation 32130(b) operates upon the "last date to file," in order to avoid requiring a filing on a day PERB offices are closed. The purpose of this Regulation is not served if it operates upon a date prior to the last date for filing. Thus, if other provisions of law, such as section 1013, extend the time for filing, they must logically operate prior to the application of Regulation 32130(b).

Lastly, the approach urged by our dissenting colleague raises

The Association's appeal was not received in the headquarters office until the following day. Therefore, the appeal may be considered on the merits only if its late filing should be excused under the extraordinary circumstances standard provided by Regulation 32136.

In Anaheim Union High School District (1978) PERB Order No. Ad-42, the Board held that mail delays generally do not constitute extraordinary circumstances:

"Extraordinary circumstances" means exactly that - out of the ordinary, remarkable, unpredictable situations or occurrences far exceeding the usual which prevent a timely filing. Mail delays are ordinary, commonly accepted occurrences and, therefore, will generally not serve to excuse a late filing.

Any delay in the instant case was neither remarkable nor unpredictable. Of the seven days between mailing and receipt, on two days there was no mail service (one holiday, one Sunday). Since the appeal was mailed the day before Thanksgiving, receipt in the headquarters office in Sacramento after the following Tuesday (December 3) was particularly unremarkable. By waiting to

the possibility that Regulation 32130(b) would be applied twice, both before and after the five-day extension of section 1013, a result surely not intended by the drafters of those provisions. The last day for filing under his approach would have been December 7, a Saturday. Since PERB headquarters was not open until the following Monday, December 9, presumably the appeal would not have been due until then. The December 9 deadline would extend the original ten-day appeal period to twenty-one days, clearly an anomalous result. Alternatively, if Regulation 32130(b) is applied only once, then presumably the last day for filing would have been Friday, December 6. The potential for confusion and inconsistency is apparent.

mail its appeal until the day before a long holiday weekend, the Association took the obvious risk that its appeal would not arrive in a timely fashion.⁷ The Association failed to obviate that risk by ensuring a timely filing, in accordance with Regulation 32135, by sending its appeal by certified or Express United States mail. Nor has the Association claimed that events beyond its control forced it to wait until November 27 to mail its appeal.⁸

In sum, upon the facts as presented by the Association, we find no extraordinary circumstances which would excuse the untimely filing.

ORDER

In accordance with the above discussion, the executive director's rejection of the Fontana Classified Employees Association's appeal as untimely is AFFIRMED, and Case No. LA-D-176 is hereby DISMISSED.

Chairperson Hesse and Member Burt joined in this Decision. Member Porter's dissent begins on p. 7.

⁷The risk is even more apparent considering that, according to PERB Regulations then in effect, the appeal was due December 2.

⁸In addition, it should be noted that the Board agent's decision was first served on the Association on November 12. Because the decision inadvertently omitted several lines of intended text, it was reissued on November 18, and the Association was then given a new 10-day period within which to appeal.

Porter, Member, dissenting: I would find that the appeal of the Fontana Classified Employees Association (Association) had been timely filed and would accordingly reverse the executive director's rejection of it.

In this case, the appellant Association had been served by mail with the Board agent's order on November 18, 1985. Under PERB Regulations 32360(b) and 32130(b) the appellant had to and including December 2, 1985 to exercise its right to file an appeal with this Board.¹ The Association mailed its appeal on November 27 and the appeal was received by this Board on December 4.

As the majority opinion acknowledges, this Board has recently held that section 1013 of the California Code of Civil

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

Regulation 32360(b) provides:

An original and 5 copies of the appeal shall be filed with the Board itself in the headquarters office within 10 days following the date of service of the decision or letter of determination.

Regulation 32130(b) provides in pertinent part:

Except for filing required during a "window period" . . . whenever the last date to file a document falls on Saturday, Sunday, or a holiday . . . or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day.

In applying these regulations, under Regulation 32360 (b) the last day to file the appeal would have been Thursday,

Procedure applies to administrative actions before this Board.

Lake Elsinore School District, (1986) PERB Order No. Ad-154.

Section 1013 provides in pertinent part:

(a) In case of service by mail . . . any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California, . . .

Calculating the period of time or the "date certain" within which an appeal with this Board is considered to be timely filed should not ordinarily present any special difficulties. However, in the event that the last day or the date certain on which to file a document falls on either a Saturday, Sunday or a government-defined holiday, PERB Regulation 32130(b) is thereby triggered, and it then becomes a question of determining the order in which the extensions mandated under section 1013 of the Code of Civil Procedure and PERB Regulation 32130(b) are to be applied.

As illustrated by the facts in the instant case, determining the order of the application of these provisions can be critical. Appellant mailed its appeal November 27, and it was received at PERB on December 4. Under the method of

November 28th, but since under Regulation 32130(b) the 28th was a holiday (Thanksgiving) as was the 29th (state holiday), and PERB offices were closed on the 30th and December 1st, the last day for the Association to file an appeal was extended to Monday, December 2, 1985.

calculation chosen by the majority opinion, if the five additional days mandated by section 1013 are added initially to the 10 days afforded by PERB Regulation 32360(b) without any consideration of the effect of PERB Regulation 32130(b), the appeal would have been due at the Board's headquarters office on or before December 3, 1985 in order to have been timely filed. Under this application of section 1013, the Association's filing on December 4 would have been one (1) day late. If instead, however, the extension mandated by section 1013 is added to the date at which the Association's appeal would have been due under PERB Regulations 32360(b) and 32130(b), which was December 2, the Association would have had until December 7 to file its appeal, and the appeal would therefore have been timely on December 4.

Sections 12, 12(a) and 12(b) of the Code of Civil Procedure ² are the statutory parallel provisions to PERB Regulation 32130(b). In determining the sequence under which extensions pursuant to sections 12, 12(a) and 1013 are to be

²Section 12 of the California Code of Civil Procedure provides:

The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.

Section 12(a) of the California Code of Civil Procedure provides, in pertinent part:

If the last day for the performance of any act provided or required by law to be

granted, California courts have uniformly applied them in such manner so as to preserve, if at all possible, the parties' right of appeal. In other words, the courts have shunned the arbitrary and draconian application of one statute before another, and have striven instead for a coextensive and harmonious application of their extensions in the order in which the ultimate goal of preservation of the right of appeal is fostered. See e.g., Schoutens v. Superior Court (1950) 97 Cal.App.2d 855; 857-858; Industrial Indem. Co. v. Ind. Acc. Com. (1961) 57 Cal.2d 123, 126; Montgomery v. Norman (1953) 120 Cal.App.2d 855, 857-858.³ Furthermore, in favoring an application in which these statutes are applied coextensively

performed within a specified period of time shall be a holiday, then such period is hereby extended to and including the next day which is not a holiday. The term "holiday" . . . shall mean all day on Saturdays

Section 12(b) of the California Code of Civil Procedure provides:

If any city, county, state or public office, other than a branch office is closed for the whole of any day, insofar as the business of that office is concerned, that day shall be considered as a holiday for the purposes of computing time under Sections 12 and 12(a).

³For example, in Schoutens v. Superior Court, *supra*, Section 12 of the Code of Civil Procedure was applied before Section 1013. Then, in order to preserve the appellant's right of appeal the facts necessitated an application of section 12 again after the application of Section 1013. However, in Montgomery v. Norman, *supra*, the situation required a change from the order that had been applied in Schoutens. Specifically, in order to ensure the timeliness of defendant's filing, section 1013 was applied first, followed by an application of section 12 of the Code of Civil Procedure.

and on an ad hoc basis, the California authorities cited are consistent with the cardinal principle of California caselaw favoring the preservation of the right of appeal and the hearing of appeals on their merits. See e.g., City of Santa Barbara v. California Coastal Zone Conservation Comm. (1977) 75 Cal.App.3d 572, 581, Gibson v. Unemployment Insurance Appeals Board (1973) 9 Cal.3d 494, 499. Pesce v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 310, 313.

The facts of the instant case highlight the manifest unjustness of not applying section 1013 coextensively with PERB Regulation 32130(b). This appellant was not sleeping on its rights, nor did it attempt to file its appeal after the due date. The appellant served its appeal by mail on November 27, which was a full six days before December 2, the date at which it would have been due pursuant to PERB Regulation 32130(b), absent any application of section 1013. In fact, December 2, 1985 was acknowledged by PERB's executive director as the date (or, "date certain") on which the appeal was due.⁴ Nonetheless, by an application of section 1013 whereby PERB Regulation 32130(b) could not also be applied, the majority opinion divests this appellant of its right of appeal and, ironically, defeats the very purpose of section 1013.

⁴In rejecting the appeal as untimely, our executive director specifically identified December 2 as the due date without any consideration of section 1013.