



complaint and unfair practice charge on the grounds of collateral estoppel.

PERB Regulation 32410<sup>1</sup> requires that a request for reconsideration be filed with the Board within 20 days of service of the decision. The filing deadline may be extended pursuant to PERB Regulation 32130(c) which provides a five-day extension for documents filed by mail. Accordingly, a request for reconsideration of the Board's decision in Youth Authority was due to be filed no later than February 6, 1995.

On January 31, 1996, Janowicz filed the instant request that the Board accept his late filed reconsideration request. To substantiate his request to excuse the late filing, Janowicz explains that the U.S. Equal Employment Opportunity Commission (EEOC) recently issued a ruling on charges he filed in 1992 which "proves Charging Party's claim of retaliation."<sup>2</sup> Janowicz now asserts that the EEOC's recent "finding" of retaliation by the CYA justifies the Board's reconsideration of the retaliation charge considered in Youth Authority.

#### DISCUSSION

PERB Regulation 32136 provides that:

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

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<sup>1</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

<sup>2</sup>In 1992, Janowicz filed charges with the EEOC alleging that he was laid off as a permanent intermittent teacher as a result of age discrimination and in retaliation for filing prior charges against the CYA with the EEOC.

A late filing which has been excused becomes a timely filing under these regulations.

The Board's previous decisions which apply this regulation primarily concern problems related to the mechanical process of filing documents with PERB. In California School Employees Association (Simeral) (1992) PERB Order No. Ad-233, the Board excused a late filing that was inadvertently misaddressed and delayed by the postal service. In Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H, the Board excused a filing that was inadvertently sent by regular mail rather than by certified mail; and, in Trustees of the California State University (1989) PERB Order No. Ad-192-H, the late filing was excused due to an inadvertent clerical error. By contrast, good cause was not found in cases where the Board found that the party had failed to make a conscientious effort to timely file or request an extension of time.

This case more closely resembles unexcused cases because of the reason Janowicz offers to justify his late filing: he waited to file until he received a ruling from another forum involving different statutes. While there is no PERB precedent directly on point, it is helpful to look at factors that California appellate courts have used in resolving late filing requests. In general, the cases hold that if an excuse is reasonable and credible, the court will then focus on whether permitting a late filing would

be prejudicial to the opposing party.<sup>3</sup> PERB's opinions have been consistent with the court cases on this point.<sup>4</sup> One reason courts are willing to exercise leniency in this area is the well-established doctrine that an appellate body is reluctant to permit minor procedural defects to preclude an examination of a controversy on its merits.<sup>5</sup>

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

If the excuse is credible and not clearly unreasonable . . . the court should consider all other factors, including prejudice to the defendant, before ordering dismissal. . . .  
[Id. at 557.]

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

<sup>4</sup>See, for example, University of California, Los Angeles (1992) PERB Decision No. 961-H, where the Board allowed a late filing because, among other reasons, doing so posed no prejudice to opposing counsel. See also, San Diego Adult Educators v. Public Employment Relations Board (1990) 223 Cal.App.3d 1124, 1131-1132 [273 Cal.Rptr. 53], in which the Court of Appeal upheld PERB's decision to allow late service of an unfair practice charge since there was no showing of prejudice to the respondent.

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

In this case, the following factors were weighed in deciding that good cause has not been shown. First, Janowicz made no conscientious effort to file on time or request an extension of time. Second, the merits of the case he presented in Youth Authority were considered in Superior Court and a decision was issued in favor of CYA. Third, in Youth Authority PERB again considered and dismissed Janowicz's unfair practice charge and complaint based on collateral estoppel. To reconsider those rulings yet again because of a decision rendered by another forum under provisions of a different statute would be unduly burdensome to CYA and we exercise our discretion against excusing the late filing.

ORDER

Frank D. Janowicz's request to accept his late filed request for reconsideration of the Board's decision in State of California (Department of Youth Authority) (1995) PERB Decision No. 1080-S is hereby DENIED.

Member Johnson joined in this Decision.

Chairman Caffrey's concurrence begins on page 6.

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(Id. at 498, fn. 5; citations omitted.) See also, Flores v. Unemployment Ins. Appeals Bd. (1973) 30 Cal.App.3d 681 [106 Cal.Rptr. 543]).

CAFFREY, Chairman, concurring: I concur in the denial of the request by Frank D. Janowicz (Janowicz) that the Public Employment Relations Board (PERB or Board) accept his late filed request for reconsideration of the Board's decision in State of California (Department of Youth Authority) (1995) PERB Decision No. 1080-S (Youth Authority). I write separately to clearly state the reasons for my decision.

PERB Regulation 32136 provides, in part, that:

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

Janowicz asserts that a ruling by the United States Equal Employment Opportunity Commission (EEOC) supports his allegation that the California Department of Youth Authority retaliated against him for his protected activity in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).<sup>1</sup> The Board in Youth Authority dismissed Janowicz's unfair practice charge which was based on that allegation. Janowicz argues that good cause

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<sup>1</sup>The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

It shall be unlawful for the state to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

exists to excuse his late filed request for reconsideration because the EEOC ruling only recently became available.

The documents presented by Janowicz indicate that the recent EEOC ruling deals with his allegation that his employer retaliated against him for filing a previous EEOC charge. Janowicz has provided no information to indicate how that ruling is relevant to his allegation before PERB that his employer retaliated against him for his exercise of rights protected by the Dills Act. Therefore, Janowicz has failed to demonstrate that good cause exists to excuse his late filed request for reconsideration of the Board's decision in Youth Authority.