

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FRANK D. JANOWICZ,)
)
 Charging Party,) Case No. LA-CO-52-S
)
 v.) Administrative Appeal
)
 CALIFORNIA STATE EMPLOYEES) PERB Order No. Ad-276-S
 ASSOCIATION, LOCAL 1000,)
) May 31, 1996
 Respondent.)
)
 _____)

Appearances: Frank D. Janowicz, on his own behalf; Michael D. Hersh, Attorney, for California State Employees Association, Local 1000.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request by Frank D. Janowicz (Janowicz) that the Board accept his late filed request for reconsideration of the Board's decisions in California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043-S (CSEA (Janowicz)) and California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043a-S. After reviewing the entire record, including Janowicz's request and the response filed by California State Employees Association, Local 1000 (CSEA), the Board hereby declines to accept the late filing.

BACKGROUND

Janowicz alleged in CSEA (Janowicz) that CSEA had failed to assist him in eliminating unfair labor practices directed at him

by his employer, conduct which allegedly constituted a breach of the duty of fair representation in violation of section 3519.5(b) of the Ralph C. Dills Act (Dills Act).¹ On March 25, 1994, the Board issued its decision in CSEA (Janowicz) in which it affirmed a PERB administrative law judge's (ALJ) proposed decision, dismissing Janowicz's complaint for failure to state a prima facie case of a breach of the duty of fair representation.

PERB Regulation 32410² 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 CSEA (Janowicz) was due to be filed no later than April 19, 1994.

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 states that the U.S. Equal Employment Opportunity Commission

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519.5 provides, in part:

It shall be unlawful for an employee organization to:

(b) 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.

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

(EEOC) recently issued a ruling on charges he filed in 1992 which, according to Janowicz, "proves Charging Party's claim of retaliation [by his employer]."³ Janowicz now asserts that the EEOC's recent "finding" justifies the Board's reconsideration of CSEA (Janowicz).

DISCUSSION

PERB Regulation 32136 provides that:

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

³In 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.

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 and different parties. 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.⁴ PERB's opinions have been consistent with the court

⁴See, 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.]

cases on this point.⁵ 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.⁶

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; in fact, this request comes almost two years after the deadline. Second, the merits of CSEA (Janowicz) were fully considered by the ALJ and a decision was issued in favor of CSEA. Third, in California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043a-S, PERB denied Janowicz's request for reconsideration of CSEA (Janowicz) because that request merely restated arguments previously considered and rejected by the Board in its underlying decision. To reconsider those arguments years later, because of a decision rendered by

⁵See, 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.

⁶See Pesce v. Dept. Alcoholic Bev. Control (1958) 51 Cal.2d 310, 313 [333 P.2d 15]. This principle is also followed in administrative agencies. Gibson v. Unemployment Ins. Appeals Bd. (1973) 9 Cal.3d 494 [108 Cal.Rptr. 1] discusses cases which hold that "whether good cause is shown for relief from an appeal deadline depends upon the factual circumstances of each case." (Id. at 498, fn. 5; citations omitted.) See also, Flores v. Unemployment Ins. Appeals Bd. (1973) 30 Cal.App.3d 681 [106 Cal.Rptr. 543]).

another forum under provisions of a different statute, where there is no connection with PERB's decision in CSEA (Janowicz), would be unduly burdensome to CSEA 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 California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043-S and California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043a-S is hereby DENIED.

Member Johnson joined in this Decision.

Chairman Caffrey's concurrence begins on page 7.

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 California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043-S (CSEA (Janowicz)). I write separately to state clearly the reasons for my decision.

PERB Regulation 32136 provides, in pertinent part:

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

Janowicz asserts that a recent ruling by the United States Equal Employment Opportunity Commission (EEOC) supports his allegation that the California State Employees Association, Local 1000 (CSEA) failed to assist him in eliminating unfair labor practices directed against him by the California Department of Youth Authority (CYA) and, thereby breached its duty of fair representation in violation of section 3519.5(b) of the Ralph C. Dills Act (Dills Act). In CSEA (Janowicz), the Board dismissed Janowicz's unfair practice charge which was based on that allegation. Janowicz argues that good cause 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 CYA 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 CSEA breached its duty of fair

representation to him in violation of the Dills Act. Therefore, he has failed to demonstrate that good cause exists to excuse his late filed request for reconsideration of the Board's decision in CSEA (Janowicz).