STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FONTANA UNIFIED SCHOOL DISTRICT, Employer, and UNITED STEELWORKERS OF AMERICA, Exclusive Representative.	Case No. LA-UM-683-E Administrative Appeal PERB Order No. Ad-324 May 9, 2003

Appearances: Atkinson, Andelson, Loya, Ruud & Romo by John W. Dietrich, Attorney, for Fontana Unified School District; Gilbert & Sackman by Jay Smith, Attorney, for United Steelworkers of America.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the United Steelworkers of America (Steelworkers) of an administrative determination rejecting the Steelworkers' filing of its response to exceptions because Steelworkers did not provide an appropriate proof of service as required by PERB Regulations 32310 and 32140. [1]

After reviewing the record, the Board excuses the Steelworkers' defective proof of service and thereby accepts the Steelworkers' response to the Fontana Unified School District's (District) exceptions.

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

BACKGROUND

On September 26, 2002, Steelworkers filed with the Board its response to the District's exceptions in Case No. LA-UM-683-E. The response was accompanied by a proof of service dated September 23, 2002, which only listed the PERB headquarters office as a recipient of service. On October 3, 2002, the Board appeals office sent Steelworkers a written notice that Steelworkers had neglected to provide a proof of service showing that it had served the District's Representative, John W. Dietrich (Dietrich), as required by PERB Regulation 32310. The October 3 notice provided a deadline of October 15, 2002 for providing a proof of service showing that Dietrich had been served with a copy of the response to the District's exceptions. Steelworkers did not provide a compliant proof of service by the October 15 deadline; so by letter dated October 22, 2002, the appeals office notified Steelworkers that its response would not be considered by the Board itself.

In its appeal, Steelworkers makes the following arguments. First, it provided proof of service on opposing counsel to the same PERB Oakland address on October 7, 2002 that it filed its response on September 23, 2002. Second, in the October 3 letter, the appeals office did not indicate that the Oakland address was the incorrect address to provide proof of service on opposing counsel. Third, opposing counsel Sherry Gordon (Gordon) was served with Steelworkers' response to exceptions on September 23 and acknowledged that fact in a phone conversation that took place on October 7, 2002.[2] Fourth, Steelworkers first learned of Dietrich's participation in these procedures in the October 3 letter and served its response on Dietrich on October 7, 2002. In addition, Janice Carr, Dietrich's assistant, acknowledged

[2]Although Steelworkers did not provide a declaration regarding the existence and substance of this phone conversation with its appeal, the District did not deny in its response either that the phone conversation occurred or that Gordon acknowledged receipt of Steelworkers' response to exceptions during that conversation.

Dietrich's receipt on September 25, 2002 of the original document served on Gordon during a phone conversation that occurred on October 25, 2002.[3] Fifth, although Steelworkers apologizes for any inconvenience, it argues that none of the parties has been prejudiced by Steelworkers' failure to provide the Board with proof of service on opposing counsel to its Sacramento address, and that consideration of Steelworkers' exceptions would allow for a full adjudication of this matter. A copy of the proof of service on opposing counsel Gordon, dated September 23, 2002, is attached to the appeal. That same proof of service shows service on the Board at the 1515 Clay Street, Oakland address. Also attached to the appeal is a proof of service showing service to the Board's Oakland office and to Gordon on September 23, and to Dietrich on October 7, 2002. That proof of service was signed under penalty of perjury on October 7, 2002. An original of this proof of service was filed with the Board on November 18, 2002.

The District opposes Steelworkers' appeal on the grounds that Steelworkers has not demonstrated good cause for the relief requested. The District asserts that Steelworkers was required to file a properly completed proof of service with PERB by October 7, 2002 and failed to do so, but instead, attached to its appeal a questionable proof of service that indicated a different address for PERB than the one used in the proof of service attached to Steelworkers' statement of exceptions. As a result, the District questions the authenticity of Steelworkers' Attachment 2 to its appeal, which is the proof of service showing service to the Board's Oakland office and to Gordon on September 23.

[3]The District did not refute the existence or substance of this phone conversation either.

DISCUSSION

PERB Regulation 32310 provides:

> Within 20 days following the date of service of the statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself in the headquarters office. The response may contain a statement of any exceptions the responding party wishes to take to the recommended decision. Any such statement of exceptions shall comply in form with the requirements of Section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this Section. Service and proof of service of these documents pursuant to Section 32140 are required.

PERB Regulation 32140 provides, in pertinent part:

> (a) All documents referred to in these regulations requiring 'service' or required to be accompanied by 'proof of service,' except subpoenas, shall be considered "served" by the Board or a party when personally delivered or deposited in the first-class mail properly addressed.
>
> (b) Whenever 'service' is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

In determining whether to accept Steelworkers' defective service in this matter, we find it instructive to summarize Board decisions in this matter. In Los Angeles Community College District (1983) PERB Decision No. 309, the Board would not accept an appeal of a charging party who failed to use a non-party to serve an appeal, who failed to serve the appeal on the opposing party, and who failed to identify in the appeal why facts provided in the charge were sufficient to state a prima facie case. In Los Angeles Community College District (1984) PERB Decision No. 395 (LACCD), the charging party both failed to serve the district with his appeal of the dismissal of his charge and when he appealed the rejection by the Board of his appeal, he again failed to serve the district. In the dismissal letter, the charging party was informed of the service requirements. The Board here explained that service requirements are

not merely ritualistic, but are basic to providing due process to the involved parties. In Coronado Unified School District (1989) PERB Order No. Ad-188, the Board would not excuse the charging party's failure to serve the district with her appeal until nine days after the filing deadline and to serve the district with a request for extension of time twenty days after the filing deadline. The service requirements had been explained to the charging party in the administrative law judge's proposed decision and in the denial of her request for an extension of time. Attached to the latter document was a copy of PERB Regulation 32140, showing that the charging party had clearly been informed of the service requirements.

Conversely, in Santa Monica-Malibu Unified School District (1987) PERB Order No. 163 (Santa Monica), opposing parties were served with a decertification petition two days after its filing with PERB, after the employer and the exclusive representative had executed a new tentative agreement. Citing the similar fact pattern in Lum v. Mission Inn Foundation (1986) 180 Cal. App. 3d 967 [226 Cal.Rptr. 22] (Lum), the Board accepted service of the petition on the basis that the parties had received actual notice of the filing prior to the filing deadline and therefore fulfilling the purpose of the service requirement. In addition, as in Lum, the parties admitted that they had not been prejudiced by the late service. In San Diego Community College District (1988) PERB Decision No. 662 (San Diego), affirmed in part, San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d 1124, 1131-1132 [273 Cal.Rptr. 53], service was not effectuated within the six-month statute of limitations although the charge had been timely filed. The Board compared provisions of the National Labor Relations Act and parallel state statutes, noting that unlike those laws, there is no service requirement found in the statutes under the Board's jurisdiction, only in PERB regulations. Although the Board has dismissed an appeal for failure to serve in the LACCD decision, the Board in San Diego recognized that where the respondent has notice of a timely

filing with the Board, late service will not bar the filing. (Santa Monica.) The Board interprets PERB regulations to support their intended purpose, in this case, to protect a respondent from stale claims or to prevent prejudice because the respondent was unable to defend itself due to late service.

In another matter, California School Employees Association (Kotch) (1992) PERB Decision No. 953 (Kotch), the proof of service attached to an appeal was signed by the charging party and therefore defective. The Board, however, accepted the appeal, reasoning that the respondent had opposed the appeal and thus there was no prejudice to it caused by the defective service. In Los Angeles Unified School District (1993) PERB Order No. Ad-250, the petitioner failed to serve the opposing parties with its appeal of an administrative determination denying its severance petition. The Board accepted the appeal because the service deficiency was cured by later service on the opposing parties with sufficient time for those parties to file opposing statements. Therefore, the opposing parties were not prejudiced by the late service.

In State of California (Department of Developmental Services) (1996) PERB Decision No. 1150-S (DDS), the department was served with the union's appeal eleven days after it was filed with PERB. The Board held that although PERB Regulation 32140 requires service concurrent with filing, that regulation provides no penalty for failure to comply. The Board stated that it is within the Board's discretion to overlook a technical violation of the regulation. (DDS, at pp. 2-3, fn. 2.) Looking to appellate precedent, the Board explained that service of process statutes should be liberally construed to effectuate service if actual notice has been received by the defendant and questions of service should be resolved by considering each situation from a practical standpoint. The courts will not presume prejudice by the mere passage of time. The purpose of these statutes is to eliminate unnecessary, time-consuming, and costly

disputes over legal technicalities, without prejudicing the rights of the defendant to proper notice in court proceedings. (Id.) In DDS, the Board extended these principles to the service requirements in Section 32140. The Board excused the late service in this case because it found no evidence of prejudice, the delay was brief, and no party claimed that either evidence or witnesses were unavailable because of the delay.

Finally, in Lodi Unified School District (2001) PERB Decision No. 1429 (Lodi), the exclusive representative alleged that service of a severance petition was defective because it was signed by an authorized agent of the party. The Board held that there was no claim of an actual failure to serve or of prejudice to the opposing parties, and that more than a technical violation was required to dismiss the petition.[4]

In conclusion, Board precedent on this issue has evolved over the years in favor of accepting documents with defective service when certain standards are met.[5] Looking at the above line of cases, it is clear that the Board has ultimately excused defective service if the opposing parties received actual notice of the filing and if there was no showing of prejudice.

In this matter, Steelworkers' response to the District's exceptions was timely filed with the Board's headquarters on September 26, 2003, but was accompanied by an incomplete proof of service, which failed to indicate that the District had been served. The appeals office advised Steelworkers by letter dated October 3 to provide a proof of service showing that District Representative Dietrich had been served with Steelworkers' response to exceptions by

[4]The Board further found in Lodi that the signator on the proof of service was not an authorized agent of the party.

[5]We respectfully disagree with the author of the concurrence regarding the introduction of a "good cause" standard for accepting documents with defective proof of service. There is neither a PERB regulation nor precedent supporting such a standard. In fact, some cases identified in this decision address defective proof of service, applying the standard articulated herein. (Lodi, Kotch.)

October 15, 2002. Steelworkers did not comply with this deadline. Instead, Steelworkers did not provide the Board with a proof of service until the appeal in this matter, filed on October 28, 2002. This proof of service is different in the following respects. First, it was served on the Board's Oakland regional office; whereas, the proof of service attached to Steelworkers' response to exceptions was properly served on the Board headquarters office. Second, the new proof of service contained two dates: September 23, 2002, for service to the Board's Oakland office and District counsel Gordon; and October 7, 2002, for service on District counsel Dietrich. None of these discrepancies is explained.

On the other hand, the District does not allege that it did not receive Steelworkers' response to its exceptions, that it did not receive the response in a timely manner, that the response was not served on the proper counsel, or that proof of service was not timely received by the District. Interestingly, in the case file for exceptions taken to the proposed decision, in all proof of service documents, Gordon is listed as the District's counsel of record. Only in the District's exceptions, are both Gordon and Dietrich are listed as counsel of record; Dietrich signed both the statement of exceptions and the cover letter. Gordon had otherwise represented the District throughout the proceedings and both Gordon and Dietrich are employees of the same law firm, representing the District from the firm's Riverside office.[6] Thus, there is no showing of prejudice to the District and it is apparent that the District was indeed served on a timely basis. We therefore hold that the defective proof of service should be excused and Steelworkers' response to the District's exceptions be accepted into the record.

ORDER

The appeal of the United Steelworkers of America (Steelworkers) of the administrative

[6]The Board should take official notice of these facts in the case file for exceptions to the proposed decision in this matter, also listed under Case No. LA-UM-683-E.

determination to deny the filing of its response to the Fontana Unified School District's exceptions to a hearing officer's proposed decision is GRANTED. It is hereby ORDERED that the appeals office accept the Steelworkers' filing into the record for Case No. LA-UM-683-E.

Member Neima joined in this Decision.

Member Baker's concurrence begins on page 10.

BAKER, Member, concurring: I agree with the majority that the response of the United Steelworkers of America (Steelworkers) to the exceptions filed by the Fontana Unified School District (District) should be accepted. I write separately because I believe that a distinction exists between defective service and a defective proof of service. The record establishes that the Steelworkers' response was timely served on the District. However, the proof of service filed by the Steelworkers failed to list the District as a recipient of the response. In this regard the proof of service was defective even though service had in fact been effectuated. In the future, such technical defects should be informally corrected by the parties in consultation with the Appeals Office. This matter is before the Board only because the Steelworkers compounded their initial error by sending the corrected proof of service to the Board's Oakland office, instead of the Headquarters office in Sacramento. On these facts, I find that good cause exists to accept the Steelworkers' response.