

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

LINDA LOU KESTIN,

Charging Party,

v.

UNITED TEACHERS OF LOS ANGELES,

Respondent.

Case No. LA-CO-1084-E

Administrative Appeal

PERB Order No. Ad-325

May 22, 2003

Appearances: Linda Lou Kestin, on her own behalf; Geffner & Bush by Steven K. Ury, for United Teachers of Los Angeles.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on a motion by Linda Lou Kestin (Kestin) for permission to file a late appeal of a Board agent's dismissal of her unfair practice charge. The charge alleged that the United Teachers of Los Angeles (UTLA) violated its duty of fair representation, set forth at Educational Employment Relations Act (EERA) section 3544.9¹, by refusing to assist her in securing release from psychiatric hospitalization which, according to Kestin, was precipitated by false statements by district management to police officers.

¹ EERA is codified at Government Code section 3540 et seq. Section 3544.9 states:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

The Board agent dismissed the charge, finding that UTLA did not owe Kestin a duty of fair representation regarding her involuntary hospitalization or release because UTLA did not possess the exclusive means by which she could obtain a remedy. More than five months later, Kestin submitted a motion for permission to file a late appeal of the Board agent's decision.

Motion to File Late

On January 15, 2002, the Board agent served a warning letter by mail on Kestin, stating that her charge failed to state a prima facie case and would be dismissed on January 22, 2002, if Kestin did not file an amended charge by that date. Kestin spoke with the Board agent by phone on January 18, 2002, and on January 21, 2002, sent the Board agent a letter, dated January 19, 2002, with attachments, in response to the warning letter.

On February 13, 2002, the Board agent issued a dismissal letter, finding that Kestin's supplemental submission failed to cure the defects in her charge identified in the warning letter. A proper proof of service, sworn under penalty of perjury by a PERB staff person other than the Board agent, was attached to the dismissal letter.

In her motion to file late, Kestin states that she never received the dismissal letter and asserts that it was "lost in the mail." Kestin says she did not see the letter until it was faxed to her by PERB staff on July 24, 2002. She does not explain when she learned of the letter's existence or what triggered PERB staff to fax it to her.

In addition, Kestin's request for permission to file late contains complaints regarding various aspects of her experience with the charge processing procedure and her interactions with PERB staff. She also asserts that she contacted an attorney when she learned of the dismissal letter who told her she, "should have come to him initially and had him file the

complaint for me.” Kestin submits allegations regarding retirement benefits and salary increases in the Los Angeles Unified School District and asks the Board to accept her late filing.

UTLA’s Opposition to Motion

UTLA argues that Kestin’s asserted basis for filing late lacks credibility because “Kestin does not explain how she knows the letter was lost in the mail, as opposed to having been lost by her or otherwise destroyed.” UTLA further submits that, even if Kestin’s explanation were credited, it would not justify a delay of more than five months. Otherwise, argues UTLA, PERB’s filing deadlines would be “rendered meaningless” because a party could file at any time merely by asserting that the dismissal letter was lost in the mail.

UTLA further asserts that, regardless of whether Kestin received the dismissal letter, the warning letter placed her on notice that the charge would be dismissed on January 22, 2002, if she did not file an amended charge. Although Kestin filed supplemental documents in response to the warning letter, she did not file an amended charge, argues UTLA. Kestin was in regular contact with the Board agent in mid-January, 2002. UTLA contends that, in light of those facts, a five-month delay does not constitute a “conscientious effort” to timely file, so good cause to accept the appeal is lacking.

Good Cause

PERB Regulation 32136 provides, “A late filing may be excused in the discretion of the Board for good cause only.” The Board’s application of Regulation 32136 to a variety of factual scenarios reveals that “good cause” is a flexible standard, defined and constrained by considerations of fairness and reasonableness. Examined together, those cases show that good cause exists only where, under all the surrounding circumstances, it is evident that the party

made a conscientious effort to timely file and the delay caused no prejudice to any party in the case. (State of California (State Teachers Retirement System) (1999) PERB Order No. Ad-296-S.)

Generally, the Board has excused a late filing where a non-prejudicial delay of short duration resulted from circumstances beyond the control of the filing party or from excusable misinformation and where the filing party's explanation was either credible on its face or was corroborated by other facts or testimony. (See, e.g., Trustees of the California State University (1989) PERB Order No. Ad-192-H (excusing late filing that was sent by certified mail on last day for filing but was erroneously postmarked the following day, corroborated by credible mailroom employee's supporting declaration); The Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H (excusing late filing based on attorney's plausible explanation that ordinarily reliable clerical employee inadvertently sent document by regular instead of certified mail on last day for filing); North Orange County Regional Occupational Program (1990) PERB Decision No. 807 (excusing late filing that was mailed to wrong PERB office, but was filed, served, and received in advance of filing deadline); but see State of California (State Teachers Retirement System) (1999) PERB Order No. Ad-296-S (no excuse for late filing where attorney already received two extensions and submitted only general, uncorroborated allegations of illness and computer problems to justify delay); State of California (Water Resources Control Board) (1999) PERB Order No. Ad-294-S and Calipatria Unified School District (1990) PERB Order No. Ad-217 (no excuse based on attorney misunderstanding of regulations); cf, Los Angeles Unified School District (2003) PERB Order No. Ad-318 (late filing excused where unrepresented

charging party honestly misunderstood filing deadline and communicated incorrect information to attorney she hired at last minute to file charge on her behalf.)

DISCUSSION

Kestin's motion to excuse her late filing must be assessed in light of the entire record, including the fact that the dismissal letter was accompanied by a proper proof of service.

PERB Regulation 32140 provides, in 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.

Documents accompanied by a valid proof of service, signed under penalty of perjury, are presumed to have been properly served. (Evidence Code sec. 641; Glasser v. Glasser (1998) 64 Cal.App.4th 1004 [75 Cal.Rptr.2d 621] (Glasser)). The party claiming that service was invalid bears the burden of rebutting the presumption of validity. (Glasser, pp. 1010 – 1011.)

In the instant case, a proof of service, sworn under penalty of perjury by a PERB employee other than the Board agent, was attached to the dismissal letter, asserting under oath that the letter was mailed on February 13, 2002. Consequently, service of the letter on Kestin is presumed valid.

In juxtaposition to that presumed validity, Kestin's asserted justification for her late filing consists of an uncorroborated, unsworn, and unexplained statement that the dismissal letter was "lost in the mail." Unlike each of the cases where late filings due to postal error were documented through declarations of third parties or other evidence, Kestin has produced only her assertion.

The Board is unpersuaded by UTLA's argument that Kestin's motion to excuse her late filing is foreclosed by the statement in the warning letter that the charge would be dismissed on January 22, 2002, if an amended charge were not filed. It is undisputed that Kestin phoned the Board agent and mailed documents in response to the warning letter, prior to the January 22, 2002, deadline. Given that the Board agent addressed those submissions in the dismissal letter, it is possible that Kestin reasonably deduced from her conversation with the Board agent that her oral and written submission would be treated as an amended charge. If she formed such a belief, she would not have had reason to expect that her charge would automatically be dismissed on January 22, 2002.

Nevertheless, the Board finds good cause lacking to excuse the late filing. Kestin was in regular contact with the Board agent during the weeks preceding the dismissal. Apparently, for more than five months after the dismissal, she did not once call PERB regarding the status of her case. Kestin has offered no corroboration for her claim that she did not receive the dismissal letter or her assertion that the letter was "lost in the mail." In the face of a duly sworn proof of service and in light of the record as a whole, Kestin's assertion is insufficient. (See Glasser, pp.1010 – 1011 (attorney's claim that he never received notice of judgment insufficient to rebut presumption that document accompanied by proof of service was served).)

The Board finds that, under all the circumstances of this case, Kestin has failed to demonstrate that she made a conscientious effort to timely file. After reviewing Kestin's charge and supporting documents, the warning and dismissal letters, Kestin's motion to file late, and her appeal and supporting documents, the Board finds that there is not good cause to excuse the late filing. The motion to file late is therefore denied and the appeal is rejected as

untimely. In light of the foregoing, the merits of Kestin's appeal are not before the Board and will not be addressed.

ORDER

Linda Lou Kestin's motion to file a late appeal of the Board agent's dismissal in Case No. LA-CO-1084-E is hereby DENIED.

Members Baker and Whitehead joined in this decision.