

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



UNIVERSITY PROFESSIONAL AND
TECHNICAL EMPLOYEES, CWA LOCAL 8,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. LA-CE-1006-H

Administrative Appeal

PERB Order No. Ad-370-H

February 29, 2008

Appearances: Susan Cross, Steward, for University Professional and Technical Employees, CWA Local 8; University of California, Irvine by Nadine Baron Fishel, Lead Labor Relations Specialist, for Regents of the University of California.

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

RYSTROM, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by University Professional and Technical Employees, CWA Local 8 (Local 8 or Union) of the dismissal of an unfair practice charge by a Board agent against the Regents of the University of California (University). In this matter, Local 8 requests that PERB reopen the case to allow the late filing of a factual letter for consideration by the Board agent as part of the initial charge to determine if a complaint should issue. We must treat this request as an appeal pursuant to PERB Regulation 32136¹ for the reasons stated below.

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

We reviewed the entire file including the appeal letter and supporting documents filed by Local 8, the University's response thereto as well as the unfair practice charge, the University's response to the charge and the Board agent's warning and dismissal letters. We affirm the Board agent's dismissal of Local 8's unfair practice charge on the basis that the instant appeal is untimely and Local 8 has not shown good cause for a late filing pursuant to PERB Regulation 32136.²

PROCEDURAL BACKGROUND

On May 11, 2007, Local 8 filed an unfair practice charge alleging that the University violated the Higher Education Employer-Employee Relations Act (HEERA)³ by denying employee Gabriel Ginez (Ginez) his right to have a union representative present during two meetings with his supervisors. A May 15, 2007, letter from the Board agent explaining the procedure to be used in processing the charge was served on all parties. The University filed its response to the charge on June 12, 2007.

On August 2, 2007, the Board agent issued a warning letter informing Local 8 that the unfair practice charge did not state a prima facie case and outlining the charge's deficiencies. This letter was directed to Jay Gummerman (Gummerman) as president of Local 8 at the Union's address according to the unfair practice charge. The letter notified Local 8 that if there were additional facts which would correct the charge's deficiencies, it could be amended and the deadline to do so was August 9, 2007, or the charge would be dismissed. Local 8 was

²Subparagraph (b) of PERB Regulation 32635 allows for the presentation of new supporting evidence on appeal upon a showing of good cause. Because we have concluded that Local 8's appeal is untimely, we do not reach the issue of whether Local 8 has shown good cause to present a new factual letter for consideration on appeal.

³HEERA is codified at Government Code section 3560, et seq.

also informed that if there were any questions to please call the Board agent at the number provided.

No amended charge was filed and no extension was requested. A dismissal letter was served by mail on August 20, 2007, again directed to Gummerman as president and addressed to Local 8. This letter informed Local 8 of its right to appeal to the Board within 20 calendar days after service of the dismissal and PERB's regulation allowing a written request for an extension of time to appeal. Absent an extension request, the deadline for Local 8 to file its appeal was September 14, 2007.⁴ No appeal was filed within this deadline nor was an extension requested.

On November 1, 2007, Local 8 filed a letter dated October 19, 2007, with PERB requesting it to reopen this case. The proof of service attached to this letter declared that it had been placed in the mail for PERB and the University on October 23, 2007.

LOCAL 8'S FACTUAL CLAIMS

In support of its request to reopen the case, Local 8 claims that circumstances beyond Ginez's control caused information supporting his charge contained in a letter written by Ginez (the factual letter) not to reach PERB in a timely manner. Local 8 offers the following facts as an explanation of what these circumstances were.

Ginez was out of the country "when the case was pending,"⁵ therefore his Local 8 Steward, Gummerman, had to file Ginez's unfair practice charge without his factual letter. Local 8 claims it was intended that Gummerman would send this letter to the Board as soon as Ginez returned.

⁴This deadline is calculated by counting the 20-day period pursuant to PERB Regulation 32635(a) and the five-day extension pursuant to PERB Regulation 32130(c) resulting in a filing deadline of September 14, 2007.

⁵No specific dates are given for this time period.

Local 8 next explains that “several events occurred simultaneously” which prevented Ginez’s letter from being sent to the Board as planned. First, Gummerman terminated his employment with the University, thus he no longer was a union steward. No date for this termination is given. Susan Cross (Cross) followed as Ginez’s steward at Gummerman’s request. No date for this transition is provided. Gummerman was supposed to have Ginez call Cross for a meeting on his case but this never occurred.

When Ginez returned, he was bedridden due to back pain. No dates are given for Ginez’s return or his period of incapacity. When Cross did not hear from Ginez, she unsuccessfully tried to contact Gummerman who was moving to a different town and not taking calls. No dates are given for Cross’ attempts to contact Gummerman. Cross next tried to access Ginez’s file in the Local 8 office but could not find it. We are not informed when she did this. Cross was left with no knowledge about Ginez’s unfair practice charge including any filing deadlines.

Eventually Ginez met with Cross, on dates not provided, which resulted in Cross learning this was a very complex case with information not being easily accessible. Cross did have a case number and contacted a PERB Board agent, who faxed the warning and dismissal letters to her on October 10, 2007. At that time, Cross “became certain” that Ginez’s factual letter had not been included with the charge.

Local 8 goes on to explain that Cross serves as its steward on a voluntary basis and is not eligible for release time to conduct union business. Therefore, all the work she does as a steward must be on her own free time which makes it difficult for her to expedite a case handed over to her by another steward.

In support of its appeal, Local 8 attaches the factual letter from Ginez which it seeks to have the Board agent review as part of the charge upon the reopening of this case. Ginez's factual letter, addressed to PERB, is dated September 5, 2007.

THE UNIVERSITY'S RESPONSE

The University contends that Local 8's request is untimely and inappropriate. The University asserts that the September 5, 2007, factual letter from Ginez is dated after the appeal's deadline.⁶

The University next argues that Gummerman could have sought an extension prior to the August 9, 2007, deadline for filing the amended charge given he was still the union president on August 20, 2007. The University states that Gummerman did not leave for his new employment until September 14, 2007.

Attached to the University's response is an August 7, 2007, letter from Local 8 updating its list of officers and stewards for Local 8. The letter does not indicate that Gummerman is president, however, he is listed as a current steward along with Cross. The address of Local 8 according to this letter is the same as that provided on the unfair practice charge.⁷

DISCUSSION

Local 8 requests this case be reopened so it can file a letter authored by Ginez to the Board in which he explains more fully the facts involved in his unfair practice charge. Local 8 asks that the case be reconsidered with this additional factual information.

⁶As is stated above, the deadline for Local 8 to appeal the Board agent's August 20, 2007, dismissal was September 14, 2007.

⁷This attached August 7, 2007, union letter is not referenced in the University's response letter to PERB.

This request to reopen the case should be treated as an appeal pursuant to PERB's decision in Los Angeles Unified School District (2007) PERB Order No. Ad-368 (Los Angeles). As in the instant case, Los Angeles involved a request by the charging party that PERB reopen their case presumably to enable them to file an amended charge. In Los Angeles PERB held that the request is more appropriately considered an appeal of the dismissal of the charge citing California Teachers Association (Underhill) (2001) PERB Decision No. 1466.

Considering this case as an appeal from the Board agent's dismissal letter, we find Local 8's appeal is not timely.⁸ The Board agent's dismissal letter was served on August 20, 2007, thus the deadline for filing an appeal of the dismissal was September 14, 2007. (See fn. 4, supra.) Local 8's appeal was not filed until November 1, 2007, 48 days late. Therefore, Local 8's appeal cannot be considered unless PERB exercises its discretion under PERB Regulation 32136 to excuse the late filing.

This discretion can only be exercised if PERB finds that the requesting party has shown good cause for the late filing. (PERB Reg. 32136.⁹) The issue in this case is whether Local 8 presented facts showing the requisite good cause for a late filing. The Board has found good cause exists where the excuse for the untimely filing was reasonable and credible. (Barstow Unified School District (1996) PERB Order No. Ad-277 (Barstow)).¹⁰

⁸PERB Regulation 32635 provides that an appeal of a dismissal must be filed within 20 days of service of a dismissal.

⁹PERB Regulation 32136 provides, in pertinent part: "A late filing may be excused in the discretion of the Board for good cause only."

¹⁰In Barstow a late filing was excused under PERB Regulation 32136 where the use of a computerized document to create another document led to the filing being inadvertently sent to the wrong office and the opposing party made no claim of prejudice.

Neither party directly addressed this issue in their appellate papers. However, Local 8 did present the facts it claims caused the delay in filing Ginez's factual letter with the Board. An analysis of these factual assertions and the University's response thereto indicate that Local 8 cannot present reasonable and credible evidence to support a finding of good cause to excuse the late filing of its appeal.

Local 8 claims it was prevented from sending Ginez's factual letter to the Board because Ginez was out of the country and then bedridden upon his return. No dates are given for this travel or incapacitation by Ginez. The factual letter written by Ginez and presented as part of Local 8's appeal is dated September 5, 2007. This evidence establishes that the basis for Local 8's appeal, Ginez's letter, existed on September 5, 2007, which is prior to the deadline to file Ginez's appeal. For this reason, we find Ginez's necessary travel and incapacitation did not contribute to the late filing of his appeal.

Given the basis of Local 8's appeal existed on September 5, 2007, we must examine what prevented Local 8 from filing a timely appeal on or before September 14, 2007. Local 8 contends that Gummerman's change of employment and transfer of Ginez's unlawful charge to Cross caused the delay in getting Ginez's letter to the Board. However, Local 8 fails to give the dates of these events to show how they prevented getting Ginez's factual letter to the Board prior to the September 14, 2004, deadline.

The University states unequivocally that Gummerman did not leave his employment with the University until September 14, 2007. Local 8 does not contend that Cross could not communicate with Gummerman while he was employed by the University. Instead it is claimed that the delay in filing Ginez's letter was caused by Cross not being able to communicate with Gummerman after he left the University, because he was moving to a different town and was not taking calls. From this evidence we reasonably infer that Cross'

inability to communicate with Gummerman regarding Ginez's appeal did not occur until after September 14, 2007. No claim is made that she could not do so prior to Gummerman's employment termination. For these reasons, Gummerman's turning Ginez's case over to Cross and her being unable to communicate with him cannot justify a late filing.

Local 8 also claims that Cross "was left completely in the dark about what complaints had been filed where and what deadlines were looming," because she could not find Ginez's file in Local 8's offices. In our good cause determination, we question why Cross or someone else from Local 8 did not request information from PERB earlier regarding Ginez's case and its deadlines. In its appeal, Local 8 admits that Cross knew the case number and did eventually contact PERB for the file. Again no date is given for this contact, but PERB's response to Cross' request was October 10, 2007. Local 8 does not claim any delay was caused by PERB, thus we infer Cross' request for a file from PERB was acted on promptly which indicates her request was made immediately prior to or on October 10, 2007.

Assuming, arguendo, that we found the above evidence justified not filing Ginez's appeal during the August 20 to October 10 time period, Local 8 cannot overcome the lack of good cause for its delay in filing the appeal after discovering Ginez's factual letter had not been filed. Cross admits that on October 10, 2007, she received Ginez's case file from PERB and at that time "became certain" Ginez's letter had not been included with the charge. Rather than immediately filing the present appeal within 20 days of that discovery, Cross did not file the instant appeal until 22 days after learning of the need to reopen the case. This fact alone precludes us from finding good cause for a late filing under PERB Regulation 32136.

For all of the above reasons PERB finds that Local 8's appeal to reopen Ginez's case is untimely and that the Union has not presented reasonable and credible evidence justifying good cause for PERB to excuse Local 8's late filing.

ORDER

University Professional and Technical Employees, CWA Local 8's request to reopen Case No. LA-CE-1006-H is hereby DENIED.

Chair Neuwald and Member McKeag joined in this Decision.