

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



CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION AND ITS CHAPTER 32,

Charging Party,

v.

BELFLOWER UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5955-E

PERB Order No. Ad-447

June 28, 2017

Appearances: Charmaine L. Hunting, Staff Attorney, for California School Employees Association and its Chapter 32; Law Offices of Eric Bathen by Eric Bathen, Attorney, for Bellflower Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by California School Employees Association and its Chapter 32 (CSEA), from an administrative determination in which PERB's Appeals Assistant rejected as untimely CSEA's response to exceptions to a proposed decision filed by the Bellflower Unified School District (District). The District filed and served its exceptions by facsimile and U.S. Mail on March 25, 2016, and CSEA filed and served its response on April 19, 2016.

PERB Regulation 32310¹ requires that a response to exceptions to a proposed decision be filed within 20 days following the date of service of the exceptions. PERB Regulations also apply a five-day extension of time to any filing made in response to documents served by mail, if the place of address is within the State of California, as was the case here. (PERB

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

Reg. 32130, subd. (c).) The fact that a document is also filed and served by e-mail does not alter the five-day extension of time, if the document is also filed and served by regular mail in accordance with PERB Regulations. However, the same is not true for documents filed and served by facsimile. The Regulation states that, “No extension of time applies in the case of documents served in person, or by facsimile transmission as defined in Section 32090.” (*Ibid.*)

Because, in this case, the District served its exceptions by facsimile, the five-day extension of time for service by mail did not apply, and the Appeals Assistant correctly determined that CSEA’s response to the District’s exceptions was untimely, as it was not filed and served until more than 20 days following the date of service of the District’s exceptions.

CSEA’s appeal acknowledges that its response to the District’s exceptions was not timely filed and served. It claims the untimeliness was due to CSEA’s honest, but mistaken, belief that facsimile is a species of “electronic transmission,” and, consequently, that, where a document is filed and served by regular mail, the five-day extension of time applies, even if the document was also filed and served “electronically.” CSEA’s appeal acknowledges that, upon closer inspection, the Regulations distinguish between “electronic” transmissions (i.e., e-mails), and service by facsimile, and that its initial reading of the Regulation was incorrect, since the Regulation expressly states that, “No extension of time applies in the case of documents served ... by facsimile transmission”

However, CSEA argues the Board should excuse the untimeliness in this case, because it was only a few days past the deadline, because it was the result of an honest mistake, and because, under the circumstances, there are no grounds to conclude that the District was deprived of notice of the issues or that it would be unfairly surprised or prejudiced in any way, if the Board were to consider CSEA’s response to the District’s exceptions.

For the reasons explained below, we find that CSEA has not shown good cause within the meaning of PERB Regulations and decisional law to accept its late filing and therefore deny CSEA's appeal.

DISCUSSION

PERB Regulations provide that a late filing may be excused at the discretion of the Board "for good cause only." (PERB Reg. 32136.) If excused, a late filing becomes a timely filing. (*Ibid.*) Consistent with the general policy of law which favors preservation of the right to appeal and hearing of appeals on their merits, 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. (*Trustees of the California State University* (1989) PERB Order No. Ad-192-H (*Trustees of CSU*), pp. 4-5.)

For example, the Board has excused late filings caused by "honest mistakes," such as mailing or clerical errors. (See, e.g., *Kern Community College District* (2008) PERB Order No. Ad-372, p. 3 [clerical employee served appeal on respondent but did not file appeal with PERB]; *Trustees of CSU, supra*, at pp. 3-5 [mailroom employees incorrectly set postage meter causing exceptions to be filed late]; *San Francisco Unified School District* (2009) PERB Decision No. 2048 (*San Francisco*), pp. 3-4 [late filing excused as a result of clerical error in counsel's office].) The Board has also found good cause where an "untimely filing was a result of honest error ... resulting from misunderstood communications" with an unrepresented appellant. (*Los Angeles Unified School District* (2003) PERB Order No. Ad-318 (*Los Angeles*), p. 4; *Los Angeles Unified School District* (2007) PERB Order No. Ad-368 (*LAUSD*), p. 4; *City of Oakland (Oakland Fire Department)* (2015) PERB Order No. Ad-425-M, pp. 5-6.)

Generally, the Board has excused a late filing where a non-prejudicial delay of short duration resulted either from circumstances beyond the control of the filing party or from excusable misinformation, where the filing party's explanation was credible on its face or was corroborated by other facts or testimony. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325, pp. 3-4; *Barstow Unified School District* (1996) PERB Order No. Ad-277 (*Barstow*), p. 4; cf. *Oxnard Elementary School District* (2004) PERB Decision No. 1728, p. 1, fn. 2.) Whatever the reason(s) for the late filing, the moving party must provide a "reasonable and credible" explanation for its untimely filing or show that it at least made a conscientious effort to comply with the deadline. (*National School District* (2010) PERB Order No. Ad-389, pp. 2-3; *Newport-Mesa Unified School District* (2008) PERB Order No. Ad-373, p. 3; *San Francisco, supra*, PERB Decision No. 2048, p. 4.)

In the present case, the untimeliness of CSEA's filing was due to a mistake of law, and CSEA's filing was only a few days late. Although the District objected to CSEA's response as untimely, it has given no indication that it was unfairly surprised or prejudiced by the delay. Even after being served with the present appeal, the District has filed no opposition or responded to CSEA's argument that good cause exists for excusing the late filing. CSEA's response includes no cross-exceptions nor raises other new issues, and PERB Regulations do not grant the District an absolute right to reply to a response to exceptions. CSEA's response was also filed before the matter was considered by the Board or set for oral argument. Thus, the District has not been deprived of adequate notice or the right to be heard, and it has not identified any other substantial right that would be affected by a Board decision to excuse the late filing and consider CSEA's response. (*LAUSD, supra*, PERB Order No. Ad-368, p. 4; cf. *ABC Unified School District* (1991) PERB Decision No. 831b, pp. 1-2.)

Nevertheless, we are constrained by Board precedent, which considers whether good cause exists separate from whether excusing a late filing would result in prejudice. In *Calipatria Unified School District* (1990) PERB Order No. Ad-217 (*Calipatria*), the Board determined that, because a party had failed to establish that its mistake of law constituted good cause for its late filing, the fact that the opposing party had not been prejudiced would not by itself excuse the late filing. (*Id.* at p. 13.) The Board reasoned that, “while the lack of prejudice resulting from a late filing is an important consideration in deciding whether to excuse a late filing for good cause, it is not, in and of itself, the determinative factor.” (*Ibid.*) Thus, we must separately determine whether good cause exists to excuse CSEA’s late filing, despite the apparent absence of any prejudice.

Although the Board has excused late filings due to “honest mistakes” such as mailing or clerical errors on the part of laypersons or clerical staff employed by an attorney (*Barstow, supra*, PERB Order No. Ad-277; *San Francisco, supra*, PERB Decision No. 2048, pp. 3-4; *Los Angeles, supra*, PERB Order No. Ad-318, pp. 3-4), “the Board has not found good cause in situations where the party’s attorney was directly responsible for the late filing.” (*State of California (Department of Corrections)* (2003) PERB Order No. Ad-328-S, pp. 3-5; *State of California (Water Resources Control Board)* (1999) PERB Order No. Ad-294-S, p. 5; *Calipatria, supra*, PERB Order No. Ad-217; cf. *Los Angeles USD, supra*, PERB Order No. Ad-318, pp. 3-4.) We overrule *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 to the extent it holds to the contrary. (*Id.* at pp. 25-26.)

Because CSEA’s late filing was due to an attorney’s misreading of the Regulation governing the timelines for responding to exceptions, we do not find good cause to excuse the late filing and will therefore not consider CSEA’s response to the District’s exceptions. A

decision on the merits of the District's exceptions to the proposed decision in this case will follow.

ORDER

The Public Employment Relations Board (Board) hereby DENIES California School Employees Association and its Chapter 32's appeal and request that the Board accept its untimely-filed response to the Bellflower Unified School District's exceptions to the proposed decision in Case No. LA-CE-5955-E.

Chair Gregersen and Member Winslow joined in this Decision.