

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



LORI E. EDWARDS, ET AL.,

Charging Party,

v.

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-6082-E

PERB Order No. Ad-449

June 28, 2017

Appearances: Lori E. Edwards, Representative, for Lori E. Edwards, et al.; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore 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 Lori E. Edwards (Edwards), Kimberley A. Rosales (Rosales), David Pickett, and Victoria Pickett (collectively, Charging Parties) from an administrative determination, in which PERB's Appeals Assistant rejected as untimely Charging Parties' December 28, 2016 filing captioned "Exceptions to Proposed Decision Amended." As explained in the Appeals Assistant's determination, the proposed decision of a PERB administrative law judge (ALJ) in Unfair Practice Case No. LA-CE-6082-E was served on the parties on November 29, 2016, and exceptions to the proposed decision were therefore due to be filed no later than December 27, 2016. On December 27, 2016, Charging Parties electronically filed and served by mail their statement of exceptions to the proposed decision and, one day later, filed electronically and served by mail an attempted amendment to their

statement of exceptions. While Charging Parties' statement of exceptions was accepted as timely filed, the attempted amendment was rejected as untimely.

Pursuant to PERB Regulations 32360¹ and 32136,² Charging Parties appeal from the Appeals Assistant's determination and request that the Board excuse the late filing and consider the attempted amendment to their statement of exceptions when deciding the merits of the underlying unfair practice charge. For the reasons explained below, Charging Parties' appeal from the administrative determination was itself untimely filed, and we therefore deny the appeal and decline to consider whether Charging Parties have established good cause to excuse their late filing.

THE APPEAL

Charging Parties' appeal consists of a single-page, sworn declaration by Rosales, in which she asserts that, in December 2016, while Charging Parties were preparing their statement of exceptions, Rosales' partner "was diagnosed with life-threatening medical issues, which led to renal failure, a heart attack, and a leg amputation," and that, as of January 17, 2017, when Rosales executed her declaration, her partner remained "in a drug induced coma in the intensive care unit." Rosales' declaration further asserts that, Edwards, who is Charging

¹ PERB Regulation 32360, governs appeals to the Board itself from most administrative decisions by the agency and sets forth the criteria for filing such appeals. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

² PERB Regulation 32136 provides that a late filing may be excused in the discretion of the Board "for good cause only."

Parties' designated representative in this matter,³ also suffered an illness on December 27, 2016 and was unable to assist Rosales in preparing Charging Parties' statement of exceptions. According to Rosales, because she was consumed with caring for her partner, and because of Edwards' simultaneous illness and unavailability on December 27, 2016, Rosales was unable to communicate with Edwards to ensure that Edwards received certain citations to Rosales' testimony in this matter, which were the subject of Charging Parties' untimely amendment to the statement of exceptions filed with PERB on December 28, 2016. Rosales requests that, under the circumstances, the Board find good cause to excuse the late filing and accept the untimely amendment to Charging Parties' exceptions when deciding the unfair practice issues in this case.

THE DISTRICT'S RESPONSE

The District opposes the appeal on two grounds. First, the District contends that, like their statement of exceptions and their attempted amendment thereto, Charging Parties appeal from the administrative determination was also untimely filed with Board. The District notes that the Appeals Assistant issued her administrative determination by letter dated

³ Although the case file includes correspondence, dated April 15, 2016, from Attorney Andrew A. Rosenberry indicating that, at that time, the law firm of Donald R. Holben & Associates represented Rosales in this matter and in a separate unfair practice case before PERB, as of late September 2016, when the three-day hearing before the ALJ took place, Edwards was the sole representative for all Charging Parties. Although PERB regards a party as self-represented until an executed "Notice of Appearance" form has been filed, PERB Regulations do not specifically require a Notice of Appearance form to designate or change a party's representative and our decisional law recognizes that, in the absence of an executed Notice of Appearance form, other circumstances may indicate that a party has designated or changed its representative in the matter. (*United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475, p. 4, fn. 5, and cases cited therein.)

December 29, 2016, and, according to the District's calculation, the appeal was therefore due on January 9, 2017. However, because Charging Parties did not file and serve their appeal until January 17, 2017, the appeal was not filed "within 10 days following the date of service of the decision or letter of determination," as required by PERB Regulation 32360, subdivision (b).

Second, the District contends that, even if timely, the appeal fails to demonstrate good cause to excuse the late filing, because, as Charging Parties' representative, Edwards, not Rosales, was responsible for ensuring that Charging Parties' exceptions were timely filed, and Rosales' declaration fails to explain how her partner's illness affected Edwards' ability to timely file the amendment to Charging Parties' exceptions. According to the District, Rosales' declaration "does not explain how or why Ms. Edwards was not able to timely complete or file the statement of exceptions on account of this single day of delay, especially considering the statement of exceptions was due on December 19, 2016, a week before the events that allegedly caused Ms. Edwards' delay in filing the statement of exceptions." (Fn. omitted, underlining in original.) The District similarly argues that, with approximately one week left before their December 19, 2016 deadline, Charging Parties should have sought an extension of time, which they failed to do.

DISCUSSION

We first address the District's argument that Charging Parties' appeal from the administrative determination itself is untimely and that the Board should therefore not reach the issue of whether the appeal establishes good cause to excuse the untimeliness of Charging Parties' previous filing.

Initially, we address the issue of whether all parties have had adequate notice and opportunity to be heard on this issue. We note that, while the Appeals Assistant rejected Charging Parties' December 28, 2016 attempt to amend their statement of exceptions as untimely, there has been no determination by PERB that Charging Parties' January 17, 2017 appeal from the previous administrative determination was untimely. Consequently, Charging Parties did not brief that issue and the timeliness of their administrative appeal was raised for the first time in the District's response to the appeal.

However, while PERB Regulations neither expressly permit nor preclude the filing of reply briefs, Board decisional law has long held that acceptance of a reply brief may be appropriate to aid the Board in its review of the underlying dispute, particularly where a response has raised new issues, discussed new case law or formulated a new defense. (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408, pp. 4-5; see also *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14.) Although Charging Parties have not requested leave to file a reply to address the District's response or otherwise attempted to brief the issue, we conclude that they had adequate notice of the issue, as it was raised in the District's response to their appeal.

Additionally, because the Board is not precluded from reviewing unappealed matters or applying legal analysis not urged by the parties (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259a, pp. 5-6; *Apple Valley Unified School District* (1990) PERB Order No. Ad-209a, p. 3; *ABC Unified School District* (1991) PERB Decision No. 831b, p. 4), Charging Parties' failure to avail themselves of the opportunity to file a reply or otherwise brief the issue does not preclude the Board from addressing it now. (*Barstow Unified School*

District (1996) PERB Decision No. 1138a, p. 10 [“determination of the issues to be considered in an unfair practice proceeding before PERB is made by the Board and its agents, and not by the parties to the proceeding”].) In the past, the Board has decided issues not raised by the parties themselves when necessary to correct a serious mistake of law and thereby prevent an erroneously-decided issue from becoming Board precedent. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 23-24.) We do so here to correct an error in the application of PERB’s Regulations, which was not identified or briefed by either party.

As explained in a separate Board decision concerning the District’s appeal from an administrative determination in this case,⁴ throughout these proceedings, the District has incorrectly calculated filing deadlines by ignoring PERB Regulation 32130, subdivision (c), which, in relevant part, extends by five days the time for responding to documents served by mail within the State of California. (PERB Reg. 32130, subd. (c); *City of Alhambra* (2011) PERB Decision No. 2161-M, p. 11; *State of California (State Personnel Board)* (2004) PERB Order No. Ad-343-S, p. 4.) We thus reject the District’s *reasoning* that Charging Parties’ appeal was untimely because it was not filed on or before the tenth day after issuance of the administrative determination appealed from. Nevertheless, we conclude that, even with

⁴ In that decision, we affirmed an administrative determination by PERB’s Appeals Assistant to reject as untimely the District’s response to Charging Parties’ statement of exceptions to the proposed decision.

application of the five-day extension for service by mail, Charging Parties' administrative appeal was due on or before Friday, January 13, 2017, and was therefore untimely when filed the following Tuesday, January 17, 2017.

PERB Regulation 32130 provides for two filing extensions at issue here. Subdivision (c) provides a five-day extension of time applies to any filing made in response to a document served by mail within California, while, subdivision (b) provides an extension to the next regular PERB business day applies whenever the last day to file a document falls on a weekend or holiday. (PERB Reg. 32130, subds. (c), (b).) As stated in the Regulation, the weekend or holiday extension "shall be applied subsequent to the application of any other extension of time provided by these regulations or by other applicable law." (*Ibid.*) Stated another way, the five-day extension for service by mail, if applicable, must be applied *before* applying the weekend or holiday extension. (*County of Santa Clara* (2014) PERB Order No. Ad-412-M, pp. 2-3; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 25; *Stockton Unified School District* (2005) PERB Decision No. 1759, p. 2, fn. 3.) Additionally, the regulatory language gives no indication that either extension may be applied more than once.

In the present case, the Appeals Assistant issued her determination on December 29, 2016. PERB's Regulation governing appeals from administrative determinations states, in relevant part, that such appeals "shall be filed with the Board itself in the headquarters office within 10 days following the date of service of the decision or letter of determination." (§ 32360, subd. (b).) Additionally, the separate Regulation governing the computation of time for filing deadlines provides that, "the period of time begins to run the day after the act or occurrence referred to." (PERB Reg. 32130, subd. (a).) Consequently, in this case, the 10-day

filing period for an appeal from the December 29, 2016 administrative determination fell on January 8, 2017, a Sunday. However, as noted above, subdivision (b) of Regulation 32130 also specifies that the weekend/holiday extension “shall be applied” only after applying any other applicable extension of time, including the five-day extension for service by mail. Accordingly, the Regulation requires first applying the five-day extension for service by mail within California, and then applying the weekend/holiday extension.

Applying the five-day extension for service by mail, the correct due date for Charging Parties to file their appeal from the administrative determination was therefore Friday, January 13, 2017. However, Charging Parties did not file their appeal until the following Tuesday, January 17, 2017. Moreover, as noted above, the Appeals Assistant apparently did not regard the appeal as untimely, as it was accepted. We can only speculate as to the reasons why Charging Parties filed their appeal four days late and why the Appeals Assistant apparently accepted that filing as timely, though, in all likelihood, these errors resulted from applying the weekend/holiday extension twice. That is, notwithstanding the language of subdivision (b), because the tenth day following the administrative determination fell on a Sunday, Charging Parties and the Appeals Assistant appear to have first extended the “deadline” to the next PERB business day, which was Monday, January 9, *and then* applied the five-day extension for service. If calculated in this manner, the newly-computed filing deadline would fall on Monday, January 16, which was the Martin Luther King, Jr. holiday, and which, in turn, would further extend the deadline to Tuesday, January 17, by applying the weekend/holiday extension a second time.

While the above scenario seems to us the most likely explanation, we emphasize that it is *not* the method for computing deadlines prescribed by Regulation 32130, which expressly states

that the weekend/holiday extension “shall be applied *subsequent to* the application of any other extension of time provided by these regulations or by other applicable law,” (subd. (b), emphasis added), and which does not appear to contemplate applying the same extension twice.

Regardless of the reasons for Charging Parties’ untimely filing, or those of the Appeals Assistant in accepting it, the fact remains that Charging Parties’ appeal was due on or before Friday, January 13, 2016, but was not filed with PERB until the following Tuesday, January 17, 2017. Although the District’s computation of timelines in this matter has been equally faulty, it is nonetheless correct in its assertion that Charging Parties’ administrative appeal was untimely and that they have presented no explanation or justification to excuse the late filing.

We therefore deny Charging Parties’ appeal from the December 29, 2016 administrative determination and decline to consider whether good cause existed to excuse the untimeliness of Charging Parties’ attempted amendment to their statement of exceptions, which was the subject of that appeal.

ORDER

The Public Employment Relations Board hereby DENIES the appeal filed on January 17, 2017 by Lori E. Edwards, Kimberley A. Rosales, David Pickett, and Victoria Pickett (collectively, Charging Parties) from the administrative determination rejecting Charging Parties’ December 28, 2016 filing captioned “Exceptions to Proposed Decision Amended” as untimely, and therefore declines to consider Charging Parties’ request to find good cause to excuse the late filing of the attempted amendment to their statement of exceptions in Unfair Practice Case No. LA-CE-6082-E.

Chair Gregersen and Member Winslow joined in this Decision.