

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN DAVID IRISH,

Charging Party,

v.

IUOE LOCAL 39,

Respondent.

Case No. SA-CO-10-M

PERB Decision No. 1542-M

June 30, 2003

Appearance: John David Irish, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by John David Irish (Irish) of a Board agent's dismissal of his unfair practice charge. The Board agent dismissed the charge after PERB failed to receive an amended charge by the deadline set forth in the warning letter.

After reviewing the record in this matter, including the warning and dismissal letters, and Irish's appeal, the Board reverses the Board agent's dismissal for the reasons set forth below.

BACKGROUND

On December 12, 2002, the Board agent sent Irish a warning letter explaining that his original charge failed to establish a prima facie violation of the Meyers-Milias-Brown Act (MMBA).<sup>1</sup> The warning letter further explained that Irish could correct the deficiencies by

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<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq.

submitting an amended charge by December 23, 2002. Irish was warned that his charge would be dismissed if the Board agent did not receive an amended charge by December 23, 2002. However, the warning letter did not direct Irish to “file” his amended charge or otherwise direct his attention to PERB Regulation 32135.<sup>2</sup> After the warning letter was served, Irish was granted an extension until January 6, 2003, to submit an amended charge. Because the Board agent did not receive an amended charge by January 6, 2003, the Board agent dismissed Irish’s charge on January 7, 2003.

### APPEAL

In his appeal, Irish explains that he did, in fact, mail copies of his amended charge to PERB. Irish alleges that he dropped the envelope containing the amended charge into the drive-up mailbox at the South Land Park Post Office on January 4, 2003, at approximately 11:00 a.m. After receiving the dismissal letter on January 8, 2003, Irish immediately called the Board agent to explain the situation. Irish also called the post office and attempted to trace the envelope containing his amended charge, but was unsuccessful.

The record before the Board reveals that Irish’s amended charge was eventually received by PERB on January 13, 2003. The amended charge contains a proper proof of

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<sup>2</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32135(a) states, in pertinent part:

- (a) All documents shall be considered "filed" when actually received by the appropriate PERB office before the close of business on the last date set for filing, or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing and addressed to the proper PERB office.

service, dated January 4, 2003. Although there is no apparent explanation for why the amended charge was not delivered by the postal service until January 13, 2003, there is no evidence that the amended charge was not mailed on January 4, 2003.<sup>3</sup>

### DISCUSSION

PERB Regulation section 32136 provides that the Board may excuse a late filing for good cause.<sup>4</sup> The Board has previously excused late filings which have gone astray. (North Orange County Regional Occupational Program (1990) PERB Decision No. 807 (exceptions were filed well before the deadline, but were inadvertently filed in the Los Angeles Regional office, rather than the Sacramento Headquarters office).) The Board has also excused filings which were mailed to the proper office, but were not timely received. (The Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H (secretary inadvertently sent documents by regular first-class mail, instead of by certified mail which was standard practice); Trustees of the California State University (1989) PERB Order No. Ad-192-H (incorrectly set postage meter caused exceptions to be untimely filed).)

The Board has also excused late filings resulting from postal errors. In California School Employees Association (Simeral) (1992) PERB Order No. Ad-233, the Board found good cause to excuse a late filing caused in part by inadvertent action by the United States postal service. In that case, the postal service held an incorrectly addressed filing before returning it to the

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<sup>3</sup> No declarations have been submitted disputing Irish's version of the facts.

<sup>4</sup> PERB Regulation 32136 provides:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

charging party, making it impossible for him to correctly address and timely file a request for reconsideration. In State of California (Department of Corrections) (1994) PERB Order No. Ad-259-S, the Board again found good cause to excuse a late filing caused by a postal service error. In that case, a party deposited documents in a mailbox at 11:00 p.m. A notice on the mailbox stated that mail deposited before 12:00 midnight would be postmarked with the current date. However, the documents were postmarked the following day and thus rejected as untimely. On appeal, a postal service representative admitted the error and stated that the documents should have been postmarked with an earlier date.

This case is similar to those discussed above. Irish made a conscientious attempt to timely file his amended charge. The proof of service, which was signed under penalty of perjury, establishes that the amended charge was deposited in the mail on January 4, 2003. Irish was also not informed whether or not PERB Regulation 32135 would apply. Accordingly, the Board finds that good cause exists to excuse Irish's late filing of his amended charge.

#### ORDER

The Board REVERSES the Board agent's dismissal in Case No. SA-CO-10-M and REMANDS the case to Office of the General Counsel for further processing.

Member Whitehead joined in this Decision.

Member Neima's concurrence begins on page 5.

NEIMA, Member, concurring: I agree with the majority's sound determination that good cause exists to excuse John David Irish's (Irish) late filed amended unfair practice charge. However, I respectfully submit that the following considerations are essential to reaching that conclusion.

The Public Employment Relations Board (PERB or Board) generally excuses 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 United Teachers of Los Angeles (Kestin) (2003) PERB Order No. Ad-325 at p. 4 and citations therein.)

Irish claims he timely mailed his amended unfair practice charge. Corroborative of that claim is the fact that Irish's amended charge was accompanied by a valid proof of service signed under oath, in conformance with PERB Regulation 32140(a). 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.4<sup>th</sup> 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 addition, "a writing is presumed to have been truly dated." (Evidence Code sec. 640.)

The most probative fact bearing on the presumed validity of the proof of service and its date would have been the postmark on the envelope used to submit the appeal. Unfortunately, that item was not retained by PERB. Irish should not be penalized for the agency's inadvertent omission. Under these circumstances, the Board should adhere to the presumption of validity afforded sworn proofs of service as well as the presumption that the document was truly dated.

I note further that IUOE Local 39, who also was served by mail, had an opportunity to rebut Irish's explanation and the presumptions discussed above, but has not filed any objection to Irish's petition to excuse the late filing or challenged his explanation.

Taken together, the circumstances of this case provide good cause to excuse Irish's late amended unfair practice charge.