

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



THOMAS PECORE,

Charging Party,

v.

FALLBROOK PUBLIC UTILITY DISTRICT,

Respondent.

Case No. LA-CE-647-M

PERB Decision No. 2229-M

January 10, 2012

Appearance: City Employees Associates by Michael W. Gaskins, Labor Representative, for Thomas Pecore.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Thomas Pecore (Pecore) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Fallbrook Public Utility District (District) violated section 3506 of the Meyers-Milias-Brown Act (MMBA)¹ by retaliating against Pecore for his alleged protected activities. The Board agent dismissed the charge, finding that the amended charge was not timely filed.

We have reviewed the entire record in this matter, including the original unfair practice charge, the warning and dismissal letters of the Board agent, and Pecore's appeal. Based on this review, we vacate the dismissal and remand this matter to the Office of the General Counsel for further investigation and processing of the amended charge for the reasons discussed below.

¹ MMBA is codified at Government Code section 3500 et seq.

PROCEDURAL BACKGROUND

On November 15, 2010, Pecore filed his unfair practice charge with PERB.

On February 16, 2011, the Board agent sent Pecore, by mail, a warning letter explaining that his charge would be dismissed unless Pecore amended the charge to allege conduct that occurred within the six-month statutory period.

On March 1, 2011, the Board agent granted an extension of time to March 16, 2011 for Pecore to file his amended charge.

On March 15, 2011, the Board agent granted another extension of time to March 23, 2011 for Pecore to file his amended charge.

On March 22, 2011, Pecore mailed his amended charge to PERB and to the District.² Pecore has since provided a proof of service to PERB for both transmissions.³

On March 25, 2011, according to the appeal, the Fallbrook Utilities District Employees Association Representative received a telephone call from the attorney representing the District.⁴ According to the appeal, during this call the attorney stated that he had received the amended charge.

On March 29, 2011, the Board agent dismissed the charge for failure to allege conduct that occurred not more than six months prior to the charge.

On April 1, 2011, the Board agent received, by fax, Pecore's amended charge.

On April 11, 2011, Pecore filed his appeal of the Board agent's dismissal.⁵

² Pecore did not fax a copy of the amended charge to PERB on this date.

³ The District has not disputed that it received timely service of the amended charge.

⁴ The District has not disputed that this telephone call occurred.

⁵ The District did not file a response to Pecore's appeal.

DISCUSSION

In his appeal, Pecore claims that he served the amended charge upon PERB on March 22, 2011. He stated that he first learned of the dismissal when he received the dismissal letter sometime on or around March 29, 2011.

PERB Regulation 32136 provides that the Board may excuse a late filing for good cause.⁶ Good cause is a flexible standard that is defined and constrained by the consideration of fairness and reasonableness. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325 (*Kestin*).

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 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].)

Additionally, the Board has ruled that good cause exists only when the party made a conscientious effort to timely file and the delay did not cause prejudice to any party. (*Kestin*;

⁶ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32136 states:

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.

City of Sacramento (2003) PERB Decision No. 1541-M (*Sacramento*)). The 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 party's explanation was either credible on its face or was corroborated by other facts or testimony. (*Kestin*.)

In the Board's decision in *Sacramento*, the Board found good cause to excuse the charging party's late filing of his amended charge. In that case, the charging party mailed his amended charge prior to the board agent's deadline. However, the board agent did not receive the charging party's amended charge prior to the board agent's imposed deadline. The board agent dismissed the amended charge as untimely. On appeal, the charging party provided the Board with a proof of service, signed under penalty of perjury, establishing that the amended charge was deposited in the mail prior to the deadline. The Board concluded that the charging party made a conscientious attempt to timely file his amended charge. In his concurring opinion, Member Neima notes that the respondent had an opportunity to rebut the charging party's explanation and the presumption that the proof of service was valid, but the respondent did not file any objection to the charging party's petition to excuse the late filing or challenge his explanation.⁷

This case is similar to *Sacramento*. Like the charging party in *Sacramento*, Pecore mailed his amended charge to the Board agent prior to the Board agent's deadline and the Board agent failed to receive the amended charge.

⁷ The party claiming that service was invalid bears the burden of rebutting the presumption of validity. (Concurring opinion in *Sacramento*; *Glasser v. Glasser* (1998) 64 Cal.App.4th 1004 at pp. 1010-1011 (*Glasser*)). In addition, a writing is presumed to have been truly dated. (Evidence Code § 640.)

Also, like in *Sacramento*, on appeal, Pecore has provided the Board with a proof of service,⁸ signed under penalty of perjury, establishing that Pecore deposited the amended charge in the mail on March 22, 2011 in conformance with PERB Regulation 32140(a), prior to the deadline of March 23, 2011.⁹

Additionally, as in *Sacramento*, the respondent, the District had an opportunity to rebut Pecore's explanation and the presumptions discussed above, but has not filed any objection to Pecore's petition to excuse the late filing and has not challenged his explanation.

Taken together, the circumstances of this case provide good cause to excuse Pecore's untimely amended unfair practice charge. We therefore vacate the dismissal letter, and restore this matter to the status quo that existed immediately before the issuance of the dismissal letter. Accordingly, we remand this matter to the Office of the General Counsel for further investigation and processing of the amended charge.

ORDER

The dismissal of the unfair practice charge in Case No. LA-CE-647-M is hereby VACATED; and the matter is REMANDED to the Office of the General Counsel for further investigation and processing of the amended charge.

Members McKeag and Dowdin Calvillo joined in this Decision.

⁸ At this stage of the charge review, we take the charging party's allegations as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.)

⁹ Documents accompanied by a valid proof of service, signed under penalty of perjury, are presumed to have been properly served. (Concurring opinion in *Sacramento*; Evidence Code § 641; *Glasser*.)