STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO EDUCATION ASSOCIATION, CTA/NEA, Charging Party, v. GOMPERS PREPARATORY ACADEMY, Respondent.	Case No. LA-CE-6531-E PERB Decision No. 2765 April 30, 2021

Appearances: California Teachers Association by Megan Degeneffe, Staff Counsel, for San Diego Education Association, CTA/NEA; Procopio Cory Hargreaves & Savitch by Wendy Tucker and Tracie Stender, Attorneys, for Gompers Preparatory Academy.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Gompers Preparatory Academy (GPA) to a proposed decision issued by an administrative law judge (ALJ). The San Diego Education Association, CTA/NEA (SDEA), filed an unfair practice charge alleging that GPA violated the Educational Employment Relations Act (EERA) and the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD) by sending messages to employees that interfered with their right to organize and discouraged union membership, retaliating against an SDEA bargaining team member for engaging in protected conduct, and failing to bargain with SDEA in good faith.[1]

[1] EERA is codified at Government Code section 3540 et seq. The PEDD is codified at Government Code section 3550 et seq. All statutory references are to the Government Code unless otherwise indicated.

After PERB's Office of the General Counsel (OGC) issued a complaint, GPA failed to file its answer by the 20-day deadline in PERB Regulation 32644, subdivision (a).[2] The ALJ assigned to the case issued an Order to Show Cause (OSC) ordering GPA to show why its failure to timely file an answer to the complaint did not constitute an admission of the truth of the material facts alleged and a waiver of GPA's affirmative defenses and right to a hearing. On the same day, GPA filed its response to the OSC and a motion for leave to file a late answer, together with a supporting declaration from GPA's attorney and a copy of the proposed answer.

The ALJ denied GPA's motion, finding no good cause to excuse the late filing. As a result, GPA was deemed to have admitted the material factual allegations, and to have waived any affirmative defenses and its right to a hearing. GPA sought leave to file an interlocutory appeal with the Board itself, but the ALJ declined to certify the appeal. After the parties briefed the limited legal issues that remained following GPA's deemed admissions and waiver, the ALJ issued a proposed decision finding that GPA violated EERA and the PEDD.

In its exceptions, GPA mainly contends that the ALJ erred by denying its request to file a late answer, thereby depriving GPA of its due process right to defend against SDEA's allegations. Having reviewed the record in light of the applicable law, we find good cause exists to allow GPA to file a late answer, and therefore we vacate the proposed decision and remand the case to the Division of Administrative Law for further proceedings consistent with this decision.

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

BACKGROUND[3]

On December 12, 2019, SDEA filed an unfair practice charge alleging that GPA violated EERA and the PEDD by sending communications to staff regarding bargaining with SDEA, engaging in bad faith bargaining tactics, retaliating against a teacher for engaging in protected activity, and interfering with employees' and SDEA's protected rights. On January 24, 2020, GPA filed its position statement contending that it had been bargaining with SDEA in good faith, that its communications regarding bargaining did not interfere with protected rights, and that it had not taken adverse action against the teacher because of protected activity.[4]

On February 13, SDEA filed an amended charge, requesting that the decertification petition in PERB Case No. LA-DP-441-E be stayed pursuant to PERB Regulation 32752.[5] On March 30, GPA filed a supplemental position statement, arguing that SDEA's charge was brought in bad faith to avoid a decertification election, reiterating that its bargaining conduct was not unlawful, and requesting that any stay order temporarily relieve GPA of its bargaining obligations.

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[3] Because we resolve GPA's exceptions solely on procedural grounds, we make no factual findings or legal conclusions as to the underlying claims that would bind the parties on remand.

[4] All further dates refer to 2020 unless otherwise specified.

[5] PERB may take official notice of its own records. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, p. 16, fn. 10.) Here, we take official notice of the records in the decertification matter, PERB Case No. LA-DP-441-E. On May 13, OGC issued an administrative determination in Case No. LA-DP-441-E staying the decertification election and placing the matter in abeyance pending resolution of the instant case. In *Gompers Preparatory Academy* (2020) PERB Order No. Ad-481, the Board upheld the stay.

On April 6, OGC issued a notice of partial withdrawal and a complaint. The complaint alleged that:

> (1) GPA issued multiple letters to staff that deterred or discouraged union membership in violation of PEDD section 3550 and interfered with employee and union rights in violation of EERA section 3543.5, subdivisions (a) and (b);
>
> (2) GPA engaged in bargaining conduct that amounted to a failure to meet and negotiate in good faith in violation of EERA section 3543.5, subdivisions (a), (b), and (c);
>
> (3) GPA further failed to meet and negotiate in good faith in violation of EERA section 3543.5, subdivisions (a), (b), and (c) when it failed or refused to provide SDEA with requested information that was relevant and necessary to discharge its duty to represent employees;
>
> (4) GPA retaliated against an employee because of his exercise of EERA-protected rights in violation of EERA section 3543.5, subdivisions (a) and (b); and
>
> (5) GPA directed an employee to raise workplace concerns exclusively with GPA management, which interfered with employee and union rights in violation of EERA section 3543.5, subdivisions (a) and (b).

OGC electronically served the complaint on counsel for both parties on April 6. Pursuant to PERB Regulation 32644, subdivision (a), GPA's answer was due within 20 calendar days of April 6, making the last day to respond April 27.[6] A telephonic informal settlement conference was conducted on May 5, but the parties did not resolve the matter. On the same day, the case was transferred to the ALJ and a

[6] Because 20 days from April 6 fell on Sunday, April 26, the answer was due on the next PERB business day, Monday, April 27. (PERB Reg. 32130, subd. (b).)

formal hearing was scheduled for July 27 through July 31. At this time, GPA had not filed an answer to the complaint, and had not requested an extension of time to do so.

On May 7, the ALJ issued an OSC that ordered GPA to show cause as to why he should not find its failure to file a timely answer to the complaint "an admission of the truth of the material facts alleged in the charge and a waiver of respondent's right to a hearing" pursuant to PERB Regulation 32644, subdivision (c) and *Regents of the University of California* (2018) PERB Decision No. 2601-H (*Regents*).[7]

Responding to the OSC within a day, GPA filed a motion for leave to file a late answer. GPA contemporaneously filed a proposed answer and a declaration from its counsel, Wendy Tucker, explaining the reasons for GPA's error. GPA's motion asked the ALJ to allow the answer to be filed despite being 10 days late, explaining that its answer:

> "was not timely filed as the result of an honest mistake and miscommunication resulting from effects of the COVID-19 pandemic that are outside of Gompers' control, and despite conscientious efforts to comply with the deadline. Gompers is represented in this matter by the law firm of Procopio, Cory, Hargreaves and Savitch LLP (the 'Firm'). Employees at the firm have been adjusting to working entirely from home since California's Governor issued a statewide emergency stay at home order on March 19, 2020. In addition to adjusting to working remotely and exclusively through email and phone, staff in the Firm's calendaring and administrative support departments have been adjusting to modified hours and assignments necessitated by the COVID-19 pandemic. Further, employees responsible for this deadline have struggled with illness (including Gompers' attorney Wendy Tucker) and with caring for family members while seeking to also perform their job duties from home. During this initial adjustment

[7] Because the OSC was electronically served on the parties after the close of business on May 6, the ALJ deemed it issued on May 7.

> period when the Complaint was received on April 6, 2020, the deadline to file [GPA's answer] was mistakenly not calendared in the Firm's internal system, and without the calendaring entry, the [a]nswer was inadvertently not filed."

GPA explained that the answer had been drafted five days prior to the filing deadline and that GPA's "attorney had mistaken[ly] believed the [a]nswer was filed." GPA averred that "Gompers has otherwise diligently sought to comply with all deadlines, obligations and requirements." Furthermore, GPA argued that SDEA would not be prejudiced by its 10-day delay because GPA had previously "filed two extremely thorough position statements that outline the facts and arguments that support its position in response to the allegations" in the unfair practice charges; therefore, the contents of the answer "will not create surprise or prejudice anyone." Because the formal hearing was not scheduled to occur until July 27, GPA contended that accepting the answer was not likely to affect the parties' ability to prepare their cases.

Tucker's declaration in support of GPA's motion corroborated the factual bases for the motion. The answer admitted to some of the facts alleged in the complaint and denied others, denied any violation of the PEDD or EERA, and set forth several affirmative defenses.

SDEA opposed the motion, arguing that GPA had failed to show good cause for its late filing, despite the effects of the COVID-19 pandemic. SDEA argued that "[t]he Association has consented to extensions in two PERB matters with GPA during this time (including this one) and has agreed to cancel a bargaining session." SDEA further argued that "[a]lthough illness, childcare and adjusting to working from home are reasonable justifications for requesting an extension of a deadline, there is no indication that every person involved in this deadline was sick, involved in childcare, or

having issues transitioning to working from home such that GPA was prevented from simply requesting an extension." SDEA further argued that "PERB has failed to find that there was good cause for a late filing where the party asserting good cause failed to provide the dates of unavailability or incapacitation. See *Regents of the University of California* (2008) PERB Order No. Ad-370-H, p. 7 (no good cause where union failed to provide dates representative was traveling or bedridden)."

While SDEA mainly argued that GPA did not provide sufficient details to demonstrate its inability to timely file an answer or to request an extension of time, SDEA added a number of related arguments, including the following: SDEA noted that GPA's proposed answer was dated May 7, even though GPA's law firm had represented that it drafted the answer five days prior to the April filing deadline; SDEA further argued that GPA's motion was insufficient because GPA failed to provide any evidence of the calendaring error, citing to *City of Sacramento* (2003) PERB Decision No. 1541-M and *Trustees of the California State University* (1989) PERB Order No. Ad-192-H; finally, SDEA argued that accepting the late answer would prejudice SDEA because GPA admitted in its position statements to making some statements, while its proposed answer generally denied some complaint paragraphs alleging that same conduct. SDEA supported its opposition with declarations of counsel Megan Degeneffe and field organizer Anthony Saavedra.

GPA requested that the ALJ hear the matter over a telephonic conference, but the ALJ declined. GPA was granted leave to file a reply. In its reply, GPA explained:

> "Although [GPA] cannot pinpoint a singular reason that Ms. Tucker's staff failed to calendar this deadline as they normally would, the credible evidence shows a combination of factors caused this honest mistake, namely: the extraordinary circumstances and unusual strain caused by

> working from home during a pandemic, including distractions caused by family members, personal illness, and working in environments and under schedules that had been significantly disrupted. This combination of factors existed at the time the need to calendar this deadline arose, caused Ms. Tucker's support staff to deviate from their normal calendaring procedures and resulted in this late filing."

(Citations removed.) GPA also objected to SDEA's references in its opposition and the Saavedra declaration to GPA's alleged bargaining conduct, arguing it was not relevant to the inquiry of whether accepting the late-filed answer would prejudice SDEA.

On May 27, the ALJ issued an "Order Denying Respondent's Motion to File Late Answer; Deeming Respondent's Failure to File Timely Answer to Constitute Admission of Truth of All Material Facts Alleged in Charge & Complaint and Waiver of Right to Hearing; and Setting Briefing Schedule" (Order). The Order found no good cause to accept the late answer because GPA did not "provide sufficient factual detail to establish a reasonable and credible explanation for its untimely filing or show that it at least made a conscientious effort to comply with the deadline." (Internal quotation marks omitted.) The ALJ found that GPA's explanation of the events that caused it to miss the deadline frequently used passive voice, which "obscures who should have calendared and filed the [a]nswer and who was responsible for the deadline." Further, the Order found that GPA did not explain how staff adjustments led to the failure to calendar the deadline.

The Order reasoned that because counsel for GPA claimed responsibility, and because there was not a sufficient basis to find that clerical staff were at fault, good cause could not be found to excuse the late filing:

> "'[T]he 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, p. 3 (*Corrections*), citing *State of California (Water Resources Control Board)* (1999) PERB Order No. Ad-294-S; *Calipatria Unified School District* (1990) PERB Order No. Ad-217 (*Calipatria*).) Thus, if the calendaring mistake was made by 'clerical staff employed by an attorney' for Gompers, it may be excusable, but if '[Gompers'] attorney was directly responsible for the late filing,' it cannot be excused."

While the ALJ acknowledged that GPA's failure to timely file its answer may not have prejudiced SDEA, he nonetheless concluded that good cause and prejudice are separate considerations pursuant to *Bellflower Unified School District* (2017) PERB Order No. Ad-447 (*Bellflower*). Thus, he found that because good cause did not exist, the fact that SDEA would not be prejudiced could not by itself excuse the late filing. After finding that GPA's motion "must fail," the ALJ reasoned that according to *Regents*, *supra*, PERB Decision No. 2601-H, the application of PERB Regulation 32644, subdivision (c) was not discretionary, and required him to find that GPA's failure to timely file its answer "constitutes an admission of the truth of the material facts alleged in the charge and the complaint and a waiver of any affirmative defenses and respondent's right to a hearing." The Order acknowledged the factual differences between the circumstances here and those in *Regents*, but nonetheless found that *Regents* mandated this result. The Order directed the parties as follows:

> "Because of the severe consequences that . . . may flow to [GPA from deeming the allegations true and affirmative defenses and hearing waived] . . . I am inviting the parties to file written briefs . . . on the following two remaining issues and no others:

> "1. For each alleged violation in the Complaint, does [GPA's] constructive admission of the truth of the material facts alleged in the Charge and the Complaint and its constructive waiver of any affirmative defenses establish an actual violation? In other words, for each such alleged violation, does the Complaint state a prima facie case?
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> "2. For any violation(s) I may find, what is the appropriate remedy for the violation(s), both separately and (if I find more than one violation) as a whole?"

(Footnote omitted.)

On June 5, GPA filed a request for the ALJ to certify its interlocutory appeal of the Order to the Board itself, pursuant to PERB Regulation 32200. SDEA opposed the request and the ALJ denied it. The parties then filed their briefs in response to the ALJ's two questions regarding the merits of the complaint's allegations.

On September 23, the ALJ issued a proposed decision that deemed true all material allegations and found that: GPA interfered with protected employee and union rights in violation of EERA and the PEDD by sending the July 29 letter to its staff; GPA violated its duty to meet and negotiate with SDEA in good faith under the totality of the conduct test and that it also committed a per se violation of this duty; and GPA retaliated against a teacher for exercising EERA-protected rights by imposing an involuntary transfer to a different grade level and by issuing a letter of reprimand. The proposed decision dismissed the allegations that two other letters GPA sent to staff constituted unlawful interference or a violation of the PEDD, and that GPA had interfered with protected employee rights by directing an employee to address workplace concerns to GPA management.

GPA timely filed exceptions to the proposed decision. GPA primarily contends that the ALJ erred by denying its motion to file a late answer, and deeming the failure

to file an answer an admission of all material allegations and a waiver of all affirmative defenses and right to a hearing. GPA argues that this ruling deprived it of procedural due process.

SDEA responded to GPA's exceptions, arguing in relevant part that the ALJ properly denied GPA's motion to file a late answer and imposed the correct consequences pursuant to PERB Regulations.[8]

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Ventura* (2021) PERB Decision No. 2758-M, p. 32.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*Eastern Municipal Water District* (2020) PERB Decision No. 2715-M, p. 7.) "The Board itself may: . . . [¶] Affirm, modify, or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper." (PERB Reg. 32320, subd. (a)(2).) The Board need not address

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[8] SDEA argued that GPA's exceptions were not timely filed pursuant to PERB Regulation 32300, subdivision (a), since the proposed decision was issued on September 23, and GPA did not request an extension of time to file its exceptions until October 12, which was one day before the deadline. GPA initially attempted to file its request on October 9, but the filing was rejected as deficient, and the request was not re-filed until October 12. Because SDEA did not oppose this extension of time, we need not examine its propriety.

SDEA also filed cross-exceptions. Specifically, SDEA challenged the proposed decision's finding that two of GPA's letters to staff did not constitute unlawful interference or a violation of the PEDD, along with the dismissal of the interference allegation based on GPA directing an employee to raise workplace issues exclusively to GPA management. SDEA also excepted to the ALJ's proposed remedies. We do not reach these cross-exceptions given that we vacate the proposed decision in its entirety on procedural grounds, as discussed below.

alleged errors that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

I. GPA's Motion to File a Late Answer

PERB Regulations require the respondent to "file with the Board an answer to the complaint within 20 days or at a time set by the Board agent following the date of service of the complaint." (PERB Reg. 32644, subd. (a).) If a respondent fails to timely file an answer to the complaint, that failure may be deemed "an admission of the truth of the material facts alleged in the charge and a waiver of respondent's right to a hearing," unless the untimeliness is excused for good cause. (PERB Reg. 32644, subd. (c); *Regents*, *supra*, PERB Decision No. 2601-H, p. 14.)

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."

Generally, "good cause to excuse a late filing exists where the delay is of short duration and based on circumstances that were either unanticipated or beyond the party's control." (*City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 9, citing *Regents*, *supra*, PERB Decision No. 2601-H, p. 15; see, e.g., *Trustees of the California State University* (2016) PERB Order No. Ad-432-H, p. 8; *State of California (Department of Corrections)* (2006) PERB Decision No. 1806-S, p. 7; *United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325, p. 4.)

A late filing will generally be excused when it has resulted in a short and non-prejudicial delay, and it was the result of either "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." (*Bellflower*,

supra, PERB Order No. Ad-447, p. 4.) PERB has found good cause to exist for "honest mistakes" such as clerical errors. (*Id*. at p. 3; see also *Lodi Unified School District* (2005) PERB Order No. Ad-346, pp. 2-3 [clerical staff who was usually trustworthy mistakenly failed to file document].) Similarly, PERB has found good cause when a late filing was shown to be an error caused by reorganization of job assignments. (*Trustees of the California State University* (2004) PERB Order No. Ad-344-H, p. 2.) Regardless of the reason(s) given, "the moving party must provide sufficient factual detail to establish a 'reasonable and credible' explanation for its untimely filing or show that it at least made a conscientious effort to comply with the deadline." (*Trustees of the California State University*, *supra*, PERB Order No. Ad-432-H, p. 8, citations omitted.)

"'[W]hile 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.'" (*City and County of San Francisco*, *supra*, PERB Decision No. 2757-M, p. 9, quoting *Calipatria*, *supra*, PERB Order No. Ad-217, p. 13.) Therefore, even where no prejudice to the other party is apparent, we must first determine whether good cause exists. (*Bellflower*, *supra*, PERB Order No. Ad-447, p. 5.)

"'[G]ood cause' is a flexible standard, defined and constrained by considerations of fairness and reasonableness." (*Regents*, *supra*, PERB Decision No. 2601-H, pp. 14-15, citing *Trustees of the California State University*, *supra*, PERB Order No. Ad-192-H, pp. 4-5.) Consistent with the policy of "not depriv[ing parties] of the opportunity to have their issues heard on the merits due to legal technicalities" (*Regents*, *supra*, PERB Decision No. 2601-H, p. 12), we do not require a rigid

application of the good cause standard, and find it appropriate to take the entirety of the circumstances into account in our inquiry. We emphasize the importance of this principle in these circumstances due to the COVID-19 pandemic and the statewide emergency stay-at-home order. (See Governor's Exec. Order No. N-33-20 (March 19, 2020).)

The events that led to GPA's failure to timely file its answer appear to be largely due to the COVID-19 global pandemic. We are cognizant of the widespread and serious impacts of the once-in-a-century pandemic and the stay-at-home order on individuals and business operations. COVID-19 has impacted all of us personally and professionally. Indeed, the California Supreme Court implemented an automatic 30-day extension of time for all filings. (Administrative Order No. 2020-03-20 (March 20, 2020).) Likewise, federal courts have found the circumstances caused by COVID-19 to constitute sufficient cause to extend deadlines and allow late filings. (E.g., *Brown v. Davis* (E.D. Cal. 2020) 482 F.Supp.3d 1049, 1052-1053 [finding good cause existed to warrant equitable tolling because petitioner's counsel had calendared an erroneous due date and that counsel's COVID-19-related childcare responsibilities had led to the error going unrecognized].) While we are not bound by these courts' actions, we nonetheless note their recognition of the impact of the COVID-19 pandemic on our personal and professional lives.

In GPA's motion to file a late answer and Tucker's supporting declaration, GPA explained that the answer was not timely filed due to "an honest mistake and miscommunication between departments" within Tucker's law firm that resulted in a calendaring error. Tucker explained that the answer was drafted five days prior to the filing deadline, and Tucker had mistakenly believed that the answer was filed. The

mistake and miscommunication were due to staff adjustments to working entirely from home with reduced hours and modified assignments in the first weeks of the stay-at-home order. Tucker further explained that she and some of the staff responsible for calendaring and administrative support struggled with illness and with caring for family members, in addition to performing their job duties from home.

SDEA argues that *Regents of the University of California*, *supra*, PERB Order No. Ad-370-H, required GPA to provide detailed dates of unavailability to demonstrate the inability to timely file the answer or to request an extension of time. (*Id*. at p. 7.) However, in that case, although the Board noted the charging party gave no dates for when its business agent was out of the country and then incapacitated, additional evidence showed that the agent's unavailability "did not contribute to the late filing." (*Ibid*.) Thus, the finding of lack of good cause was not based on the charging party's failure to provide specific dates for its agent's unavailability.

Therefore, we find that GPA demonstrated good cause to excuse the late filing of its answer based on a sufficiently detailed, credible explanation of extenuating circumstances. The complaint was issued less than one month after California's stay-at-home order required all employees deemed "non-essential" to remain at home. In light of the widespread, publicized disruption to business practices caused by the sudden and unexpected shift from conducting business in-person to virtually from home, Tucker's explanation was compelling and justifiable due to COVID-19, and sufficient to establish good cause.

Moreover, we find GPA's explanation for its late filing to constitute good cause even if Tucker, rather than her clerical staff, was at fault for the delay. The Order reasoned that "if the calendaring mistake was made by 'clerical staff employed by an

attorney' for Gompers, it may be excusable, but if '[Gompers'] attorney was directly responsible for the late filing,' it cannot be excused." However, "the Board has never adopted a categorical rule that an attorney's conduct can never constitute good cause to excuse a late filing." (*City and County of San Francisco*, *supra*, PERB Decision No. 2757-M, p. 10.) In *Barstow Unified School District* (1996) PERB Order No. Ad-277, the Board found good cause to exist when the attorney who was responsible for the late filing did not notice while preparing the proof of service that the wrong PERB office was listed. (*Id*. at pp. 4-5.) Therefore, "good cause to excuse a late filing does not depend on whether the responsible person was an attorney but on whether the late filing was occasioned by circumstances that were either unanticipated or beyond the person's control, whether the responsible person provided a reasonable and credible explanation for their failure to comply, or made a conscientious effort to comply with the filing deadline." (*City and County of San Francisco*, *supra*, PERB Decision No. 2757-M, p. 11.) While an attorney's erroneous interpretation of the law or misunderstanding of PERB's regulations does not normally constitute good cause (*Bellflower*, *supra*, PERB Order No. Ad-447, p. 5), there is no categorical bar to finding good cause for an attorney's honest mistakes. In these circumstances, we find it unnecessary to parse whether the calendaring error and resulting missed filing deadline were due to a mistake by Tucker or one of her clerical staff, as in either instance GPA's explanation was reasonable and credible.

This case also is distinguishable from *Regents*, *supra*, PERB Decision No. 2601-H. In *Regents*, the labor relations specialist drafted the answer to the complaint and forwarded it to counsel, but it was not filed. (*Id*. at p. 15.) However, the respondent provided no explanation of its failure to file the answer, and despite being

aware since early December that no answer had been filed, the attorney did not attempt to file an answer until the day before hearing at the end of January. (*Ibid*.) The facts of this case stand in stark contrast: GPA filed its answer and a motion to excuse the late filing the day it received the OSC notifying it that an answer was not yet filed. This speedy response demonstrates a conscientious effort on the part of GPA to file the answer.

Having found good cause, we also find that the circumstances here do not demonstrate prejudice. GPA argued that allowing the answer to have been filed 10 days late would not have prejudiced SDEA when the parties still had months until the scheduled start of the formal hearing. The ALJ found, and we agree, that accepting the late answer would not have caused prejudice. We do not agree with SDEA's argument that allowing the answer to have been filed would have created prejudice because the answer's general denials and affirmative defenses varied slightly from GPA's position statements. We have explained that "prejudice typically means that a party has been prevented from preparing or presenting evidence or argument. It does not typically mean that an amendment improves one party's pleadings and thereby presents an additional obstacle to the opposing party; were that the case, nearly every proposed amendment would be prejudicial." (*Eastern Municipal Water District*, *supra*, PERB Decision No. 2715-M, pp. 11-12 [finding charging party would not have suffered undue prejudice if respondent was allowed to amend its answer at hearing, and any potential prejudice could have been mitigated with a continuance].) GPA provided its answer to the ALJ and SDEA 10 days after it was originally due, and over three months before the first day of hearing. Had the ALJ accepted the late-filed answer, SDEA would have had sufficient time to prepare to

address at hearing any denials or affirmative defenses pled in the answer. We do not find prejudice in these circumstances.

II. The ALJ's Denial of Certification of GPA's Interlocutory Appeal

PERB Regulation 32200 provides that a "party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself." However, the "Board itself will not accept the request unless the Board agent joins in the request." (*Ibid*.) In order for an ALJ to join in the request and certify the interlocutory appeal to the Board itself, three elements must be found: (a) the issue involved is one of law; (b) the issue involved is controlling in the case; and (c) an immediate appeal will materially advance the resolution of the case. (*Ibid*.) SDEA argued that this test was not met because the appeal implicated both legal and factual questions and because an immediate appeal would not materially advance the resolution of the case. The ALJ found that only the first element was present. We disagree and find that GPA established all three elements.

SDEA argued that factual questions existed as to whether to credit Tucker's statements in support of GPA's motion to file its late answer, and whether SDEA would be prejudiced by accepting the answer. Because the existence of good cause requires the application of a legal standard, it is an appropriate issue to certify to the Board. Further, after not allowing GPA to file its answer, the ALJ deemed GPA to have admitted all material factual allegations in the complaint and charge, waived all affirmative defenses, and waived its right to a hearing. While the ALJ still allowed the parties to brief several remaining issues, we nonetheless construe the finding of no good cause as being sufficiently controlling in this case to warrant an interlocutory appeal.

We also find that allowing an immediate appeal would have materially advanced the resolution of the case in these circumstances. In concluding the opposite, the ALJ reasoned that an immediate appeal of the issue had the potential of expediting the matter a few months if his Order was incorrect, or adding many months before the resolution of the case if his Order was correct. Certifying an interlocutory appeal would signify to the Board that a critical issue in this case needed immediate resolution. The Board could have expeditiously resolved the issue and returned the case to the ALJ to either order limited briefing on the merits if his Order was affirmed, or setting a hearing if his Order was reversed. While we commend the ALJ's desire to avoid delay, unfortunately, the opposite has resulted. Nor is judicial economy served by requiring the parties to twice brief the merits of this case.

An ALJ's primary responsibility is to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered." (PERB Reg. 32170, subd. (a); *Eastern Municipal Water District*, *supra*, PERB Decision No. 2715-M, p. 15.) Because PERB's mission is to come to the correct factual and legal conclusions to effectuate the statutes it is tasked with administering, we have a longstanding policy against "depriv[ing parties] of the opportunity to have their issues heard on the merits due to legal technicalities." (*Regents*, *supra*, PERB Decision No. 2601-H, p. 12; see also *City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 22, fn. 7 ["'We are sensitive to the fact that PERB is not a court, but an administrative agency, and that the formalities of practice and procedure in the judicial system are not always appropriate for fulfilment of PERB's mission . . .'"].) Board agents should be guided by this important mandate when determining whether to certify an interlocutory appeal to the Board.

ORDER

For the foregoing reasons, the proposed decision in Case No. LA-CE-6531-E is hereby VACATED and the matter is REMANDED to the Division of Administrative Law. On remand, the assigned ALJ shall accept the filing of GPA's answer pursuant to PERB Regulation 32136, hold a hearing on the merits, and issue a new proposed decision after the parties have had the opportunity to provide full briefing.

PER CURIAM