

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LINCOLN UNIFIED TEACHERS ASSOCIATION,)	
CTA/NEA,)	Case No. S-CE-29
)	
Employee Organization,)	PERB Order No. Ad- 35
)	
and)	Administrative Appeal
)	
LINCOLN UNIFIED SCHOOL DISTRICT,)	May 30, 1978
)	
Employer, <u>APPELLANT</u> .)	

Appearances: C. M. Sullivan, Jr., Attorney (Litts, Mullen, Perovich, Sullivan and Newton) for Lincoln Unified Teachers Association, CTA/NEA; Rebecca A. Davis, Deputy County Counsel, San Joaquin County, for Lincoln Unified School District.

Before Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

OPINION

This is an appeal by the Lincoln Unified School District from the rejection by the executive assistant to the Board of its exceptions to the hearing officer's recommended decision. The executive assistant to the Board rejected the District's exceptions as untimely filed pursuant to Board rule 35030.¹

¹The Board's rules are codified in California Administrative Code, title 8. Section 35030 provided at the times relevant to this appeal:

Statement of Exceptions to Recommended Decision.

- (a) Within seven calendar days after service of the recommended decision a party may file a statement of exceptions to the recommended decision or any part of the record or proceedings.
- (b) The filing of the statement of exceptions submits the case to the Board itself.

Section 35030 was repealed and replaced by section 32300 effective March 20, 1978.

FACTS

The recommended decision in this case was served on appellant on March 8, 1978, making exceptions due on March 15, 1978. The District did not request an extension of time for the filing of exceptions and did not file its exceptions until March 17, 1978, two days late. The executive assistant to the Board rejected the exceptions on the ground they were untimely filed.

DISCUSSION

The District urges the Board to accept and consider its untimely filed exceptions on several grounds. The Board has examined each argument and concludes that the executive assistant to the Board was correct in rejecting the exceptions.

The District first argued the Board should accept the exceptions because the District was confused regarding the difference in meaning between "service" and "filing." The Board, however, notes that these terms are clearly defined by the Board's rules. At the times relevant to this appeal, rule 32140 provided:

Service. All documents referred to in these rules and regulations, except subpoenas, shall be considered "served" by the Board or a party when personally delivered or deposited in the first-class mail properly addressed.

and rule 35002(b) provided:

An unfair practice charge, an application for joinder and a petition to submit an informational brief shall be considered "filed" by a party when actually received by the appropriate regional office. All other documents referred to in these rules and regulations shall be considered "filed" by a party when actually received by the appropriate regional office accompanied by proof of service of the document on each party.

The Board must assume that each party practicing before it is familiar with the Board's rules, so confusion regarding the meaning of "service" and "filing" is not a valid excuse for filing exceptions late.

The District's second argument is that rule 35030 is unreasonable because it allows only seven days for the filing of exceptions. In this connection, the Board notes that in most cases coming before it the parties have filed their exceptions within the seven day period provided by rule 35030. Also, the District in this case did not request the Board to extend the seven day filing period.

The District's third argument is that it did not request an extension of time for filing because the Board does not have any rules governing such a procedure. The Board notes that at the times relevant to this appeal, rule 35002(d) provided:

With the exception of the charge, upon timely application and a showing of good cause the Board may extend the required filing date [of any document required to be filed with the Board].

Finally, the District argues its exceptions were not required to be filed until March 22, 1978, based upon the following reasoning. Rule 32130 provides:

Computation of Time. In computing any period of time under these rules and regulations, the period of time begins to run the day after the act or occurrence referred to.

Thus, the seven days began to run on March 9, 1978, the day after the Board served the recommended decision. Code of Civil Procedure section 12 provides:

The time in which any act provided by law is to be done is computed by excluding the first day, and including the last....

It is argued that this section should be superimposed on rule 32130 so that the seven days began to run one day after March 9, which would be March 10.

Then, Code of Civil Procedure section 1013(a) provides:

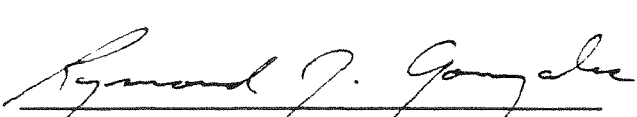
In the case of service by mail... The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended five days if the place of address is within the State of California....


The District concludes that seven days after March 10 is March 17, plus five days for mailing under section 1013(a) makes March 22, 1978 the day on which exceptions were due to be filed by the District. The Board rejects this argument. The Code of Civil Procedure applies only to civil actions in the courts, so section 12 and section 1013 do not apply to administrative actions before this Board. In any case, rule 32130 and section 12 state the same law. Applied in this case, the seven day period began on March 9.

The Board, not being persuaded by the arguments in favor of accepting the exceptions filed late by the District, sustains the decision of the executive assistant to the Board rejecting the exceptions.

ORDER

The decision of the executive assistant to the Board, rejecting the exceptions to the hearing officer's recommended decision filed by the Lincoln Unified School District, is sustained.


By: Raymond J. Gonzales, Member


Harry Gluck, Chairman

Jerilou Cossack Twohey, Member, dissenting:

I disagree with the majority's conclusion that the executive assistant properly rejected the District's exceptions to the hearing officer's recommended decision.

The recommended decision was "served" on the parties on March 8, 1978. The District actually received the recommended decision on Friday, March 10. Exceptions were technically due to be received by this Board on Wednesday, March 15. The District deposited its exceptions in the mail on Tuesday, March 14; they were actually received by the Board on Friday, March 17. In effect, the majority has mechanically applied the then-existing rules¹ to afford the District only three work days--Monday, March 13; Tuesday, March 14; and Wednesday, March 15--within which to prepare its exceptions and make sure they were actually received by this Board.

This is yet another case, of which there have been many,² where a majority of this Board has mechanically applied an unreasonable rule in such a fashion as to deny a party its right to appeal a lower decision. I do not advocate permitting parties to ignore the time requirements established by the Board's rules and regulations. However, where as here, the time requirements are unreasonable, the long-established legal principle of not permitting minor procedural defects to preclude the examination of an actual controversy by an appellate body should prevail.³ Accordingly, I would reverse the executive assistant and entertain the District's exceptions.


By: Jerilou Cossack Twohey, Member

¹The rules were amended on March 20, 1978 to provide more time for filing exceptions.

²See Manteca Unified School District (8/5/77) EERB Decision No. 21; San Francisco Unified School District (9/8/77) EERB Decision No. 23; Santa Ana Unified School District (10/28/77) EERB Decision No. 36; Anaheim Union High School District (3/16/78) PERB Order No. Ad-27.

³Pesce v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 310, 313; See also Gibson v. Unemployment Insurance Appeals Board (1973) 9 Cal.3d 494 and Flores v. Unemployment Insurance Appeals Board (1973) 30 Cal.App.3d 681.

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 17, 1978

Ms. Rebecca Davis
Deputy County Counsel
Courthouse - Room 711
Stockton, CA 95202

Re: Lincoln Unified Teachers Association, CTA/NEA vs. Lincoln
Unified School District, S-CE-29

Dear Ms. Davis:

We received your exceptions to Hearing Officer's Decision in the above-captioned case, on behalf of the Lincoln Unified School District. Unfortunately, your exceptions were not timely filed according to Section 35030 of the Board's rules and regulations.

Section 35030 states: "Within seven calendar days after service of the recommended decision a party may file a statement of exceptions to the recommended decision or any part of the record or proceedings."

The decision was served March 8, 1978, making exceptions due March 15, 1978. Your exceptions were not filed in this office until March 17, 1978, making them two days late.

As a result of this failure to timely file, your exceptions cannot be submitted to the Board itself for consideration. Please be advised that while there are no rules to this effect, you are welcome to appeal this rejection. Should you choose to do so, your appeal should be filed in this office on or before March 27, 1978.

Very truly yours,

A handwritten signature in cursive script that reads "Stephen Barber".

STEPHEN BARBER
Executive Assistant to the Board

SB:dd