

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

SAN DIEGO COMMUNITY COLLEGE
DISTRICT,

Employer,

and

SAN DIEGO ADULT EDUCATORS CHAPTER
OF LOCAL 4289, CFT, AFT, AFL-CIO,

and

AMERICAN FEDERATION OF TEACHERS
GUILD, LOCAL 1931, CFT, AFT, AFL-CIO,

Exclusive Representatives.

Case No. LA-UM-649-E

Administrative Appeal

PERB Order No. Ad-311

November 28, 2001

Appearances: Liebert Cassidy Whitmore by Bruce A. Barsook, Attorney, for San Diego Community College District; Gattey Cooney & Baranic LLP by James M. Gattey, Attorney, for San Diego Adult Educators Chapter of Local 4289, CFT, AFT, AFL-CIO and American Federation of Teachers Guild, Local 1931, CFT, AFT, AFL-CIO.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Diego Community College District (District) from the appeals assistant's denial of the District's request for judicial review as untimely filed.

On June 15, 2001¹ the Board issued San Diego Community College District (2001) PERB Decision No. 1445 (San Diego) granting a unit modification petition jointly filed by the

¹ All dates refer to 2001.

San Diego Adult Educators Chapter of Local 4289, CFT, AFT, AFL-CIO (SDAE) and the American Federation of Teachers Guild, Local 1931, CFT, AFT, AFL-CIO (Guild). On July 10 the District filed its request for judicial review of San Diego. Although the District's request was filed within the timelines set forth in PERB Regulation 32500(a)², the request was filed in the San Francisco regional office, instead of the Sacramento headquarters office. The District claims the request was filed with the San Francisco regional office by mistake. The request was routed to Sacramento, but was not received until July 16, six days late.

In addition to the administrative appeal from untimely filing, the District also requests the Board stay its decision in San Diego.

In a jointly filed responsive paper opposing the District's request to excuse the late filing and opposing the District's request for a stay, the SDAE and the Guild request that the Board clarify the effective date of San Diego and clarify which exclusive representative represents the affected unit members.

DISTRICT'S REQUEST TO EXCUSE LATE FILING

The District's brief was mailed via U.S. Express Mail on July 10 (the document due date) to the San Francisco regional office instead of to the Sacramento headquarters office, thus it was treated under PERB Regulation 32500(a) as untimely.

² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32500(a) provides:

(a) Any party to a decision in a representation case by the Board itself, except for decisions rendered pursuant to Chapter 5, Subchapter 1 of these Regulations, may file a request to seek judicial review within 20 days following the date of service of the decision. An original and five copies of the request shall be filed with the Board itself in the headquarters office and shall include statements setting forth those factors upon which the party asserts

The District's instant appeal states that the document was mailed to the San Francisco regional office by mistake and seeks excuse of the late filing based on a secretarial error. A secretary of the District's law firm was asked to assist with the preparation and service of the District's request for judicial review. The secretary looked in the underlying casefile and found the last correspondence from PERB, a letter from Jerilyn Gelt (Gelt) dated June 27. She mailed the request for judicial review to Gelt's address, the Board's San Francisco regional office, as she mistakenly thought the June 27 letter reflected the address to which she was to send the request for judicial review. The District argues that because the SDAE and the Guild received copies in a timely manner, and because they knew of the District's intent to file the document before the deadline, they are not prejudiced by the late filing. The request was routed to the Board's Sacramento headquarters office, but was not received until July 16, 2001, six days late.

EXCLUSIVE REPRESENTATIVE'S RESPONSE

The SDAE and the Guild oppose the District's appeal from the administrative determination, claiming they would be prejudiced if the filing were accepted as timely. Specifically, they argue that the late filing was not due to an inadvertent clerical error, but due to the District counsel's negligence and that the SDAE and the Guild continue to be prejudiced by the late filing because the District refuses to recognize the effectiveness of the Board's decision until it has exhausted all review and appeal remedies available to it.

DISCUSSION

PERB Regulation 32136 provides that:

that the case is one of special importance. Service and proof of service of the request pursuant to Section 32140 are required.

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.

The Board, in North Orange County Regional Occupation Program (1990) PERB Decision No. 807 (North Orange County), excused a filing that was inadvertently sent to the Los Angeles regional office rather than the Sacramento headquarters office.

The SDAE and the Guild argue North Orange County is distinguishable because it is unclear whether anyone told the secretary in that case that the document needed to be filed with the Board's headquarters' office; and because in that case, the document was filed ten days before the due date, not on the due date like the District's filing in this case.

In Trustees of the California State University (1989) PERB Order No. Ad-192-H (Trustees), the Board excused a technically late filing based on secretarial error where unrefuted evidence indicated that the document was actually mailed on the filing date, where the explanation of what occurred was not so unreasonable as to be unbelievable, and where the opposing party had shown no actual prejudice resulting from the one-day delay. This standard has been applied by PERB in subsequent decisions. (Regents of the University of California (1989) PERB Order No. Ad-202-H.)

The District, through declarations, offers unrefuted evidence indicating the document was mailed by U.S. Express Mail on the due date, albeit to the incorrect office. The District's explanation of what occurred is not so unreasonable as to be unbelievable. There is no evidence of prejudice resulting from the technically deficient filing. Accordingly, as the instant case falls squarely within the Board's precedent found in North Orange County and Trustees, we conclude good cause exists for excusing the late filing and accepting the District's request for judicial review as timely filed.

REQUEST FOR A STAY

The District claims that the Educational Employment Relations Act (EERA)³ statutes and policy provide that the Board's decision in San Diego should be stayed pending judicial review. The District argues that pending the outcome of its request for judicial review, the District is at risk of an enforcement proceeding. The District claims a stay would avoid the potential conflict and confusion that could result from having employees move from one bargaining unit to another for a limited period of time, only to be returned to the original bargaining unit once the decision in its favor has been rendered.

The SDAE and the Guild argue that the Board's regulations do not provide for an automatic stay of the effectiveness of a unit modification decision and that the request for a stay only seeks to delay the affected unit members' desire to be represented by their exclusive representative of choice.

DISCUSSION

PERB does not have a specific regulation which covers whether a request for judicial review filed with the Board stays a Board decision in a unit modification setting.

EERA section 3542(a) outlines the parties' rights and PERB's role with respect to requests for judicial review of a unit determination as follows:

No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

³ EERA is codified at Government Code section 3540 et seq.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for a writ of extraordinary relief from the unit determination decision or order.

A plain reading of the statute indicates that only a Board order directing an election is subject to a mandatory prohibition on any stay pending judicial review. In non-election unit determination cases, it is apparent the Board has the discretion to grant a stay.

On August 29, 2001 the Guild filed an unfair practice charge and requested injunctive relief against the District. (PERB Unfair Practice Charge No. LA-CE-4321-E; Injunctive Relief Request No. 422.) The unfair practice charge alleges that the District refuses to bargain over the wages, hours, and other terms and conditions of employment for the continuing education counselors. On September 10, 2001, the Board denied the request that PERB seek injunctive relief in this matter.

Without prejudging the Board's determination on the request for judicial review, if it is necessary to resolve any perceived ambiguity about the effect of San Diego it will likely be done through the pending unfair practice case. As such, the Board declines to exercise its discretion to grant a stay in this matter.

CLARIFICATION OF THE IMPACT OF SAN DIEGO

The SDAE and the Guild request clarification as to the "effective date of the Board's decision and which exclusive representative represents the affected unit members in light of District's refusal to recognize the effectiveness of the Board's decision."

For the same reasons the Board denies the request for a stay, the request by the SDAE and the Guild that the Board clarify the effective date of San Diego and clarify which exclusive representative represents the affected members is denied.

ORDER

The San Diego Community College District's (District) request for judicial review of San Diego Community College District (2001) PERB Decision No. 1445 (San Diego) is hereby ACCEPTED as timely filed. The request by the District for a stay is hereby DENIED. The request by the San Diego Adult Educators Chapter of Local 4289, CFT, AFT, AFL-CIO and the American Federation of Teachers Guild, Local 1931, CFT, AFT, AFL-CIO that the Board clarify the effective date of San Diego and clarify which exclusive representative represents the affected members is DENIED.

Members Amador and Whitehead joined in this Decision.