

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

LAWANDA BAILEY,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4355-E

Administrative Appeal

PERB Order No. Ad-318

February 6, 2003

Appearance: William D. Evans, Attorney, for Lawanda Bailey.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lawanda Bailey (Bailey) of the Appeals Assistant's denial of Bailey's appeal of dismissal of her unfair practice charge due to late filing. The Board finds that Bailey demonstrated "good cause" to excuse the late filing pursuant to PERB Regulation 32136¹ and therefore, reverses the Appeals Assistant's determination.

DISCUSSION

The Board agent's dismissal was served on the parties by mail on April 22, 2002.² Under PERB Regulation 32635, the charging party may appeal a dismissal within 20 days of service of the dismissal. The appeal thereby had to be filed no later than May 17. Bailey sent

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

²All dates refer to 2002.

her appeal by regular mail on May 16; the appeal is also postmarked May 16. The proof of service for the appeal shows that the appeal was served by mail on the opposing party on May 16. The appeal was received by PERB on May 20, one business day after the due date.

In a declaration attached to her appeal of the administrative determination, Bailey alleges that, on or about April 25, 2002, she telephoned PERB to discuss her plan to appeal the Board agent's dismissal and her intent to hire an attorney to handle the appeal on her behalf. She wanted to ensure that her appeal was timely filed. Bailey was referred to the Board's Appeals Office. She alleges that the Appeals Office advised her that her appeal would be timely if mailed by May 13, that an extra five (5) days was added bringing the date to May 17, and that Bailey ensure that the appeal was mailed and postmarked no later than May 16. Bailey says that the Appeals Office did not inform her that the letter had to be mailed by express mail or any form other than regular mail in order to be timely. Bailey further states that her attorney, William D. Evans, mailed the appeal on May 16. The appeal letter dated May 16 indicates for the first time that Evans is representing Bailey.

PERB Regulation 32135 provides, 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. (Emphasis added.)

It is true that the appeal was not technically filed under Section 32135 until May 20. However, under PERB Regulation 32136, the Board may excuse a late filing for "good cause." The facts in this case are very similar to those in The Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H

(Regents). In Regents, the University mailed a brief to PERB by regular first-class mail on the due date. PERB received the document three days later. If the document had been sent by certified or express mail and postmarked on or before the due date, it would have been considered as timely filed. Citing Trustees of the California State University (1989) PERB Order No. Ad-192-H, the Board looked at whether the document was actually mailed on the filing date, whether the explanation was not so unreasonable as to be unbelievable, and where the opposing party has shown no actual prejudice resulting from the delay (Regents at p. 2.), and found that the University of California had shown good cause for the Board to excuse the late filing. The Board has historically excused late filings caused by “honest mistakes” such as mailing or clerical errors. (Barstow Unified School District (1996) PERB Order No. Ad-277, at p. 3, citing other Board decisions in fn. 3.)

The allegations in her declaration, identifying various dates and mailing times, demonstrated Bailey’s apparent confusion regarding the information provided. According to Bailey’s allegations, the Appeals Office advised her to mail the appeal by May 13 but postmark it no later than May 16; yet, she alleges that she was not informed to send the appeal by express or certified mail.³ Through her attorney, Bailey mailed and served her appeal on May 16, and the appeal was postmarked on May 16. Therefore, her explanation for and confusion regarding the late filing is reasonable.

This case is also easily distinguished from the Board’s decisions in State of California (Water Resources Control Board) (1999) PERB Order No. Ad-294-S (Water Resources Control Board) and its predecessor, Calipatria Unified School District (1990) PERB Order

³PERB Regulation 32135(a), however, clearly specifies that filing occurs upon receipt of the document by the appropriate office, when mailed by certified or express mail, or when delivered by a common carrier promising overnight delivery.

No. Ad-217 (Calipatria). In each of those cases, the attorney was directly responsible for the late filing. The Board held that an attorney's misunderstanding of the regulation did not constitute good cause to excuse the late filing. In this case, although the attorney mailed the appeal, Bailey herself assumed responsibility for ascertaining the filing requirements. It was Bailey who attempted to determine the correct filing date by contacting the Appeals Office. In addition, unlike the filings in Water Resources Control Board and Calipatria, where the document was mailed on the final filing date, in this matter, the appeal was postmarked the day before the due date.

The record also indicates that Bailey was not represented by counsel during the period of her communications with the Appeals Office regarding the filing procedures and deadlines. PERB was first notified that Bailey was represented by Evans, her counsel, on May 16 when her appeal was filed, which we observe was one day prior to the filing deadline.

Accordingly, the Board finds that the untimely filing was a result of honest error by Bailey resulting from misunderstood communications that occurred before she was represented by counsel. The Board has previously excused late filings due to honest errors. Furthermore, there is no showing of prejudice to the opposing party for the one-business-day delay. As a result, Bailey has shown good cause for the late filing. The Board thereby excuses the late filing and reverses the Appeals Assistant's administrative determination.

ORDER

Lawanda Bailey's (Bailey) request to accept the late-filed appeal of the dismissal of her unfair practice charge in Case No. LA-CE 4355-E is hereby GRANTED. Pursuant to PERB Regulation 32635(c), the Los Angeles Unified School District is afforded twenty (20) days

following service of this decision to file a response to Bailey's May 16, 2002 appeal of dismissal.

Members Baker and Neima joined in this Decision.