

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

CESSALY DENISE HUTCHINSON,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
TRANSPORTATION),

Respondent.

Case No. SF-CE-193-S

Administrative Appeal

PERB Order No. Ad-326-S

June 20, 2003

Appearances: Cessaly Denise Hutchinson, on her own behalf; State of California (Department of Personnel Administration) by Wendi L. Ross, Labor Relations Counsel, for State of California (Department of Transportation).

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request by Cessaly Denise Hutchinson (Hutchinson) to excuse the late filing of her exceptions to the administrative law judge's (ALJ) proposed decision.

Hutchinson's request alleges that there is new evidence that justifies her request and attached exhibits in support of her request.

After reviewing the entire record, including Hutchinson's request and exhibits and the opposition filed by the State of California (Department of Transportation) (State), the Board denies Hutchinson's request.

BACKGROUND

On June 14, 2001, the ALJ issued a proposed decision on the complaint issued in Hutchinson's unfair practice charge against the State, which was served that same day on Hutchinson and the State. Exceptions were due 20 days later, on July 5, 2001. No exceptions

were filed and the ALJ's decision became final and binding on the parties on July 16, 2001. In addition, Hutchinson was informed by e-mail on July 30, 2001 that the ALJ's decision became final and was provided with a copy of the final decision.

During late July 2001, Hutchinson began e-mail correspondence with Board employee Harriette Hertzog requesting copies of the final decision. During that correspondence, Hutchinson also learned that the decision had become final and binding, was issued on July 16 and recently mailed to Hutchinson. Hutchinson, in one e-mail, stated that she planned to file exceptions although the decision was final.

On November 16, 2001, Hutchinson filed exceptions to the proposed decision. Her exceptions recite personal matters (her mother's death and probate of the estate), starting a new business, and the encouragement of the General Counsel's office as the bases for her late filing. The appeal was not served on the State's counsel of record.¹ On November 27, 2001, the Appeals Office denied Hutchinson's appeal on the basis that it was not timely filed since it was four months late. Hutchinson did not appeal this administrative determination within the 10-day time period allowed by PERB Regulation 32360.²

On July 24, 2002, Hutchinson filed what appeared to be another appeal of the ALJ's proposed decision, citing new evidence. On July 22, 2002, Hutchinson faxed to the San Francisco Regional Office attachments involving litigation in Sacramento County Superior Court, over the California State Employees Association's (CSEA) suspension of Jim Hard (Hard) and Cathy Hackett (Hackett) from their positions as officers of the Civil Service Division of CSEA; these were filed with the Appeals Office on July 24, 2002. Again,

¹The State's representative in this matter is Wendi L. Ross, legal counsel for the State of California (Department of Personnel Administration) (DPA).

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

Hutchinson did not serve these on the attorney of record for the State, but rather on the State's Department of Transportation legal office, her former employer. On July 29, 2002, the Appeals Office notified the parties of the July 24, 2002 appeal and provided the State with 20 days to respond. On August 19, 2002, the State filed its opposition to Hutchinson's request to excuse her late filing.

Hutchinson thus requests that the Board excuse her late filing of the exceptions, which were not served on the appropriate representative of the opposing party and which were filed more than a year after the proposed decision became final. This matter is now before the Board.

HUTCHINSON'S REQUEST TO EXCUSE THE LATE FILING

Hutchinson's July 24, 2002 request asks the Board to accept her exceptions based upon new evidence. The new evidence involves information that Hard and Hackett, officers of CSEA's Civil Service Division, were suspended from CSEA leadership for two years. At the time she was terminated from the State, Hutchinson had also sued CSEA, and Hard and Hackett, as individuals. During that same period, CSEA denied her request to obtain outside counsel to investigate and represent her in the appeal of her termination before the State Personnel Board (SPB). She states that CSEA should have granted her request because of the conflict of interest created by her lawsuit. She also says that she partially represented herself at the SPB hearing in late 1998 and early 1999. She subsequently obtained private counsel, who represented her at the PERB hearing on the charge that is the basis for this appeal. However, Hutchinson alleges that her inability to obtain assistance from counsel to investigate her SPB case precluded an effective defense in her PERB case.

The ALJ's proposed decision in this matter is found at State of California (Department of Transportation), Case No. SF-CE-193-S [25 PERC 32076] (Transportation).³ The proposed decision is summarized here as a means to compare the issues considered by the ALJ with the "new evidence" presented in Hutchinson's request. The ALJ dismissed the complaint and underlying unfair practice charge filed by Hutchinson against the State. In the unfair practice charge, Hutchinson claimed that the State retaliated against her for her protected activity by terminating her employment. As a CSEA shop steward and active representative, she filed a number of grievances and at one point, called the police when she perceived a supervisor's interference with her representation of a co-worker to be loud and aggressive. The ALJ concluded that Hutchinson had indeed engaged in protected activity. However, over the years, the quality of Hutchinson's work was deemed of poor quality. More significantly, on various occasions, Hutchinson used state equipment for personal business and when questioned by her supervisor, allegedly lied about this conduct. The State had not provided her with a formal performance evaluation during her ten-year tenure, which the ALJ found to be a departure from established procedures and evidence of unlawful motive. However, the ALJ concluded that the State would have terminated Hutchinson for misconduct regardless of the existence of protected activity. The ALJ also found that Hutchinson's claim that her supervisor purposely terminated her because he knew that she would not receive adequate representation from CSEA was "completely unsupported in the record and highly exaggerated." (See proposed dec. at p. 284.)

³The final decision is cited at State of California (Department of Transportation) (2001) PERB Decision No. HO-U-785 [25 PERC 32094] and as stated, became final on July 16, 2001.

STATE'S OPPOSITION TO HUTCHINSON'S REQUEST

The State asserts that Hutchinson's new evidence has no relevance to the case before the Board. The SPB issued its decision in December 1999 upholding her termination. According to the State, Hutchinson never asked for reconsideration or sought a writ in Superior Court overturning the SPB's ruling. The hearings in the PERB case were held in September 2000, at which Hutchinson was represented by private counsel. At the PERB hearing, the parties agreed that the SPB record and the parties' briefs in the SPB matter would be admitted into the PERB record. On June 14, 2001, the PERB ALJ rendered a proposed decision, dismissing the complaint and the underlying unfair practice charge. As no exceptions were filed within the required time, on July 16, 2001, the proposed decision became final only concerning the parties.

The State discusses Hutchinson's July 20, 2002 request as both a late filing and as a request for reconsideration. The State argues that as Hutchinson has failed to provide justification for her late filing, the Board is precluded from finding that good cause exists under PERB Regulation 32136,⁴ citing California State Employees Association (Hutchinson) (1999) PERB Order No. Ad-299-S. Hutchinson was already informed that her November 2001 attempt to appeal the ALJ's decision was untimely and she did not appeal that administrative determination to the Board. This newest request was filed over a year after the ALJ's decision became final.

⁴PERB 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.

If this request is treated as a request for reconsideration, the State argues that under PERB Regulation 32410(a)⁵ Hutchinson cannot request reconsideration except from a final decision of the Board itself. Even if Hutchinson were allowed to seek reconsideration in this instance, her request does not satisfy the requirements for reconsideration, citing California State Employees Association (Hutchinson) (1999) PERB Order No. Ad-299a-S. Her request was not only untimely, but also failed to include a declaration under penalty of perjury showing that the newly discovered evidence was not previously available, could not have been discovered before the hearing with the exercise of reasonable diligence, was submitted within a reasonable period of time of its discovery, is relevant to the issues sought to be reconsidered, and impacts or alters the decision of the previously decided case.

⁵PERB Regulation 32410(a) provides:

(a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

The State further asserts that Hutchinson's claim for independent counsel is not new. During the PERB hearing, the State says that Hutchinson's private counsel attempted to argue that the State fired her because it knew that she would not receive adequate representation from CSEA because of her pending lawsuit against CSEA. The ALJ disagreed with this argument. (See Transportation.) According to the State, the record shows that when Hutchinson was served with her notice of termination, she spoke to a CSEA representative, who assigned her an attorney to represent her in the disciplinary matter. The CSEA attorney represented Hutchinson from September 1998 until December 1998.⁶

The State therefore maintains that Hutchinson's "new evidence" has no bearing on the matter she wishes to appeal, and her request to excuse the late filing or alternatively, for reconsideration, should be denied.

DISCUSSION

Under PERB Regulation 32136, the Board may excuse a late filing for good cause. The Board has found good cause in situations where the justification was "reasonable and credible." (Barstow Unified School District (1996) PERB Order No. Ad-277 (Barstow)). In cases in which the Board has found good cause, the filings were at most a few days late. (See e.g., State of California (Department of Forestry and Fire Protection) (1998) PERB Order No. Ad-286-S; Barstow; North Orange County Regional Occupational Program (1990) PERB Decision No. 807; Trustees of the California State University (1989) PERB Order No. Ad-192-H; The Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H.) The Board has deemed "honest mistakes," such as mailing or clerical errors, to show good cause. If the justification is

⁶There is no information in the record explaining why the CSEA attorney no longer represented Hutchinson after that date.

found to be reasonable and credible, then the Board evaluates whether there is prejudice to the opposing party in excusing the late filing. (Barstow.)

In this case, Hutchinson provides no justification for her late filing. (See California State Employees Association (Hutchinson) (1999) PERB Order No. Ad-299-S, p. 3 and citations.) Over a year after the ALJ's proposed decision became final, Hutchinson makes this request. Her only basis for the request is that she has acquired new evidence that might show that if she had had effective representation in the SPB termination hearing, she might have presented a more successful argument in the PERB hearing. The new evidence involves recent litigation over the suspension of two CSEA officers from their leadership positions. In her request to excuse her late appeal, Hutchinson states that these officers had created the conflict of interest that prevented her from obtaining adequate representation for her SPB termination hearing and consequently, the PERB hearing before the ALJ in this matter. The ALJ had found this allegation to be completely unsupported by the record. How the recent suspensions of Hard and Hackett from their official CSEA positions directly impact hearings which occurred in 1998, 1999 and 2000 is beyond our understanding. We find that this "new evidence" bears no relevance to the matter decided by the ALJ. The irrelevance of the "new evidence," the timing, and the lack of any appropriate justification leads us to conclude that there is no good cause in this matter to grant Hutchinson's request.

We also hold that under PERB Regulation 32410(a), this request may not be deemed a request for reconsideration. Under PERB Regulation 32410(a), such a request may only be considered for a "final decision of the Board itself." (See also, PERB Regulation 32030.⁷) As

⁷PERB Regulation 32030 provides:

"Board itself" means only the five-member Public Employment Relations Board, or members thereof authorized by law to act on behalf of the Board.

the decision at issue is an ALJ proposed decision made final and binding by the parties' failure to file timely exceptions, Section 32410(a) does not apply and the Board should not consider Hutchinson's July 24, 2002 filing a request for reconsideration.

ORDER

The request to excuse the late filing of the exceptions by Cessaly Denise Hutchinson of an administrative law judge's final decision in Case No. SF-CE-193-S is hereby DENIED.

Members Baker and Neima joined in this Decision.