

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



GROSSMONT-CUYAMACA COMMUNITY
COLLEGE DISTRICT,

Employer,

and

GROSSMONT-CUYAMACA COMMUNITY
COLLEGE DISTRICT PART-TIME FACULTY
ASSOCIATION,

Petitioner,

and

UNITED FACULTY OF GROSSMONT-
CUYAMACA COMMUNITY COLLEGE
DISTRICT,

Exclusive Representative.

Case No. LA-SV-145-E

Administrative Appeal

PERB Order No. Ad-365

June 20, 2007

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for Grossmont-Cuyamaca Community College District Part-Time Faculty Association; Gattey Baranic by Michael P. Baranic, Attorney, for United Faculty of Grossmont-Cuyamaca Community College District.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Grossmont-Cuyamaca Community College District Part-Time Faculty Association/CCA/NEA (Association) of a Board agent's dismissal (attached) of its severance petition (petition), on the ground that it was untimely filed pursuant to Educational

Employment Relations Act (EERA)¹ section 3544.7(b)(1), and former PERB Regulation 33020.² The Board agent stated in the dismissal dated April 20, 2006 that:

Based on the explicit language of EERA section 3544.7 (b)(I) and the lack of specific case authority that would excuse the late filing of this petition, the severance petition is therefore deemed to be untimely filed and is dismissed. The employer may not grant recognition of the Petitioner in this matter, pursuant to EERA section 3544.1(c).

The Board has reviewed the entire record in this case, including but not limited to the Association's motion to excuse the late filing, the Board agent's dismissal, the Association's appeal, and letters from the United Faculty of Grossmont-Cuyamaca Community College District (United Faculty) and the Grossmont-Cuyamaca Community College District (District). Based upon this review, the Board affirms the dismissal and adopts the Board agent's dismissal dated April 20, 2006, as the decision of the Board itself, and supplements it with the following discussion.

BACKGROUND

The current exclusive representative of the unit in question is United Faculty, which was certified as the exclusive representative on May 29, 1984. The approximate size of the proposed part-time faculty unit is 850. A written agreement existed between United Faculty and the District during the time in question. This written agreement expired on June 30, 2006.

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. The Board agent's dismissal was issued under former PERB Regulation 33020, which became effective May 31, 2005, and was amended effective May 11, 2006, subsequent to the period in question.

The Board agent found that the "window period",³ for filing a petition based on a contract expiring on June 30, 2006, was March 3 through March 31, 2006. The Los Angeles regional office of PERB (PERB office) received the petition after the close of business on March 30, 2006, at 5:06 p.m., and filed it on April 3, 2006, the next business day. PERB was closed for business on March 31, 2006, due to observance of Cesar Chavez Day, a state holiday under Government Code section 6700.

The Association alleges in its appeal to the Board that Cesar Chavez Day is not an observed holiday within the District, so the Association personnel had no prior knowledge of the closure of the PERB office on March 31, 2006. Once they were aware of the state holiday, the Association personnel arranged to have a District part-time faculty member, David Milroy (Milroy), deliver the petition and proof of support to the PERB office on March 30, 2006. While driving from San Diego to Los Angeles in the congested afternoon traffic, Milroy allegedly called the PERB office thrice on the cell phone, encountered a traffic accident, and lost his way. The Association nevertheless conceded that Milroy arrived at the PERB office "just after 5:00 p.m."

The Association filed a motion to excuse the late filing on the basis that it made a good faith effort to file the petition in a timely fashion once it realized that PERB would be closed for business on March 31, 2006. The Board agent dismissed the petition, relying on Bassett Unified School District (1979) PERB Order No. Ad-63 (Bassett), which affirmed the dismissal of a decertification petition filed on the next regular business day (Monday), after the "window period" had expired over a weekend.

³Section 3544.7(b)(1) and former PERB Regulation 33020.

DISCUSSION

In determining whether or not the Association's petition was timely filed, we must address three issues. First, we have to decide whether the petition was timely filed "on the last day set for filing," pursuant to former PERB Regulation 32135(a),⁴ and what is commonly known as the "holiday rule" in California general law. The "holiday rule" provides that if the last day to perform an act falls on a holiday, the time is extended to the next business day. (Code of Civil Procedure (CCP) secs. 12 and 12a, and Secs. 6707 and 6800.) Second, we consider whether the petition was "actually received by the appropriate PERB office before the close of business" according to former PERB Regulation 32135(a) and PERB authorities. Lastly, if the petition is found to be untimely filed, we address whether or not the Board should excuse the late filing for good cause pursuant to PERB Regulation 32136.⁵

The Association argues on appeal to the Board that former PERB Regulation 33020, defining the window period, was contrary to the "holiday rule." The Association further contends that the former PERB Regulation 32130(b), which excepted the "window period" from the application of the "holiday rule," was "unfair, inconsistent and unnecessary."

The United Faculty concurs with the Board agent's dismissal of the petition on the ground that it was untimely filed. The District is neutral on the Association's petition, but certifies that it received the Association's request on April 3, 2006.

⁴Former PERB Regulation 32135(a), effective during the period in question, read "All documents shall be considered 'filed' when the originals, and the required number of copies, if any, are actually received by the appropriate PERB office before the close of business on the last date set for filing." PERB regulation 32135(a) was amended effective May 11, 2006, to read, in part, "actually received by the appropriate PERB office during a regular PERB business day."

⁵PERB Regulation 32136 states, "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."

EERA section 3544.7(b)(1) sets forth the requirement for a severance petition as:

An election may not be held and the petition shall be dismissed if either of the following exist:

(1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

Former PERB Regulation 33020, which was in effect when the Association filed its severance petition, defined "window period" as follows:

'Window period' means the 29-day period established pursuant to Government Code Sections 3544.1(c) and 3544.7(b)(1) which is less than 120 days, but more than 90 days, prior to the expiration date of a lawful written agreement negotiated by the public school employer and the exclusive representative. The written agreement expiration date means the last effective date of the agreement. Notwithstanding the provisions of Section 32130, the date on which the written agreement expires shall not be counted for the purpose of computing the window period. Whenever the last day of the window period falls on a Saturday, Sunday, or holiday, as defined in Government Code Sections 6700 and 6701, and state offices are closed, any petition required to be filed during a window period must be filed on or before the last PERB business day during the window period. (Emphasis added.)

We first find that the Board agent correctly determined that the last day for filing the petition was March 30, 2006, under the former regulations. The window period for filing the petition was from March 3 through March 31, 2006. (See former Reg. 33020.) However, March 31, 2006 was Cesar Chavez Day, a state holiday. The former Regulation 33020 contained a specific reference to Section 6700, which provides in part, "(t)he holidays in this state are: ... (f) March 31st known as 'Cesar Chavez Day'." As quoted above, former Regulation 33020 did not apply the "holiday rule," and required petitions to be filed "on or

before the last PERB business day during the window period." Similarly, former PERB Regulation 32130(b), which was in effect during the period in question, stated in part:

Except for filings required during a 'window period' as defined in Section 33020, ..., whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code Sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day.⁶
(Emphasis added.)

Although Regulations 33020 and 32130(b) were subsequently amended to incorporate the "holiday rule,"⁷ we shall apply the regulations that were in effect when the filing of the petition and the Board agent's dismissal occurred.

We now discuss how PERB authorities have defined "close of business." The Board has established the "close of business" to be 5:00 p.m. In Shasta College Faculty Association (Sloan) (2004) PERB Decision No. 1603, the Board specifically stated:

Sloan argues on appeal that the Board agent improperly found his amended charge late-filed. Sloan has submitted documents indicating that he filed his amended charge via facsimile at 4:59 p.m. on the day it was due. Obviously, by waiting until the last minute - literally - Sloan took the risk that his amended charge would not be received by PERB until after the close of business at 5:00 p.m. (Emphasis added.)

⁶The Board amended the above-quoted portion of former PERB Regulation 32130(b) effective May 11, 2006, by removing the exception for filings required during a "window period," to state as follows:

Whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code Sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day.

⁷Effective May 11, 2006, the Board amended former PERB Regulation 33020 by deleting the last sentence, thus extending the 29-day "window period" when the last day of the period falls on Saturday, Sunday, or holiday, to include the next regular PERB business day.

In State of California (Water Resources Control Board) (1999) PERB Order

No. Ad-294-S, the Board referred to the Chief Administrative Law Judge's cover letter that accompanied the proposed decision to infer that "close of business" meant 5:00 p.m.

In compliance with former PERB Regulations 33020, 32130(b) and 32135(a), the petition in the present matter should have reached the PERB office no later than 5:00 p.m. on March 30, 2006, to be considered timely filed. The petition was clocked in at 5:06 p.m. The Association's untimely filing was due to their alleged ignorance of Cesar Chavez day as a state holiday. Since Government Code section 6700 states that March 31st is a state holiday, known as "Cesar Chavez Day," the Association had, at the least, constructive knowledge of said holiday. We therefore affirm the Board agent's dismissal of the petition.

Lastly, we decline to consider whether there was good cause for extending the deadline for filing. We affirm the Board agent's finding that a good cause consideration under PERB Regulation 32136 is inappropriate here due to the explicit language of EERA section 3544.7 (b)(1). As the Board stated in Bassett:

The window period provided by section 3544.7(b) is unequivocally defined. For the Board to extend that period by allowing the filing of decertification petitions outside its time limits would be to override explicit legislative directions and erode the right of the incumbent organization to pursue its obligations as the exclusive representative.

ORDER

The severance petition in Case No. LA-SV-145-E is therefore deemed to be untimely filed and is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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April 20, 2006

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Re: Grossmont-Cuyamaca Community College District
Case No. LA-SV-145-E

Dear Interested Parties:

Investigation of the severance petition filed in the above-referenced case has established the following facts:

1. The current exclusive representative of the unit in question is United Faculty of Grossmont-Cuyamaca CCD, which was certified as the exclusive representative on May 29, 1984.
2. The approximate size of the proposed part-time faculty unit is 850.
3. A written agreement currently exists between the exclusive representative and the employer. This written agreement expires June 30, 2006.

This petition was filed pursuant to PERB Regulation 33700¹ which provides in relevant part that:

¹ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies of the Regulations may be purchased from PERB's Publications

(a) An employee organization may file a request to become the exclusive representative of an appropriate unit consisting of a group of employees who are already members of a larger established unit represented by an incumbent exclusive representative by filing a request for recognition in accordance with the provisions of Article 2 (commencing with Section 33050). All provisions of Articles 2 and 3 of this Subchapter shall be applicable to a severance request except as provided in this Article 6.

(b) Whenever the conditions of Government Code Section 3544.1(c) exist, a severance request for recognition or intervention must be filed in accordance with Section 32135 with the employer during the "window period" as defined by Section 33020.

The Educational Employment Relations Act (EERA) states at 3544.1(c) that:

The public school employer shall grant a request for recognition filed pursuant to Section 3544, unless any of the following apply:

(c) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

EERA section 3544.7(b)(1) states:

An election may not be held and the petition shall be dismissed if either of the following exist:

(1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

The definition of window period is found at PERB Regulation 33020. It provides:

"Window period" means the 29-day period established pursuant to Government Code Sections 3544.1(c) and 3544.7(b)(1) which is less than 120 days, but more than 90 days, prior to the expiration date of a lawful written agreement negotiated by the public school employer and the exclusive representative. The written agreement expiration date means the last effective date of the agreement. Notwithstanding the provisions of Section 32130, the date on which the written agreement expires shall not be counted for the purpose of computing the window period. Whenever the last day of the window period falls on a Saturday, Sunday, or holiday, as defined in Government Code Sections 6700 and 6701, and state offices are closed, any petition required to be filed during a window period must be filed on or before the last PERB business day during the window period. (Emphasis added.)

The investigation has resulted in the administrative determination that the severance petition is not timely filed. The window period for filing a petition based on a contract expiring on June 30 is March 3 through March 31. This petition was placed in U.S. mail to the employer and current exclusive representative on March 30 and received by the employer on April 3. The petition was filed with the Los Angeles Regional Office of PERB after the close of business on March 30, 2006, at 5:06 p.m., and thus not filed with PERB until April 3, 2006 due to the State's observance of Cesar Chavez Day on March 31, 2006.

Petitioner filed a Motion to Excuse the Late Filing, and cites its good faith efforts to file the petition in a timely fashion once the petitioner learned that the PERB offices were going to be closed on March 31. Counsel cites a series of cases in which PERB has excused the late filing of documents with PERB. None of the cases cited by petitioner's counsel dealt with a statutory defined time period for filing, but rather are concerned with appeals that are either misrouted (San Diego Community College District (2001) PERB Order No. Ad-311), delayed due to mailing errors (Fullerton Elementary School District (2004) PERB Order No. Ad-319), or caused no prejudicial error (United Teachers of Los Angeles (2003) PERB Order No. Ad-325).

In Bassett Unified School District (1979) PERB Order No. Ad-63, PERB reviewed the appeal of the dismissal of a decertification petition filed on the next regular business day, Monday, after the expiration of the "window period" over a weekend. PERB held that "(t)he window period provided by section 3544.7(b) is unequivocally defined." The Board went on to state:

For the Board to extend that period by allowing the filing of decertification petitions outside its time limits would be to override explicit legislative direction and erode the right of the incumbent organization to pursue its obligations as exclusive representative.

Based on the explicit language of EERA section 3544.7 (b)(1) and the lack of specific case authority that would excuse the late filing of this petition, the severance petition is therefore deemed to be untimely filed and is dismissed. The employer may not grant recognition of the Petitioner in this matter, pursuant to EERA section 3544.1(c).

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Regulation 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95814-4174
FAX: (916) 327-7960

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento Regional Office regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed. A document filed by facsimile transmission may be

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concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Regulation 32132).

Sincerely,

Roger Smith
Labor Relations Specialist

RCS

cc: Marianne Reynolds
Ben Lastimado