



## The Initial and Amended Unfair Practice Charge

On October 8, 2014, Gillis filed an unfair practice charge alleging that on seven (7) separate occasions between June 25, 2013 and August 21, 2014,<sup>1</sup> he was denied representational rights during meetings with City Fire Division Manager Stewart McGehee (McGehee). Gillis' charge purported to be filed by Local 21 and described his title as "Dir. Political H & M." In support of his allegations, Gillis submitted several e-mail exchanges; a copy of a grievance filed by Gillis regarding McGehee's denial of his representational rights; and a step two grievance response denying Gillis' grievance from City Fire Chief Teresa Deloach Reed (Reed).

On November 21, 2014, the City filed its first position statement asserting that: (1) PERB lacked jurisdiction under Meyers-Milias-Brown Act (MMBA)<sup>2</sup> section 3509(f) because Gillis is a management employee; (2) six of the seven alleged violations occurred beyond the six-month statute of limitations; (3) Gillis failed to allege facts showing that his representational rights were violated on the one timely allegation; and (4) Gillis' charge failed to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice" as required under PERB Regulation 32615(a)(5)<sup>3</sup>.

On November 24, 2014, Gillis filed his first amended charge alleging two additional denials by McGehee of his representational rights on July 30 and November 20, 2014. On December 19, 2014, the City filed its second position statement reiterating its contentions from

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<sup>1</sup> Gillis' initial and amended unfair practice charges refer to an incident on August 21, 2013. However, the documents submitted in support of his allegation concerning this incident are dated August 21, 2014.

<sup>2</sup> The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>3</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

its first position statement and asserting that Gillis' November 20, 2014, allegation that he was denied representational rights also failed to comply with PERB Regulation 32615(a)(5)<sup>4</sup>. On January 8, 2015, the City submitted a copy of its Employer-Employee Relations Resolution (EERR) in support of its position statement.

#### Warning and Dismissal Letters

On January 13, 2015, the Office of the General Counsel sent Gillis a warning letter notifying him that his charges failed to state a prima facie case. The Office of the General Counsel noted that Gillis was a management employee of the City and, while he had a right to join an employee organization under MMBA section 3507.5, PERB lacked jurisdiction under MMBA section 3509(f) over employees designated as management employees. In addition, the Office of the General Counsel determined that seven (7) of Gillis' nine (9) allegations were not timely alleged because they occurred outside of PERB's six-month statute of limitations.

With regard to Gillis' two timely allegations, the Office of the General Counsel determined that Gillis failed to allege sufficient facts to establish that he was denied representational rights. The Office of the General Counsel noted that mere legal conclusions and references to attached documents did not sufficiently state a prima facie case. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *County of Riverside* (2013) PERB Decision No. 2307-M.) Gillis was afforded the opportunity to amend his charge to correct the deficiencies explained in the warning letter.

Gillis did not submit a second amended charge curing the deficiencies noted in the warning letter. On January 29, 2015, the Office of the General Counsel dismissed Gillis' charge. The dismissal letter informed Gillis that he could appeal the dismissal of his charge and described the filing requirements under PERB Regulation 32635.

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<sup>4</sup> The City did not address Gillis' July 30, 2014, allegation that he was denied representational rights.

## Gillis' Appeal

On February 17, 2015, Gillis submitted an appeal to PERB's Headquarters Office via PERB's e-file system. In addition to several attached PDF files, Gillis included a link to Google Drive cloud storage which contained copies of the attached files, but the appeal submitted by e-file omitted a proof of service on the City. Thereafter on February 17, 2015, PERB's Appeals Assistant notified Gillis by letter that the inclusion in his appeal of an HTML link was improper. The Appeals Assistant's letter also directed Gillis' attention to PERB Regulation 32635<sup>5</sup> and notified him that he must submit to PERB a signed copy of his appeal and a proof of service of the appeal on the City. The Appeals Assistant's letter informed Gillis he had until February 19, 2015, to cure these deficiencies.

On February 19, 2015, Gillis filed a signed original of his appeal including a proof of service with PERB's San Francisco Regional Office (SFRO). On February 23, 2015, PERB's Appeals Assistant notified Gillis by letter that his February 19, 2015, filing did not comport with PERB regulations, because it was incorrectly filed with a Regional Office instead of PERB Headquarters Office. In her February 23, 2015, letter the Appeals Assistant extended to February 27, 2015, the filing deadline for Gillis to perfect his appeal.

On February 24, 2015, Gillis re-filed a signed copy of his appeal with PERB's SFRO. On February 27, 2015, PERB's Appeals Assistant notified Gillis by letter that his February 24, 2015, filing did not comport with PERB regulations because it was incorrectly filed with a Regional Office. In her February 27, 2015 letter, the Appeals Assistant extended to March 6, 2015, the deadline for Gillis to perfect his appeal.

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<sup>5</sup> PERB Regulation 32635(a) states that an appeal must be filed with PERB's *headquarters* office. As stated in PERB Regulation 32060, PERB's headquarters is located in Sacramento.

On March 11, 2015, Local 21 notified PERB that it was not the charging party in this case and did not represent Gillis. On March 13, 2015, PERB's Appeals Assistant determined that Gillis' appeal had not been filed in conformance with PERB regulations and dismissed Gillis' attempted appeals on the ground that he had not timely filed a perfected appeal.

On March 23, 2015, Gillis appealed from the Appeals Assistant's March 13, 2015, determination. In his appeal from the Appeals Assistant's March 13, 2015, determination Gillis alleges that the Appeals Assistant contacted him via e-mail on March 10, 2015, requesting clarification over the identity of the charging party in this case,<sup>6</sup> and that the Appeals Assistant did not indicate in that communication that Gillis needed to re-file his appeal from dismissal of this unfair practice charge. Gillis further alleges that on March 12, 2015, he sent an e-mail to the Appeals Assistant notifying her that he wished to file his appeal as an individual. According to Gillis, "[t]his correspondence [from the Appeals Assistant] provides the impression that the appeal successfully filed on February 19th 2015 would be given consideration by the board." Gillis did not submit with his appeal from the Appeals Assistant's determination, a copy of the Appeals Assistant's March 10, 2015 e-mail.

On April 3, 2015, the City responded to Gillis' appeal from the Appeals Assistant's determination. The City notes that Gillis did not provide any justification for failing to perfect his appeal by March 11, 2015, and urges that we affirm the Appeal Assistant's determination.

#### DISCUSSION

Under PERB Regulation 32136,<sup>7</sup> a late filing may be accepted for good cause. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.) The Board has excused

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<sup>6</sup> Gillis had filed his unfair practice charge as an "employee organization."

<sup>7</sup> PERB Regulation 32136 states:

late filings where a short, non-prejudicial delay resulted from circumstances beyond the control of the filing party and the filing party's explanation was either credible on its face or corroborated by supporting evidence. (*Ibid.*) The Board has also found good cause in the case of "honest mistakes," (*Barstow Unified School District* (1996) PERB Order No. Ad-277) and where an "untimely filing was a result of honest error. . . resulting from miscommunications" by an unrepresented appellant. (*Los Angeles Unified School District* (2003) PERB Order No. Ad-318.)

With respect to a filing in the improper PERB office, the Board has excused a late filing sent to the wrong PERB office, but otherwise filed, served, and received in advance of the filing deadline. (*North Orange County Regional Occupational Program* (1990) PERB Decision No. 807 (*North Orange County*)). In *North Orange County*, the employer timely filed exceptions to a proposed decision but with PERB's Los Angeles Regional Office instead of PERB's Headquarters Office. The exceptions were filed by a secretary for the law firm representing the employer who was accustomed to sending documents to the Los Angeles Regional Office. The proof of service attached to the statement of exceptions indicated that the document had also been served on the opposing party. The statement of exceptions was forwarded to PERB's Sacramento Headquarters, but did not arrive until after the deadline for filing exceptions. The Board's Appeals Assistant was also notified by telephone that exceptions had been filed in Los Angeles, but this telephonic notification did not occur until

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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 has determined that good cause exists only where, under all the surrounding circumstances, it is evident that the party made a conscientious effort to timely file and the delay caused no prejudice to any party in the case.

the deadline for exceptions had passed. The employer asked the Board to accept its late filing based on an inadvertent clerical error and no prejudice to the opposing party.

The *North Orange County* Board noted the general rule in California favoring the preservation of appeal rights and the hearing of appeals on their merits. The Board also noted that the California Supreme Court held that it was improper for an agency automatically and mechanically to reject late-filed appeals without regard to the excusability of the late filing. (See *Gibson v. Unemployment Insurance Appeals Board* (1973) 9 Cal.3d 494.) In determining that the employer's late filing should be excused, the Board reasoned that the employer

. . . attempted to file in a timely fashion but, due to an inadvertent error, the mechanics of the filing went awry. In the instant case, there is no reason to believe the filing error was due to anything other than an honest mistake. While it is the responsibility of the parties to see that documents are filed in the proper office in accordance with the Board's regulations, we are nonetheless mindful that, in this case, the exceptions were received well before the filing deadline, albeit in the wrong office.

(*North Orange County, supra*, PERB Decision No. 807, p. 5.)

In the case before us, Gillis was served with the Office of the General Counsel's dismissal letter on January 29, 2015. Thus, the filing deadline for his appeal of that dismissal was February 23, 2015.

Gillis first attempted to e-file<sup>8</sup> his appeal on February 17, 2015.

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<sup>8</sup> PERB Regulation 32091 which concerns electronic filing states:

- (a) "Electronic filing" or "filing by electronic mail" means the transmission of a document to PERB via an electronic mail (e-mail) message.
- (b) Electronic filing must be directed to the e-mail address currently published by PERB for that purpose on its website.
- (c) Any attachments to an electronic filing shall be in PDF format and the total size of any e-mail message, including

Gillis' properly addressed his appeal to PERB e-file Appeals, which is the e-mail address currently published on the Board's website for electronic filing of documents with the Appeals Office. Gillis' e-filing stated that he wished to appeal the dismissal of his charge and contained five PDF documents as attachments. Gillis also stated in the body of his appeal that the documents he had attached as PDF files could also be found on the internet and provided an HTML link to those documents on Google Drive.

The Appeals Assistant's determination which Gillis appeals from here, states that his e-filing was "not in accordance with PERB Regulation 32091." (Appeal's Assistant Determination, p. 1.) The determination does not state specifically how Gillis' e-filing was not in accordance with PERB regulations. However, in correspondence dated February 17, 2015, the Appeals Assistant notified Gillis that "The Board does not click on links to documents, if you would like to include those documents in your appeal, please see regulation 32635." (Appeal's Assistant Ltr. dated 02/17/2015, p. 1.) Thus it appears that the Appeals Assistant rejected Gillis' e-filing in part because it contained an HTML link. Had Gillis supplied his supporting documents *only* via the HTML link, his submission would not comply with PERB regulations which require that supporting documents be attached and in PDF format. Gillis did submit his attached documents in PDF format. Therefore, Gillis' appeal of February 17, 2015, conformed with PERB Regulations 32091 and 32635, except for the fact it lacked a proof of service and original signature by appellant. The Appeals Assistant also informed Gillis on February 17, 2015, that he had to submit an original of his appeal along with proof of service upon the City.

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attachments, shall not exceed 3 MB, unless the files are compressed (in a zip file format).

On February 19, 2015, Gillis filed a signed original of his appeal with PERB's SFRO, with proof of service via personal delivery upon Reed, Oakland's fire chief.<sup>9</sup> The Board's Appeals Assistant rejected Gillis' February 19, 2015, filing on the basis that it was not in conformance with PERB Regulation 32142(b) which states that documents must be served on the Board itself and only at the PERB Headquarters Office. (Appeal's Assistant Determination, p. 2.) As the Board determined in *North Orange County, supra*, PERB Decision No. 807, filing a document which must be filed at PERB's headquarters at one of PERB's regional offices may be excused under the proper circumstances.<sup>10</sup>

On February 24, 2015, Gillis filed once again and the Appeals Assistant rejected this submission because it was "not in accordance with PERB Regulation 32635." (Appeal's Assistant Determination, p. 2.) The Appeals Assistant did not specifically state how Gillis' February 24, 2015, filing fails to comply with PERB Regulation 32635. However, correspondence from the Appeals Assistant regarding Gillis' February 24, 2015, filing indicates that the appeal was again filed at SFRO.

We conclude that good cause exists to excuse Gillis' improper filing with PERB's SFRO on February 19, 2015, because he had already e-filed a timely albeit incomplete appeal at the proper location, viz., PERB's Headquarters Office, on February 17, 2015. His filing of the proof of service and signed original appeal on February 19, 2015, at the SFRO was still timely, and the City suffered no prejudice because these documents were not filed at the

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<sup>9</sup> PERB Regulation 32142(c)(4) requires that service upon an employer under MMBA be served upon "the individual designated for service or the chief executive officer." Gillis is employed by the Oakland Fire Department and, as Fire Chief, Reed appears to be the chief executive officer of the Department. The City did not object.

<sup>10</sup> We do not announce today a rule that would open the door to improper filing of documents only properly filed at PERB Headquarters Office. We stress that such an improper filing will only be excused on those rare occasions where honest, good faith errors result in a short delay that does not prejudice the opposing party.

PERB's Headquarters Office. Since we excuse Gillis' improper filing of his appeal at the SFRO on February 19, 2015, we need not and do not reach the issue whether his February 24, 2015, filing complied with PERB regulations. We therefore conclude that on February 19, 2015, Gillis timely submitted a perfected appeal.

ORDER

The Appeals Assistant's administrative determination in Case No. SF-CE-1251-M is hereby REVERSED and the matter is remanded to the Public Employment Relations Board's Appeals Assistant for further processing.

Members Winslow and Banks joined in this Decision.