



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

CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION, CHAPTER 176,

Charging Party,

v.

BARSTOW COMMUNITY COLLEGE  
DISTRICT,

Respondent.

Case No. LA-CE-6666-E

PERB Order No. Ad-498

December 13, 2022

Appearances: David L. Barber, Deputy Chief Counsel, for California School Employees Association, Chapter 176; Erickson Law Firm by Joshua Taylor, Attorney, for Barstow Community College District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on Barstow Community College District's appeal of an administrative determination. PERB's Appeals Office rejected as untimely the District's response to exceptions by the California School Employees Association, Chapter 176 (CSEA) to the proposed decision of an Administrative Law Judge (ALJ). For the reasons discussed below, we affirm the Appeals Office's determination rejecting the District's filing.

BACKGROUND

On October 26, 2021, the Association filed an unfair practice charge in Case No. LA-CE-6666-E. PERB's Office of the General Counsel issued a related complaint

on December 17, 2021, which alleges that the District violated the Educational Employment Relations Act (EERA) by, without negotiating with CSEA, implementing a new policy or process allowing non-bargaining unit employees to retreat into their former bargaining unit positions and thereby “bump” bargaining unit employees.<sup>1</sup> After formal hearing and post-hearing briefs, on September 28, 2022, the ALJ issued a proposed decision dismissing the complaint and underlying unfair practice charge.<sup>2</sup> On October 18, CSEA filed exceptions to the proposed decision. On November 8, at 12:01 a.m., PERB’s Appeals Office received the District’s response to CSEA’s exceptions.

Via letter on November 9, PERB’s Appeals Office notified the parties that it was rejecting the District’s response as untimely. The letter stated, in relevant part:

“On October 18, 2022, Charging Party California School Employees Association, Chapter 176 (CSEA) filed timely exceptions in this case. Respondent Barstow Community College District’s response to CSEA’s exceptions was due 20 days later, by November 7, 2022. On November 8, 2022 at 12:01 a.m., the Appeals Office received the District’s response through e-PERB.

“PERB Regulation 32110, subdivision (f) states: “Filers may electronically file a document through e-PERB at any time. However, all documents electronically filed after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed filed the next regular PERB business day.” (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.

<sup>2</sup> All further dates are in 2022, unless otherwise noted.

“In accordance with PERB Regulation 32110, subdivision (f), PERB deemed the District’s response as filed on November 8, 2022. Because the District’s response was not timely filed, we hereby reject it.”

On November 18, the District filed a timely appeal asserting good cause for its untimely filing. Specifically, the District’s counsel, Joshua Taylor, alleges via an attached declaration that on November 7, in the late evening, he completed drafting and began preparing to file the District’s response to CSEA’s statement of exceptions while working remotely from his home office. When working remotely after-hours, Taylor utilizes a laptop computer, which includes a digitized touch surface and a digital pen, that allows the user to edit, save, and digitally sign documents. On November 7, as Taylor began preparing to file the District’s response, he discovered that the battery that powers his digital pen had become depleted, and that the pen would not allow him to digitally sign the documents that needed to be filed. Taylor immediately explored other options for the filing and signing of the District’s response, including the possibility of printing/signing/scanning the signature page of the document from his home printer, but discovered that the wireless-connected printer would not scan correctly. As a result, Taylor spent approximately 10 to 15 minutes searching for a spare battery for the digital pen that would allow him to digitally sign the document in the manner that he customarily uses. Upon locating a spare battery and confirming that the pen was operational, he signed and filed the District’s response. The District’s appeal asserts that these circumstances establish good cause for late-filing as an honest mistake arising from circumstances beyond the control of the District’s counsel. The case file reflects that the District’s response was filed electronically through PERB’s electronic filing system, e-PERB, at 12:01 a.m. on November 8.

On November 21, CSEA filed a timely opposition to the District's appeal, arguing that the District failed to establish good cause for its late filing, including because PERB Regulations deem a document to have been signed when electronically filed, meaning even with a faulty pen and malfunctioning scanner, Taylor could have timely filed. CSEA urges the Board to reject the District's appeal.

### DISCUSSION

When appealing an administrative determination, the appellant must demonstrate how or why the challenged decision departs from the Board's precedents or regulations. (*Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, p. 4, citing *Regents of the University of California* (2016) PERB Order No. Ad-434-H, p. 8; *County of Santa Clara* (2014) PERB Order No. Ad-411-M, p. 5.)

In its appeal, the District does not challenge the administrative determination's reason for rejecting the late filing. We nonetheless affirm the Appeals Office's determination that the District's response to CSEA's exceptions was due by 11:59 p.m. on November 7, and that because PERB Regulation 32110, subdivision (f) deems a document filed after 11:59 p.m. as being filed the next business day, the District's response through e-PERB on November 8, at 12:01 a.m., was untimely.

The District's appeal instead attempts to assert good cause for the late filing. PERB 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."

Generally, "good cause to excuse a late filing exists where the delay is of short duration and based on circumstances that were either unanticipated or beyond the

party's control." (*City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 9, citing *Regents of the University of California* (2018) PERB Decision No. 2601-H, p. 15; see, e.g., *Trustees of the California State University* (2016) PERB Order No. Ad-432-H, p. 8; *State of California (Department of Corrections)* (2006) PERB Decision No. 1806-S, p. 7; *United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325, p. 4.) A late filing will generally be excused when it has resulted in a short and non-prejudicial delay, and it was the result of either "circumstances beyond the control of the filing party or from excusable misinformation, where the filing party's explanation was credible on its face or was corroborated by other facts or testimony." (*Bellflower Unified School District* (2017) PERB Order No. Ad-447, p. 4 (*Bellflower*)).) Regardless of the particular reason(s) given, the party must provide sufficient factual detail to establish a "reasonable and credible" explanation for its untimely filing or show that it at least made a conscientious effort to comply with the filing deadline. (*Trustees of the California State University, supra*, PERB Order No. Ad-432-H, p. 8; *Newport-Mesa Unified School District* (2008) PERB Order No. Ad-373, p. 3.) On multiple occasions, the Board has found no good cause where the party's attorney failed to follow or misconstrued PERB's filing regulations. (See *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-446, pp. 10-11; *State of California (Department of Corrections)* (2003) PERB Order No. Ad-328-S, pp. 3-5; *State of California (Water Resources Control Board)* (1999) PERB Order No. Ad-294-S, pp. 5-6; *Calipatria Unified School District* (1990) PERB Order No. Ad-217, pp. 12-13.)

“[W]hile the lack of prejudice resulting from a late filing is an important consideration in deciding whether to excuse a late filing for good cause, it is not, in and of itself, the determinative factor.” (*Calipatria Unified School District, supra*, PERB Order No. Ad-217, p. 13) Thus, even where no prejudice to the other party is apparent, we must determine whether good cause exists. (*Bellflower, supra*, PERB Order No. Ad-447, p. 5.)

The District argues good cause based on Taylor discovering as he prepared to file that his digital pen for signing documents had a depleted battery, and that he was delayed trying to determine another way to sign and then searching for a replacement battery for the pen. The District argues these circumstances establish good cause as an honest mistake arising from circumstances beyond the control of its counsel, and notes the 2-minute delay did not cause prejudice to any party. While we concur that the brief delay was not prejudicial, we do not find that the District has established good cause for late filing.

A review of applicable PERB Regulations would have revealed that Taylor’s customary practice of signing with his digital pen was not necessary. PERB Regulation 32092, subdivision (a) defines “electronic signature” as “an electronic sound, symbol, or process attached to, or logically associated with, an electronic record and executed or adopted by a person with the intent to sign the electronic record.” Subdivision (b) provides that

“[w]hen a document to be filed electronically requires a signature of any person, whether under penalty of perjury or otherwise, the document is deemed to have been signed by that person when electronically filed. The filing party, when electronically filing a document, certifies that the document has been properly signed or electronically

signed. This subsection (b) shall not apply to proof of support under section 32700.”

Under PERB Regulation 32092, subdivision (a), a digital pen is not required to execute a valid electronic signature. Under subdivision (b), PERB would have deemed the District’s response to have been signed when it was electronically filed, even without the written signature of the digital pen. Therefore, Taylor could have timely submitted the District’s response through e-PERB without spending time searching for a battery for his digital pen. The District did not address this regulation in its appeal or explain why Taylor did not submit the document with another type of electronic signature, except that the appeal identified that his customary process for submitting documents while working remotely was to sign with the digital pen. While this presents a slightly different circumstance than matters where a party argues good cause based on an attorney misconstruing or misunderstanding PERB’s filing regulations, we find the existence of a regulation which would have allowed the District to timely file, even given the circumstances outlined in the appeal, supports that the District’s delay was not outside of its control, nor do the circumstances the District explains establish a conscientious effort to timely file.

Furthermore, it was within Taylor’s control to ensure his digital pen was working or to have an extra battery readily available when he knew he planned to use this tool to file. His declaration identifies that using the digital pen was his “customary” method of signing documents while working remotely, indicating such circumstances happen with some regularity. A party who files very near to the filing deadline without reviewing the applicable filing requirements or establishing its tools work does so at its own peril. The District has not established good cause for late filing.

Because the District neither establishes any departure from the Board's precedents or regulations, nor establishes good cause, we affirm the Appeals Office's rejection of the District's late filing.

ORDER

The Barstow Community College District's appeal of the Appeals Office's rejection of the District's late-filed response to exceptions in Case No. LA-CE-6666-E is DENIED.

Member Shiners joined in this Decision.

Member Krantz's dissent begins on page 9.



KRANTZ, Member, dissenting: “Consistent with a general policy of law which favors preserving the right to file exceptions and hear appeals on their merits, the Board’s application of [PERB] Regulation 32136 to a variety of factual scenarios reveals that ‘good cause’ is a flexible standard, defined and constrained by considerations of fairness.” (*Regents of the University of California* (2020) PERB Order No. Ad-477-H, pp. 3-4 (*Regents*.) Thus, “the Board has excused late filings caused by ‘honest mistakes,’ such as mailing or clerical errors.” (*Id.* at p. 4.) “Generally, the Board has excused a late filing where a short, non-prejudicial delay resulted either from circumstances beyond the control of the filing party or from excusable misinformation, where the filing party’s explanation was credible on its face or was corroborated by other facts or testimony.” (*Ibid.*) For example, when an excepting party’s counsel mistakenly believed that another party’s successful continuance request extended all parties’ time to file exceptions, we found the attorney’s confusion to be credible, reasonable, and excusable misinformation. (*Ibid.*) Flexibility was particularly due in that case, as a decision not to excuse the late filing would have completely extinguished a party’s rights. While today’s decision does not completely extinguish any party’s rights—as we will resolve the pending exceptions only after carefully reviewing the law and the record—I nonetheless believe that the District’s attorney made a conscientious attempt to file on time. I do not fault him for spending a short amount of time replacing a depleted digital pen battery without recognizing that he could have simply filed the District’s response as it was.

It is inevitable that reasonable minds will sometimes differ in applying the “good cause” standard, and precedent reflects multiple close decisions falling in both

directions. I respectfully dissent because I view this case as falling more in line with *Regents, supra*, PERB Order No. Ad-477-H and other precedent excusing reasonable, honest missteps that the erring party thoroughly and credibly explained, and which caused no prejudice to the other party. (See, e.g., *San Francisco Unified School District* (2009) PERB Decision No. 2048, p. 4 [finding sufficiently conscientious effort where counsel filed opposition twelve days late and four days after discovering that his paternity leave had led to a missed deadline]; *Trustees of the California State University (San Diego)* (2006) PERB Order No. Ad-355-H, p. 3 [excusing counsel's honest, reasonable mistake in determining deadline]; *Fullerton Elementary School District* (2004) PERB Order No. Ad-339, p. 2 [excusing failure to comply with regulatory change requiring opposition to be received, rather than merely postmarked, by due date].)