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

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| NEW HAVEN TEACHERS ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>NEW HAVEN UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | Case No. SF-CE-3052-E<br><br>PERB Order No. Ad-471<br><br>December 3, 2018 |

Appearances: Jason Visintainer, on his own behalf; Fagen, Friedman & Fulfrost by Joshua A. Stevens, Attorney, for New Haven Unified School District.

Before Winslow, Shiners, and Krantz, Members.

## DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Jason Visintainer's (Visintainer) appeal of an administrative determination by the Board's Appeals Office. Visintainer attempted to file an appeal of the administrative law judge's (ALJ) order dismissing the unfair practice charge and complaint for failure to prosecute. The Appeals Office rejected Visintainer's appeal of the dismissal order on the ground that Visintainer was not a party to the case.

Based on our review of Visintainer's appeal of the administrative determination and the entire record in this matter, we deny the appeal and affirm the administrative determination.

## BACKGROUND

On November 26, 2013, the New Haven Teachers Association, CTA/NEA (Association) filed the charge, which alleged that the New Haven Unified School District (District) retaliated against Visintainer in violation of the Educational Employment Relations

Act (EERA).[1] On September 22, 2014, PERB's Office of the General Counsel issued a complaint.

After an informal conference, the case was assigned to the ALJ, who scheduled a formal hearing to begin on September 29, 2015. The day before the hearing, the Association and the District requested to continue the hearing so they could pursue settlement talks.

On October 7, 2015, the Association filed a notice stating that it was withdrawing from the case, and that Visintainer would be filing a request to join as a party. No joinder motion followed.

On October 11, 2016, the District moved to dismiss the case for failure to prosecute.

On October 17, 2016, Visintainer responded to the motion by stating his interest in pursuing the matter after obtaining legal counsel. On January 23, 2017, Visintainer informed the ALJ and the District by e-mail that he was still interested in pursuing the case, although he had been unable to obtain counsel.

On March 28, 2017, the ALJ sent a letter to Visintainer and the District noting that, under *City of Inglewood* (2015) PERB Decision No. 2424-M, an ALJ "has discretion to permit an individual on whose behalf an unfair practice charge was filed to seek to join as a party to the case where the named charging party has withdrawn from the case." No joinder motion followed.

On May 3, 2018, the ALJ issued an order to show cause why the charge and complaint should not be dismissed for failure to prosecute.

On June 1, 2018, Visintainer responded that he "though[t] that my intentions of pursuing my claim through PERB, in propria persona and regardless of whether I would

[1] EERA is codified at Government Code section 3540 et seq.

maintain [sic] legal counsel, were made clear, and thought that I would be receiving a notice of a PERB hearing." Visintainer asked that the ALJ "consider setting the matter for a hearing without dismissing the charge and complaint."

On June 15, 2018, the ALJ issued the order dismissing the charge and complaint.

On July 5, 2018, Visintainer filed a timely appeal of the ALJ's order. On July 11, 2018, the Appeals Office informed Visintainer that his appeal had been rejected because he was not a party to the case.

Visintainer obtained an extension of time to appeal the Appeals Office's determination, and timely filed his appeal.

## DISCUSSION

Challenges to an ALJ's pre-hearing order dismissing a complaint for failure to prosecute are governed by PERB Regulation 32635.[2] (*Santa Ana Unified School District* (2017) PERB Decision No. 2514, p. 2.) That regulation states, as relevant here, that "the *charging party* may appeal the dismissal to the Board itself." (PERB Reg. 32635, subd. (a), emphasis added.) Based on PERB Regulation 32635's plain language, the Board has concluded that *only* a charging party, not a respondent, may appeal under this regulation. (*Duarte Unified School District* (1983) PERB Decision No. 281, p. 2.) It follows that a non-party may not appeal, either. (Cf. *Jurupa Unified School District* (2014) PERB Order No. Ad-417 [non-party may not file exceptions to a proposed decision under PERB Regulation 32300].)

In his appeal of the Appeals Office's administrative determination, Visintainer acknowledges that he is not a charging party in the present case. We agree with the Appeals

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

Office, therefore, that Visintainer did not have standing under PERB Regulation 32635 to appeal the ALJ's dismissal order.

Nevertheless, in his appeal Visintainer requests "to comply with all direction to join as the named party." PERB Regulation 32164, subdivision (a), allows that "[a]ny employee, employee organization or employer may file with the Board agent an application for joinder as a party in a case." "The Board may allow joinder if it determines that the party has a substantial interest in the case or will contribute substantially to a just resolution of the case and will not unduly impede the proceeding." (*Id.* at subd. (c).)

Even construing Visintainer's appeal as a valid application for joinder, we find that joinder is not appropriate in these circumstances. The Board has noted, in the similar context of a non-party's attempt to file exceptions to a proposed decision, that "to allow joinder at this stage of the proceedings would subvert the clear and unambiguous meaning of PERB Regulation 32300 limiting the right to file exceptions from a proposed decision to the parties to the case. Joinder under these circumstances is not contemplated by the regulatory scheme." (*Regents of the University of California (Lawrence Berkeley National Laboratory)* (2013) PERB Order No. Ad-397-H, pp. 6-7.) This concern applies equally to an appeal of a dismissal under PERB Regulation 32635. We thus decline to allow Visintainer to join this case as a charging party merely to permit an appeal when the named charging party has not appealed.

We recognize that the Association's withdrawal from this case placed Visintainer in a difficult position. At the same time, PERB explicitly offered Visintainer multiple chances to request joinder at earlier stages of the case, yet he failed to do so. He offers no explanation for his repeated failure to seek joinder at these earlier stages. Accordingly, his failure to properly apply to join as a charging party before the case was dismissed is fatal to his appeal.

In the alternative, Visintainer asks that we order the Association to represent him in this case. We lack authority to do so. (Cf. *Teamsters Local 228 (Cardoso)* (2006) PERB Decision No. 1845 [exclusive representative has no duty under EERA to represent an employee before PERB].)

ORDER

Jason Visintainer's appeal of the PERB Appeals Office's administrative determination in Case No. SF-CE-3052-E is DENIED.

Members Shiners and Krantz joined in this Decision.