STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIPATRIA UNIFIED TEACHERS ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-2792
v.	)	PERB Order No. Ad-217
CALIPATRIA UNIFIED SCHOOL DISTRICT,	)	November 7, 1990
Respondent.	)	

Appearance: Littler, Mendelson, Fastiff & Tichy, by Hector E. Salitrero, Attorney for Calipatria Unified School District.

Before Hesse, Chairperson; Camilli and Cunningham, Members.

DECISION

HESSE, Chairperson: Calipatria Unified School District (District) appeals the Public Employment Relations Board (PERB or Board) agent's rejection as untimely of its exceptions to the administrative law judge's (ALJ) proposed decision. The proposed decision was served on the District by mail on May 17, 1990. Pursuant to PERB Regulation 32300[1] exceptions to the decision were due to be filed with the Board no later than June 6, 1990.

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

Since 1978, Regulation 32300 has set forth the procedures for excepting to a Board agent's proposed decision. Regulation 32300 provides, in relevant part:

> (a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in section 32310.

However, since the proposed decision was served on the parties by mail, five additional days were added for filing exceptions pursuant to PERB Regulation 32130(c).[2] Thus, the parties had until June 11, 1990 to file exceptions. The District deposited its exceptions in the regular mail on June 11, 1990, and were received in the Board headquarter's office on June 14, 1990. On June 14, 1990, the appeals assistant rejected the District's filing as untimely. The District's appeal of this administrative decision was timely filed on June 29, 1990.

In its appeal, the District urges PERB to interpret its regulations and California Code of Civil Procedure[3] section 1013 in such a manner as to allow for an "alternate filing" with PERB by regular mail. Specifically, the District argues a filing should be considered effective when deposited in the regular United States mail, in addition to the filing methods mandated by Regulation 32135.[4] Alternatively, the District seeks to have its

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[2]Regulation 32130 provides, in relevant part:

> (c) The extension of time provided by California Code of Civil Procedure section 1013, subdivision (a), shall apply to any filing made in response to documents served by mail.

[3]All further references will be to the Code of Civil Procedure, hereinafter "CCP," unless otherwise specifically identified.

[4]Regulation 32135 provides that:

> All documents shall be considered "filed" when actually received by the appropriate PERB office before the close of business on the last date set for filing or when sent by telegraph or certified or Express United

late filing excused for good cause pursuant to Regulation 32136.[5] For the reasons set forth below, we deny the District's appeal.

DISCUSSION

1. Alternate Filing

On January 28, 1989, PERB amended Regulation 32130 by adding, inter alia, subsection (c), which states:

> The extension of time provided by California Code of Civil Procedure section 1013 subdivision (a), shall apply to any filing made in response to documents served by mail.[6] (Emphasis added.)

In order to find for the District in this case, the Board would have to interpret CCP section 1013 in a manner inconsistent with a plain reading of the statute and fully disregard its established definition of "filing" in Regulation 32135. The District relies heavily upon California court cases applying CCP section 1013(a) to administrative agencies. That section states:

> States mail postmarked not later than the last day set for filing and addressed to the proper PERB office.

[5]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.

[6]Prior to this amendment to section 32130, PERB repealed its regulation prohibiting the application of CCP section 1013 and found that PERB is mandated to provide an additional five days in which to file exceptions if service of the proposed decision occurs by mail. (See Lake Elsinore School District (1986) PERB Order No. Ad-154 and Los Angeles Unified School District (1986) PERB Order No. Ad-155.)

> In case of service by mail, the notice or other paper must be deposited in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, but such extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a of this code or notice of appeal. (Emphasis added.)

PERB Regulations clearly state that in order for exceptions to be considered timely filed, the documents must be received at the appropriate PERB office[7] within 20 days of service of the proposed decision, and, when a proposed decision is served by mail on the parties, an additional five days is added. In this case, the District does not contest the computation of time for filing exceptions. Thus, the issue is not whether the five-day extension provided by CCP section 1013 should apply, but rather whether that section can also be read to provide for an

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[7]For appeals of proposed decisions, the appropriate PERB office is ". . . with the Board itself in the headquarters office." (Regulation 32300.)

"alternate filing" with PERB by regular mail, which is effective and complete when deposited.[8]

In Pesce v. The Department of Alcoholic Beverage Control (1958) 51 Cal.2d 310 (Pesce), the California Supreme Court, in interpreting sections 23081 and 25760 of the Business and Professions Code, found these sections contained:

> . . . nothing which would preclude the application of section 1013 in its entirety to the service of the board's decision and to the extension of the period in which an appeal can be taken from such decision. (Id., p. 312; emphasis added.)

In that case, the Alcoholic Beverage Control Appeals Board had sent to the petitioner via United States mail a decision recommending that the petitioner's on sale license be revoked. Business and Professions Code section 23081 provided that time for filing an appeal of a decision of the department was limited to 40 days.[9]

The court found that it was the service of the Board's decision by mail that is the "service" which is referred to in CCP section 1013. (Id. at p. 312.) Nothing in the court's analysis provided for an alternate method of filing by regular mail. The court did not need to address that issue inasmuch as

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[8]The Board has previously refused to consider a party's response to exceptions when such response was sent by regular mail and not received until after the due date. (Ventura Unified School District (1989) PERB Decision No. 757, fn. 3.)

[9]At the time of the decision in Pesce, CCP section 1013 extended time one day for every hundred miles distance between the place of deposit and the address of the served party. The appeal was mailed via regular United States mail on the 40th day, but not received by the Board until the 41st day.

the appeal was effectively filed when received by the Board on the 41st day, a due date obtained when CCP section 1013 was applied to the time for exercising the right to appeal.

Although the District suggests that Pesce might be read to apply CCP section 1013 to render a document filed when deposited in regular mail, the Legislature removed any doubt regarding this issue when it subsequently added section 23081.5 to the Business and Professions Code. This section, which is similar to PERB regulation 32135, states:

> An appeal to the board shall be deemed filed on the date it is received in the principal office of the board; provided, however, an appeal mailed to the board by means of registered mail shall be deemed filed with the board on the date of the registry with the United States Post Office.

Therefore, the District's reliance on Pesce is not persuasive.

The District also relies on Industrial Indemnity Company v. Industrial Accident Commission (1961) 57 Cal.2d 123 as authority for its position that filing may be effective, under CCP section 1013, when a responding document is deposited in regular mail. In Industrial Indemnity, the court held that the Commission's use of the mail for service of the rating bureau's recommendation, which included a statement that the case would be submitted for decision if no objection were made within seven days, extended time for objection pursuant to section 1013. The court went on to state that the company's objection was "effective when deposited in the mails." (Id., p. 126.) However, it is not clear from the text of the decision which regulation the court

was interpreting, if any. Furthermore, there is no indication what was meant by the phrase "if no objection were made." As in Pesce, the court did not address what constituted a "filing" under the agency's regulations, only that an objection had to be made within seven days of the service of the decision. Also, as in Pesce, the court concluded that CCP section 1013 should be applied to extend the filing deadline by one day. Thus, in the apparent absence of regulations defining filing, the court could, and did, find the objections were effective when deposited in regular mail. The court did not conclude, however, that an "alternate filing" is created by the statute. Therefore, we do not find this case controlling.

Finally, in contrast to the analysis underlying Pesce and Industrial Indemnity, PERB regulations clearly specify the time, place and method for filing appeals (exceptions) to proposed decisions of ALJs. In addition, consistent with those regulations, the procedures for filing such appeals are unambiguously set forth in the proposed decision sent to the parties. Under Regulation 32135, filing is complete when received or when sent by telegraph or certified or express United States mail postmarked not later than the last day set for filing. Under Regulation 32130(c), the time extension created by CCP section 1013 is expressly applied to any filing made in response to documents served by mail. As previously noted, the date for filing, in this case, was extended five days from June 6 to June 11, 1990. Therefore, the District's exceptions, if filed

by regular mail, had to be received by June 11 to be timely. However, to be considered filed when deposited in the mail, they would have to be sent certified or express United States mail and postmarked June 11, 1990. As the Board stated in Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1989) PERB Order No. Ad-202-H, p. 2, had a document mailed to PERB by regular first class mail on the filing date, but received after the filing date, "been mailed by certified or express mail and postmarked on or before [the due date], it would have been accepted as timely." (Emphasis added.)

Since we find that the regulations governing the filing of appeals to the Board are not ambiguous and CCP section 1013 does not create an alternate filing method, the District's filing in this case was untimely.

2. Good Cause

In a declaration filed with the appeal requesting relief from rejection of the late filing, counsel for the District states his secretary inquired, on the last day for filing, whether the District's statement of exceptions to a proposed decision of a PERB ALJ should be sent by certified mail. Counsel declares that he specifically advised her not to send the exceptions by certified mail, but instead, send the document by regular mail. Counsel further declares this instruction was based upon his interpretation of PERB Regulations, CCP section 1013, as well as "to avoid any unnecessary expense to the client."

Based on these facts, the District urges the Board to excuse the late filing for good cause under Regulation 32136. The District contends that PERB has allowed late filings based upon "mistake, inadvertence and excusable neglect of counsel" particularly where the delay was brief and nonprejudicial to the opposing party. The District also argues that a mistake of law by counsel has been recognized under CCP section 473 by the courts as a valid ground for granting relief and that the Board should interpret its regulations in a similar manner. Such an interpretation, the District contends, furthers the overriding policy consideration which favors the preservation of the rights of appeal, and the hearing of such appeals, on the merits.[10] We do not find these arguments persuasive.

The "good cause" standard for excusing a late filing under Regulation 32136 was adopted on January 28, 1989. Since that time, three PERB decisions have excused late filings using this standard. In Trustees of California State University (1989) PERB Order No. Ad-192-H, the Board adopted the reasoning of the California Supreme Court in Gibson v. Unemployment Insurance

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[10]The District also urges the Board to excuse the late filing in order that PERB may address the merits of its appeal concerning an "important matter of statewide concern" regarding an exclusive representative's right to file a grievance in its own name. We note, however, that the issue of an association's right to file a grievance in its own name has been decided by the Board in South Bay Union School District (1990) PERB Decision No. 791; Chula Vista City School District (1990) PERB Decision No. 834; and Mt. Diablo Unified School District (1990) PERB Decision No. 844, (petn. for writ of review, (Mt. Diablo Unified School District v. PERB, Sixth District Court of Appeals, app. pending)) which issued after the District's appeal of the Board's rejection of the District's filing in this case.

Appeals Board (1973) 9 Cal.3d 494 which noted the general policy of law that favors the preservation of rights of appeal and the hearing of appeals on the merits. (Id. at p. 5.)[11] In Trustees, the exceptions were sent by certified mail, but were deemed to be filed one day late by reason of the postmark, which resulted from an error of a mail-room employee who incorrectly set the postage meter. The Board held that the explanation of the clerical error was not so unreasonable as to seem unbelievable, and on that basis excused the untimely filing. (Id. at p. 5.)

In Regents of the University of California, supra, PERB Order No. Ad-202-H, the Board excused the late filing based on an unrefuted declaration by the University's attorney that it was the policy of his office to file documents with PERB by certified mail. He had instructed his secretary to mail the documents, but she inadvertently sent them by regular mail on the last day set for filing rather than by certified mail. The Board also found that there was no prejudice to the opposing party as a result of the late filing.

In North Orange County Regional Occupation Program (1990) PERB Decision No. 807, the Board excused a filing that was inadvertently sent to the Los Angeles Regional Office based on

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[11]Under the previous more exacting requirement of extraordinary circumstances for excusing a late filing (prior Regulation 32136), the Board also adopted the reasoning from Gibson in Chula Vista City School District (1978) PERB Order No. Ad-29, where a temporary secretary had not followed the attorney's instructions to deliver the exceptions to the appropriate office. The Board held this was excusable neglect by the attorney.

the declaration of the secretary who mailed the document that she routinely sent a large number of PERB filings to the Los Angeles office and incorrectly followed that routine practice in this instance. In reviewing these facts, and those of Regents and Trustees, the Board noted that in each case a party had attempted to file in a timely fashion and in accord with the filing requirements specified under PERB regulations but due to inadvertent error, the mechanics of the filing went awry. (Id. at p. 5.) Accordingly, certain clerical errors were excused under the good cause standard.

In this case, however, there was no such attempt. Rather, as indicated in his declaration, counsel for the District reviewed the law and incorrectly determined that deposit in the regular mail satisfied PERB's filing requirements. We conclude this does not meet the good cause standard for excusing a late filing.

The District also argues that its appeal should be accepted based on a "mistake of law" theory. In support of this argument, the District points out that the court, in McCormick v. Board of Supervisors (1988) 198 Cal.App.3d 352, granted an inadequately plead mandamus petition based upon the lack of clear guidance in the law at the time and counsel's good faith, though faulty, attempt to comply with the pleading requirements. The court stated:

> "It is well settled that relief may be granted for mistake of law by a party's attorney. [Citation] An honest mistake of law is a valid ground for relief where a

> problem is complex and debatable."
> (Citations omitted.) The controlling factors in determining whether an attorney's mistake was excusable are (1) the reasonableness of the misconception and (2) the justifiability of the failure to determine the correct law. (Citations omitted, Id. at p. 360, emphasis added.)

Similarly, in Brochtrup v. INTEP (1987) 190 Cal.App.3d 323, the appellate court found that relief from the denial of the defendant's motion under CCP section 473 should be granted based on the attorney's mistaken belief that he was authorized to verify certain responses on behalf of two of the defendants absent from the county. Moreover, the defendant's attorney had, in fact, filed his motion in a timely manner. In determining the reasonableness of the misconception and the justifiable lack of determination of the correct law, the court found the mistake was excusable because the law had recently changed and there were no cases or authorities specifically governing the pleading requirements. The court stated:

> Thus, we can safely say that at the time defendants' motion for relief was heard and decided, the law on who may verify responses under section 2033 was unsettled.
> (Id. at p. 332.)

Unlike these cases, the rules governing the filing of exceptions with PERB to a proposed decision of an ALJ are neither new, unsettled, nor complex. Additionally, there was no lack of PERB case authority specifically dealing with the issue of timely filing under the revised regulation. Although the Board did revise its regulations in 1989 concerning the extension of time under CCP section 1013 and a section excusing a late filing,

neither of these revisions are unclear as to the time, place and method of filing. Thus, we find the District's interpretation of PERB regulations to be neither reasonable nor justifiable in this circumstance. If nothing else, the inquiry from counsel's secretary should have alerted him to the required procedures. The District's mistake of law resulting in the late filing is, therefore, not excused for good cause.

With respect to the argument that the District's mistake of law should be excused because the opposing party has not been prejudiced, we note that while 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. (See e.g., Gonzales v. State Personnel Board (1977) 76 Cal.App.3d 364, 367, where the court, addressing an employee's fundamental vested right to continue employment, granted relief from a default judgment based upon a showing of good cause and lack of prejudice to the employer.) As the District has failed to establish that its mistake of law constitutes good cause under Regulation 32136, the fact that the opposing party has not been prejudiced will not by itself excuse the late filing.

Finally, we do not find that an attorney's desire to avoid unnecessary expenses associated with the standard filing requirements specifically expressed under PERB regulations excuses the late filing, particularly where the expense is relatively minor.

ORDER

The District's appeal for relief from rejection of late filing is hereby DENIED.

Members Camilli and Cunningham join in this Decision.