

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



MARIE FERGUSON,

Charging Party,

v.

BERKELEY UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-3174-E

Administrative Appeal

PERB Order No. Ad-451

August 16, 2017

Appearances: Marie Ferguson, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Georgelle C. Cuevas, Attorney, for Berkeley Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Marie Ferguson's (Ferguson) appeal of an administrative determination by the Board's Appeals Assistant. The Appeals Assistant rejected as untimely Ferguson's appeal of the dismissal of her unfair practice charge by PERB's Office of the General Counsel.

Based on our review of Ferguson's appeal, Berkeley Unified School District's (District) opposition, and the entire record in this matter, we reverse the administrative determination and remand the matter for further processing.

BACKGROUND

On April 8, 2016, Ferguson filed an unfair practice charge alleging that the District violated the Educational Employment Relations Act (EERA).¹

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

On May 3, 2016, the Office of the General Counsel served Ferguson with a notice of appearance designating Marleen Sacks of Atkinson, Andelson, Loya, Ruud & Romo as the District's representative in this matter. It appears that this notice of appearance was faxed to PERB on April 14, 2016, without proof of service on Ferguson.

Ferguson filed amended charges on May 12, July 19, and October 26, 2016, and served each directly on the District. After each of these filings, the Office of the General Counsel duly notified the District, by letter to Sacks, of its deadline to respond to each amended charge. The letter regarding the second amended charge advised Ferguson to serve future filings on Sacks. The letter regarding the third amended charge provided the District with a courtesy copy of Ferguson's filing. On behalf of the District, Sacks filed a position statement responding to each amended charge.

On December 20, 2016, the Office of the General Counsel dismissed the charge.

On December 27, 2016, Ferguson filed a timely appeal of the dismissal.

On January 5, 2017, the Appeals Assistant sent a letter to Ferguson acknowledging receipt of a filing dated December 23, 2016, but asserting that no proof of service was included. The letter stated: "You are being afforded until January 10, 2017 to perfect this filing. If the original proof of service is not submitted to us by this date, the appeal of the dismissal cannot be forwarded to the Board itself." This letter was served by mail on Ferguson and Sacks.

On January 19, 2017, Ferguson filed a copy of her appeal with a proof of service. The signature on the proof of service is dated December 29, 2016, but states that the document was served on December 23, 2016.

On January 25, 2017 the Appeals Assistant sent a letter informing Ferguson that the filing received on January 19, 2017 was rejected as untimely filed. This letter was also served on Sacks.

On February 2, 2017, Ferguson filed a timely appeal of the Appeals Assistant's administrative determination, again with proof of service directly on the District. The appeal states:

As shown from the proof of service, I correctly served both parties in compliance with PERB regulations. The service was signed on 12/29/16. As showing [*sic*] the PERB service box both the Berkeley Unified School District were [*sic*] PERB were serviced in the box. As communicated by the appeals assistant PERB received on January 5th, 2016. 5 copies of my appeal were sent to PERB and one copy to the respondent. The appeals assistant appears to be not only violating PERB regulations but also trying to deny my rights to appeal. I request that PERB add my APPEAL to the PERB docket.

The appeal also includes a copy of the same document that was filed on January 19.

On February 22, 2017, Georgelle Cuevas of Atkinson, Andelson, Loya, Ruud & Romo, on behalf of the District, filed a letter opposing Ferguson's appeal of the administrative determination and her appeal of the dismissal of the charge. The letter was electronically filed at the e-file address for PERB's San Francisco Regional Office.

On February 27, the District filed the same document at the e-file address for PERB's Appeals Office, this time with a cover letter explaining that the District was not properly served with Ferguson's documents, that the Appeals Assistant provided the District with a courtesy copy of Ferguson's filings on February 6. The District states that its opposition was filed at the wrong e-file address due to clerical error.

DISCUSSION

The Appeals Assistant rejected Ferguson's initial filing for failure to include proof of service, while her later attempt to perfect that filing by providing proof of service was rejected as untimely. Although this was a correct application of PERB Regulations, we will excuse the defective service under the circumstances of this case.

PERB Regulation 32635 allows a charging party to appeal the dismissal of an unfair practice charge to the Board itself within 20 days of the dismissal. Among the requirements for filing an appeal are service and proof of service on the respondent. (PERB Regulation 32635, subd. (a).) We have discretion to excuse both late filings and service defects. Late filings may be excused "for good cause only." (PERB Regulation 32136.) This requires an affirmative showing of good cause for the late filing, as well as the absence of prejudice to the opposing party. (*Bellflower Unified School District* (2017) PERB Order No. Ad-447, pp. 4-5.) Our discretion to excuse service defects is broader. (*Trustees of the California State University* (2016) PERB Order No. Ad-432-H, p. 10-11.) While the failure to comply with the service requirement is grounds for denying an appeal, the Board may excuse defective service if the opposing parties have received actual notice of the filing and there is no showing of prejudice. (*Fontana Unified School District* (2003) PERB Order No. Ad-324, p. 7; *California School Employees Association (Pintor)* (2016) PERB Order No. Ad-440, pp. 4-5.)

Because of the different standards that apply, we must determine whether this case involves a late filing or a service defect. It is clear that Ferguson's initial appeal of the dismissal of her charge was timely filed on December 27, 2016, well within 20 days of the dismissal of her charge. However, the Appeals Assistant determined that the filing did not

include proof of service on the District. Ferguson has not disputed this determination and the issue is therefore not before us.²

It is also clear that Ferguson subsequently provided a proof of service attesting that her appeal was served on the District December 23, 2016, although this service was technically defective. Rather than serving Sacks, the District's designated representative, Ferguson served the District directly.³

Finally, it is clear that Ferguson provided this proof of service to PERB in an untimely filing. Whether viewed in relation to the dismissal of the charge or to the Appeals Assistant's January 5, 2017 letter, Ferguson's nominal deadline to provide the proof of service was January 10. This deadline was extended by five days for service by mail, until January 15, and then to the next regular PERB business day, January 17. (PERB Regulation 32130, subds. (b) and (c).) But Ferguson did not provide the proof of service until January 19.

Because Ferguson filed a timely appeal of the dismissal of her charge, but provided untimely proof of service, we conclude that this case ultimately involves a service defect rather than an untimely filing. As noted, we may excuse defective service if the District received

² An appeal of an administrative determination "must state the specific issue(s) of procedure, fact, law or rationale that is appealed and state the grounds for the appeal." (PERB Regulation 32360, subd. (c).) Unless circumstances indicate otherwise, we consider only those issues properly raised. (*Los Angeles City & County School Employees Union, Local 99, SEIU, AFL-CIO (Kimmitt)* (1987) PERB Order No. Ad-167, p. 4; *Morgan Hill Unified School District* (1985) PERB Decision No. 554 [Board will not normally disturb findings not specifically excepted to]; *United Teachers of Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 43.)

³ The representative identified on a notice of appearance form is regarded as the party's designated representative for purposes of service. (See, e.g., *California School Employees Association (Pintor)*, *supra*, PERB Order No. Ad-440, p. 3, fn. 4; *State of California (Department of Personnel Administration)* (1995) PERB Order No. Ad-267-S, p. 3.) Although the District's notice of appearance form suffered from its own apparent service defects, the Office of the General Counsel took the initiative to serve the form on Ferguson. Ferguson was therefore on notice that Sacks was the District's designated representative.

actual notice of Ferguson's appeal and has not been prejudiced. (*California School Employees Association (Pintor)*, *supra*, PERB Order No. Ad-440, p. 5.)

There is no question that the District has received actual notice of the issues on appeal, having acknowledged that it received a copy of the January 19, 2016 filing from the Appeals Assistant. The District also does not dispute that it received a copy of Ferguson's original filing, but objects only that this document was served on the District directly, rather than on Sacks, the District's designated representative.

There is also no indication—and no claim by the District—that the District has been prejudiced by any defects in service.⁴ We note that Ferguson has served *all* of the documents in this case on the District directly, even after the Office of the General Counsel served the District's notice of appearance on Ferguson and then later advised her specifically to serve future documents on Sacks. Although we do not condone Ferguson's failure to heed this directive, we also note that there is no record of the District objecting to these service defects

⁴ We take notice of the District's filings in opposition to Ferguson's appeal of the administrative determination for purposes of determining that the District has received Ferguson's appeal and does not claim any prejudice from the defective service. We will also consider the District's opposition to Ferguson's appeal of the dismissal, which is contained in the same document. However, we have not considered any of the District's arguments in favor of affirming the administrative determination. As an opposition to the appeal of the administrative determination, the District's filings are untimely.

The District states that it received a courtesy copy of the appeal of the administrative determination on February 6, 2017, and was advised that its response would be due 10 days later, with an additional 5 days for service by mail. A response to an administrative appeal is due 10 days after service (PERB Regulation 32375), and this deadline would be extended by 5 days if service was by mail (PERB Regulation 32130, subd. (c)). It is not clear that this deadline would be based on the date the District received a courtesy copy from the Appeals Assistant, rather than the date the document was served on the District. (See *Trustees of the California State University*, *supra*, PERB Order No. Ad-432-H [deadline to respond to appeal was not extended by service defect].) But we need not resolve this question. Even if the District's deadline was 15 days after it received the courtesy copy, its filing on February 22, 2017 was one day late, and the District does not claim any good cause for us to accept the late filing.

while the case was pending with the Office of the General Counsel. The District timely responded to each amended charge. More importantly for present purposes, the District was at least placed on timely notice that Ferguson had invoked PERB's appeals process, when it was served with the Appeals Assistant's January 5, 2017 letter to Ferguson. And the District has already filed a substantive response to Ferguson's appeal of the dismissal, even though none was required after the Appeals Assistant's rejected Ferguson's appeal. (See *Kern Community College District* (2008) PERB Order No. Ad-372, p. 1, fn. 1 [after Board excused a late filed appeal, respondent was granted 20 days to respond].)

Because the District received actual notice of Ferguson's appeal, and has not been prejudiced by the defective service, we conclude that we may, and hereby do, excuse the defective service in this matter. Having already received the District's response to Ferguson's appeal of the dismissal of her unfair practice charge, we will proceed to consider this case on the merits in a separate decision.

ORDER

The Appeals Assistant's administrative determination in Case No. SF-CE-3174-E is hereby REVERSED and the matter is remanded to the Appeals Assistant for further processing.

Chair Gregersen and Member Banks joined in this decision.