

D.U.P. NO. 98-33

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CI-97-75

LAWRENCE ZAMENSKY,

Charging Party.

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-97-412

PBA LOCAL 105,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint because the charge was filed more than six months after the occurrence of the alleged unfair practice. The Director finds that the charging party's appeal filed at the Merit System Board did not toll the six month statute of limitations governing the Commission.

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Appearances:

For the Respondent,
Peter G. Verniero, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party Zamensky,
Thomas A. Belfatto, attorney

For the Charging Party PBA Local 105,
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Robert A. Fagella, of counsel)

REFUSAL TO ISSUE COMPLAINT

On May 5, 1997, Lawrence Zamensky filed a charge alleging that the State of New Jersey violated N.J.S.A. 34:13A-5.4a(1), (3),

(5) and (7)^{1/} when it terminated him from his position as a senior corrections officer at the Garden State Reception and Youth Correctional Facility. On May 28, 1997, the Commission received a letter from the majority representative of Zamensky's negotiations unit, PBA Local 105, advising that Local 105 joins in and adopts the charge filed by Zamensky.

An exploratory conference was conducted by the Commission on October 27, 1997. At the request of the parties, the charges were held in abeyance in order to afford the parties further opportunity to explore voluntary resolution of this dispute. On January 14, 1998, the Commission was informed that settlement negotiations were unsuccessful.

On February 10, 1998, the Director of Unfair Practices wrote to the parties indicating that the Commission's complaint issuance standards had not been met and that he was inclined to dismiss the unfair practice charges. The parties were invited to submit additional information they wished to be considered by

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

February 20, 1998. After an approved extension of time, the charging party submitted a letter brief on February 27, 1998.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. Based upon the following, I find that the complaint issuance standard has not been met.

1. On March 16, 1994, Zamensky received a Notice of Disciplinary Action from the State charging that he failed to report his arrest of October 21, 1989 in connection with criminal attempt to obtain a controlled and dangerous substance by fraud in violation of N.J.S.A. 2C:21-1 and N.J.S.A. 2C:5-1.

2. Pursuant to the Notice of Disciplinary Action, a hearing was held on June 30, 1994. At the hearing, Zamensky asserted as a defense that the disciplinary action was barred by a provision contained in the labor contract covering his unit which provided, in part:

An employee shall not be disciplined for acts, except those which would constitute a crime, which occurred more than one (1) year prior to the service of the notice of discipline.
[Article XII, H, 4 of the Agreement, covering the period July 1, 1989 - June 30, 1992.]

The decision of the hearing officer resulted in Zamensky's termination effective July 13, 1994. Zamensky did not receive the decision until July 25, 1994.

3. On August 2, 1994, Zamensky filed an appeal of his termination with the Merit System Board. Pursuant to this appeal, a hearing was held in the Office of Administrative Law, before the Honorable Walter Sullivan, A.L.J., on November 6, 1996. At that hearing, Zamensky reasserted that the disciplinary action was barred by contract.

Judge Sullivan held his hearing in abeyance on November 6, 1996 in order to give Zamensky the opportunity to file an unfair practice charge with the Commission.

4. As stated above, Zamensky filed a charge with the Commission on May 5, 1997, which was joined by the PBA on May 28, 1997. In the charge, Zamensky and the PBA allege that the State repudiated Article XII of the contract and discriminated against Zamensky by bringing the disciplinary action.

The State argues that the charges are filed out of time and involve "a mere breach of contract claim" under State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Thus, the State maintains that the charges should be dismissed.

Zamensky argues that the charges are timely because the State has been guilty of a continuing violation, and in any event, the filing of his case before the Office of Administrative Law constituted reasonable error and tolls the running of the six month statute of limitations before the Commission.

N.J.S.A. 34:13A-5.4c provides in part that:

no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

Using the latest date possible in which Zamensky knew or should have known that the State was intending to take adverse action against him, on July 25, 1994 Zamensky received the hearing officer's report terminating him from employment. Zamensky, therefore, had until January 25, 1995 to file an unfair practice with the Commission unless he was prevented from filing a charge.

Equitable considerations are relevant when determining if a person has been prevented from filing a timely charge under N.J.S.A. 34:13A-5.4c and should be weighed against the Legislature's objectives in imposing a limitations period. Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329, 339 (1978). The Director of Unfair Practices and the Commission have held that filings in administrative agencies do not toll the statute of limitations. Jersey City Bd. of Ed., D.U.P. No. 81-13, 7 NJPER 180 (¶12079 1981) and Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984) (matters filed before the E.E.O.C. and Commissioner of Education, respectively, do not toll the statute of limitations). Therefore, Zamensky's appeal to the Merit System Board did not toll the 6 month statute of limitations governing the Commission.

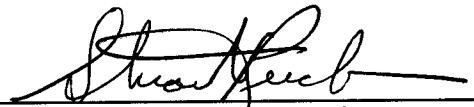
With regard to Zamensky's continuing violation argument, each instance referred to in the charge is just another example of

the initially alleged violation and does not constitute a separate, independent alleged violation. Thus, I do not find a continuing violation. See Salem County, P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987). Zamensky's charge is not timely filed.

Having found Zamensky's charge filed outside of the statute of limitations, I likewise find Local 105's charge filed on May 28, 1997 in support of Zamensky's a(5) claim to be untimely.

Based on the foregoing, I find that the Commission's complaint issuance standards have not been met and dismiss the unfair practice charges.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


A handwritten signature in cursive script, appearing to read "Stuart Reichman", is written over a horizontal line.

Stuart Reichman, Director

DATED: April 2, 1998
Trenton, New Jersey