

D.U.P. No. 2008-2

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

In the Matters of

FMBA LOCAL 68,

Respondent,

-and-

Docket No. CI-2007-070

STEPHEN E. PETERSON,

Charging Party.

CITY OF LONG BRANCH,

Respondent,

-and-

Docket No. CI-2007-071

STEPHEN E. PETERSON,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses unfair practice charges filed by a former unit employee against his former employer and majority representative. Peterson alleged that the City of Long Branch had refused to "uphold provisions of the collective agreement" purportedly entitling him to wages and benefits for one year after workers compensation and other benefits expired. He also alleged that the FMBA failed to process a grievance and demand arbitration on his behalf regarding the denial of benefits. He also alleged that the Respondents colluded in violating his rights under the Act. The City allegedly violated 5.4a(1), (3), (4) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. The FMBA allegedly violated 5.4b(1) and (5) of the Act.

The Director determined that the charges were not timely filed. He specifically found that two court actions dismissed before the charges were filed did not toll the statute of limitations. N.J.S.A. 34:13A-5.4c. He also determined that the charges set forth no facts supporting an allegation of collusion.

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Appearances:

For the Respondent, FMBA Local 68,  
Fox & Fox, LLP  
(Benjamin Benson, of counsel)

For the Respondent, City of Long Branch  
Apruzzese, McDermott, Mastro & Murphy, attorneys  
(Arthur R. Thibault, Jr., of counsel)

For the Charging Party  
Law Offices of Edward Testino  
(Lawrence S. Grossman, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On June 19 and 28, 2007, Stephen Peterson filed unfair practice charges and amended charges against his former employer, the City of Long Branch (CI-2007-071) and majority

representative, the New Jersey State Firemen's Mutual Benevolent Association, Local #68 (FMBA) (CI-2007-070).

Peterson alleges that the City has "failed to uphold provisions of the collective agreement and has taken away all of [his] sick days, vacation days, [etc.], as if he was on full service." The City's omission allegedly violates 5.4a(1), (3), (4) and (7)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

Peterson also alleges that the FMBA failed to process a grievance and demand arbitration over an alleged violation of the Respondents' collective agreement provision purportedly entitling unit employees to wages and benefits for at least one year after workers compensation, disability and other benefits expire. Peterson also alleges that the City and FMBA are "collaborating as one unit to deny [him] benefits as specified in [the collective agreement] between the [Respondents] . . ." The FMBA's conduct allegedly violates 5.4b(1) and (5)<sup>2/</sup> of the Act.

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<sup>1/</sup> 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (7) Violating any of the rules and regulations established by the commission."

<sup>2/</sup> These provisions prohibit employee organizations, their  
(continued...)

In April 2000, Peterson was hired as a firefighter by the City. On or about December 31, 2003, Peterson was injured in the performance of his job. The charge does not report when or if Peterson returned to work, or whether he returned for any period. The amended charge alleges that Peterson ". . . remains out on workers compensation temporary disability . . . [but] the last payment was in January 2007." The amended charge also specifies that on April 21, 2007, the City "terminated" Peterson's employment. Peterson alleges that the City's Public Safety Director "had an agreement" with the president of the FMBA to ". . . skip steps 1 and 2 of the grievance procedure" because of a conflict of interest.

Peterson has also filed copies of civil and chancery court complaints setting forth substantially similar allegations against the FMBA dated June 6, 2006 and January 30, 2007. On October 20, 2006 and May 24, 2007, the complaints were dismissed. The courts did not refer or transfer those actions to the Commission for processing. The Respondents have filed correspondence seeking dismissal of the charges.

Our Act requires that an unfair practice charge be filed within six months of the date that the unfair practice occurred.

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2/ (...continued)  
representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Violating any of the rules and regulations established by the commission."

N.J.S.A. 34:13A-5.4c. Charges filed later than six months after the date of the unfair practice are untimely unless the charging party was prevented from filing within the statutory period.

In Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to pursue claims diligently and prevent the litigation of stale claims. The Court cautioned that it would look to equitable considerations in deciding whether a charging party slept on its rights. Id. at 337-338.

On July 23, 2007, I wrote a letter to Counsel for Peterson, advising that I was inclined to dismiss the charges as untimely unless he could demonstrate why our statute of limitations - N.J.S.A. 34:13A-5.4c - should be tolled.

On July 31, Counsel for Peterson filed a letter, contending that Peterson's termination on April 17, 2007 falls within the statutory period. Counsel also cited New Jersey Transit Bus Operations, Inc., D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995), for the asserted proposition that ". . . the charge should be considered timely because court action had been instituted within six months of the alleged illegal conduct by the employer." Counsel asserts that "the same is true in this instant matter" (brief at p.2). Counsel asserts that Peterson "believes that he will be able to show that [Respondents] have treated other employees differently in similar situations." Finally, Counsel

argues that the appropriate remedy would be an order to "arbitrate for the benefit of [Peterson]."

Peterson does not contest that the dates of the disability determination and dismissal of civil court complaint in October 2006 are beyond the statutory period. (The chancery court filing and dismissal were in January and May 2007, respectively).

In New Jersey Transit Bus, the charging party was terminated from employment on September 17, 1993 and her union refused to submit the matter to arbitration in November after representing her at the first three steps of the grievance procedure. On March 11, 1994, charging party filed an action contesting her termination in federal court and later learned that her complaint was filed in the wrong forum and promptly withdrew it. On April 28, 1994, the charging party filed unfair practices against her employer and majority representative. The Director tolled the statute of limitations and determined that the charge was timely. He did not find that the charge was timely because "court action had been instituted within six months of the [employer's] alleged illegal conduct." He acknowledged the charging party's misunderstanding that the employer was a privately owned entity and her prompt withdrawal of the court action and filing of an unfair practice charge upon learning that it was a public employer. Under those circumstances, the Director essentially found that the charging party was "prevented" from filing a timely charge.

In this case, Peterson awaited two court dismissals over a one year period before filing an unfair practice charge. The civil complaint alleged that after Peterson was injured at work on December 31, 2003, "the City of Long Branch failed to uphold provisions of the [collective] agreement and has taken away all the sick days, vacation days. . . given to [Peterson]. . ."

Peterson alleged that the City violated a contract provision granting "full wages for at least one year without deductions from sick-leave, vacation, etc." The complaint also alleged that the FMBA, Local 68 "neglected to follow up on Peterson's complaints [i.e., "grievance"] and did not file a grievance for one and one-half years after the City of Long Branch stopped following the . . . [collective] agreement." Peterson alleged: "The [FMBA] failed to follow-up on any further requests for relief from the City under the agreement and told him that it would be too expensive to hire an attorney to fight his grievance . . ."

The chancery court action filed on January 30, 2007, alleged that the FMBA ". . . breached its duty to its members by refusing to initiate and refusing to fight. . . on Peterson's behalf as required by the [collective] agreement . . ." Peterson contended that the FMBA did not "go through the grievance procedure . . ." and sought an Order requiring the FMBA ". . . to represent him in all the steps needed to arbitrate under the grievance procedure of the contract." Finally, the chancery action alleged collusion

between the City and FMBA to deny Peterson rights provided by the collective agreement.

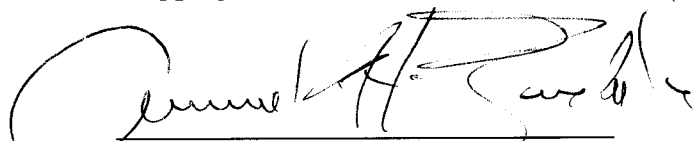
The civil and chancery court actions allege that the FMBA violated its "duty" by not filing and then processing Peterson's grievance to arbitration. On the date that the civil complaint was filed--June 6, 2006--Peterson alleged that the FMBA failed to file a grievance "for one and one-half years after the City stopped following the agreement." The FMBA would have ostensibly owed Peterson a duty of fair representation long before June 6, 2006, establishing December 6, 2006, (at the outside) as the end of the statutory period for filing an unfair practice charge against his majority representative. The same filing date and deadline would apply to a charge Peterson might have filed against the City of Long Branch. The chancery action sets forth substantively identical claims against the FMBA, together with a claim that it colluded with the City of Long Branch to deny Peterson benefits under the collective agreement. A claim of "collusion" would ultimately relate back to the date of the FMBA's alleged failure to timely pursue a grievance which could violate the duty of fair representation. See Vaca v. Sipes, 361 U.S. 171, 64 LRRM 2369 (1967); D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990). In any event, Peterson has not set forth any facts establishing "collusion" between the City and FMBA. Accordingly, the chancery court filing does not toll the statute of limitations on allegations that the City denied



Peterson contractual benefits (pertaining to his injury) and that the FMBA failed to process a grievance contesting the denial of benefits.

All allegations except one filed against the City and FMBA are beyond the statutory period and the circumstances do not justify an equitable tolling under Kaczmarek. Accordingly, they are dismissed. The only possible timely allegation pertains to Peterson's termination on April 17, 2007, though he has not alleged that he was fired for engaging in protected activity or that the employer violated a contract provision in terminating his employment or that the FMBA violated a duty fair representation. Peterson may amend this remaining portion of the charge to allege a violation of our Act. If no amendment is filed by 5 p.m., the close of business October 22, 2007, it will be dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: October 12, 2007  
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by October 22, 2007.