

D.U.P. NO. 2014-11

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

In the Matter of

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 52 LOCAL 3474,

Respondent,

-and-

Docket No. CI-2007-062

ROBERTA FARBER,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by a former municipal employee against her majority representative, AFSCME Council 52, Local 3474. The charge alleges that AFSCME failed to investigate the circumstances of her termination from employment and refused to prosecute her grievance to binding arbitration, violating the duty of fair representation. AFSCME's conduct allegedly violated 5.4b(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The Director determined that the unfair practice charge was not filed within the statutory period. N.J.S.A. 34:13A-5.4c. The charge was dismissed.

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Appearances:

For the Respondent,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Paul L. Kleinbaum, of counsel)

For the Charging Party,
McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys
(James E. Patterson, of counsel)

REFUSAL TO ISSUE COMPLAINT

On May 11, 2007, Roberta Farber filed an unfair practice charge against American Federation of State, County and Municipal Employees Council 52, Local 3474 (AFSCME). The charge was filed upon our instruction following a November 7, 2006 Order issued by a New Jersey Superior Court Judge referring a civil complaint to the Commission. The Order specifically provides that AFSCME ". . . shall waive all claims that the matter is untimely. In the event that PERC refuses to handle this matter on the basis

that it is untimely, plaintiff may seek reinstatement of this matter in this Court."

Farber alleges that she was employed by the City of Paterson for many years as Assistant Director of Economic and Industrial Development and included in a collective negotiations unit represented by AFSCME. She alleges that following her termination from employment on July 1, 2002, she sought redress through AFSCME, which ". . . refused to prosecute her grievance to arbitration" and ". . . intentional[ly], reckless[ly] and/or negligent[ly] failed to investigate the circumstances of her termination." Farber alleges that AFSCME's conduct violates section 5.4b(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The charge also provides that the claims asserted against AFSCME were originally set forth in a federal civil action which were dismissed by the Third Circuit Court of Appeals on March 8, 2006. Farber v. City of Paterson, et al., 327 F.Supp. 2d 401 (D.N.J. 2004), aff'd. in part, rev'd in part, 440 F.3d 131 (3rd Cir. 2006). On June 1, 2006, a U.S. District Court Judge ordered that Farber could file a state court action against AFSCME.

^{1/} These provisions prohibit employee organizations, their 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."

On July 11, 2007, AFSCME filed a letter, together with copies of collective negotiations agreements between the City of Paterson and AFSCME extending from July 1, 1999 through June 30, 2002 and January 1, 2000 through December 31, 2002, respectively. The letter also incorporates by reference an unpublished decision by the Appellate Division of the Superior Court of N.J. In re Roberta Farber, 2006 WL 2193390 (App. Div. 7/18/06). The letter advised that AFSCME fulfilled its duty of fair representation, if one assumes that it had such an obligation.

On February 4, 2009, Farber filed a letter, again asserting that AFSCME breached its duty of fair representation by handling her case perfunctorily and wrongfully refused to take her case to arbitration. The letter provides in a pertinent part that ". . . had [Farber] not been illegally fired from her position in Paterson she would, consistent with established City practice, have been placed in civil service status in that position."

On July 23, 2013, AFSCME filed an updated statement of position, together with Merit System Board and Appellate Division decisions, contending that the unfair practice charge does not meet the Commission's complaint issuance standard. It argues that the abolishment of Farber's position (which resulted in her termination) was appealed to and denied by the Department of Personnel (Civil Service Commission). In the Matter of Roberta Farber, City of Paterson, DOP Dkt. No. 2005-2374 (5/19/05), aff'd

2006 WL 2193390 (App. Div. 7/18/06). AFSCME contends that the two decisions dispose of all Farber's claims against it; that Farber's adjudicated provisional status under Civil Service law is neither negotiable nor arbitrable.

On August 15, 2012, Counsel for Farber filed a letter, disputing that the charge hinges on ". . . the narrow issue of whether Farber acquired de facto permanent status." The letter contends that AFSCME ". . . deliberately ignored clearly documented evidence" that Farber was terminated because of her political affiliation with the former mayor [of the City of Paterson]. That her termination was "disguised" as a "reorganization involving non-permanent employees" is of no consequence; AFSCME should have investigated the circumstances and pursued the case to arbitration. The letter also provides that the Appellate Division decision was not concerned with "just cause for the discharge."

On December 9, 2013, I issued a letter to the parties, advising of my tentative findings of fact and conclusion that the unfair practice charge was not filed within our six-month statute of limitations. N.J.S.A. 34:13A-5.4c. My letter also invited replies.

On January 6, 2014, Counsel for AFSCME filed a response, contesting my tentative conclusion and arguing that the charge should be dismissed instead for reasons set forth in its earlier-

filed letter. Specifically, AFSCME contends that decisions issued by the Merit System Board and Appellate Division concerning Farber disposed of her claim that her termination was politically motivated, with the latter decision noting that at all times she was aware that her employment status was provisional. AFSCME contends that its decision not to arbitrate Farber's grievance ". . . was not the cause of her harm" and it could not have violated the duty of fair representation. AFSCME does not argue that the charge is timely filed.

On January 9, 2014, and over AFSCME's objection, Counsel for Farber filed a response acknowledging that Farber was not "prevented" from filing a timely charge. The response also advised of Farber's intention to pursue an action in State court.

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. I find the following facts.

On or about November 5, 1990, Roberta Farber was appointed provisionally to a title in the City of Paterson. On or about February 8, 1993, the State Department of Personnel (DOP) issued letters to Farber and the City, advising that her title is

administrative clerk, provisionally appointed, pending an open and competitive examination for a permanent appointment.

Farber's name did not appear on the administrative clerk eligible list which extended from May, 1994 through May, 1997 and no appointments were made from that list.

In September, 1994, Farber was appointed to the title, Urban Enterprise Zone Coordinator, which was disapproved by DOP because it was not "an approved" title. DOP performed a desk audit of Farber's appointed title. In November, 1995, the City was advised that Farber's appropriate title was Economic Development Representative 2, provisionally appointed, pending an open competitive examination for a permanent appointment. That examination was announced, with a closing date of January 2, 1998. Although Farber filed for the examination, she was deemed ineligible because she lacked the requisite four years of experience. A second examination for the approved title was announced, with a closing date of August 21, 2001. The examination was cancelled because no one applied for it.

On or about September 1, 2001, Farber was appointed provisionally to the title, Assistant Director of Economic and Industrial Development. DOP approved her appointment the next month, and announced the open-competitive examination for the permanent title, with a closing date of March 19, 2002. Farber was the only applicant and was admitted to the examination. She

was certified to the City for appointment on July 1, 2002. On that date, the City terminated her provisional appointment.

Throughout her employment with the City, Farber was included in a collective negotiations unit of white collar employees represented by AFSCME. The applicable agreement includes a multi-step grievance procedure ending in binding arbitration (Article IV) and a "just cause" provision for discharge or discipline of more than five days suspension (Article V). The grievance procedure specifies that grievances concerning a discharge may proceed directly to the third step (Department Director), at AFSCME's election. The third step provides that a meeting of designated representatives of both parties and the grievant shall be scheduled within five days and a written "answer" rendered within five workdays thereafter. The procedure provides that AFSCME may seek arbitration within twenty days after a step 3 determination is issued.

On an unspecified date, Farber "sought redress" for her termination from AFSCME. On an unspecified date, it ". . . refused to prosecute [her] grievance to arbitration and wrongfully assisted the City in depriving [Farber] of her legal rights."^{2/}

^{2/} In Farber v. City of Paterson, et al., 327 F.Supp.2d 401 (D.N.J. 2004), the District Court Judge found that AFSCME refused to pursue Farber's claims to arbitration, noting that the civil complaint did not indicate how many steps of (continued...)

On an unspecified date in September, 2003, Farber filed a civil complaint in United States District Court for the District of New Jersey. Farber v. City of Paterson, et al., Civil Action No. 03-4355 (DID). The unfair practice charge alleges that the claims against AFSCME were "originally asserted" in that federal lawsuit. As noted earlier in this letter, the decision in that matter was issued in 2004, appealed and decided by the Third Circuit Court of Appeals in 2006.

ANALYSIS

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

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

On July 1, 2002, unit employee Farber was terminated from employment with the City of Paterson. On an unspecified date, AFSCME refused to authorize arbitration of a grievance contesting that the termination was for just cause. The parties' grievance procedure contemplates that about 25 workdays may pass from the date of termination until AFSCME must elect whether to proceed to arbitration, following an adverse decision at step three. In the

2/ (...continued)
the grievance procedure were pursued. The Judge also found that AFSCME refused to allow Farber to bring her own attorney to a meeting regarding her termination.

absence of any facts specifying the date(s) of grievance filing, determination(s) and appeal periods, I infer that AFSCME was contractually obligated to elect arbitration of Farber's discharge (or refuse) on or before August 9, 2002. A timely unfair practice charge alleging a violation of the duty of fair representation^{3/} under section 5.4b(1) of the Act should have been filed by February 9, 2003. The charge was not filed until more than four years and three months later. Unless Farber can show that she was prevented from filing a timely charge, the charge must be dismissed.

In determining whether a party was "prevented" from filing a timely charge, we must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control, disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978). Relevant considerations include whether a charging party sought timely relief in another forum; whether the Respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a

3/ See Vaca v. Sipes, 386 U.S. 171 (1967); Saginario v. Attorney General, 87 N.J. 480 (1981).

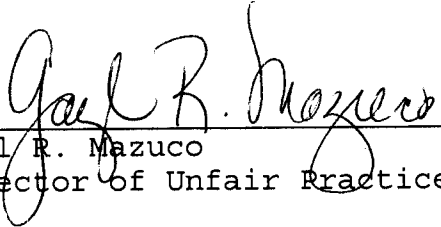
charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. State of N.J. (Dept. Of Human Services) and CWA, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003), app. disp. App Div. Dkt No. A-003951-02T1(4/7/04).

I find that Farber was not "prevented" from filing a timely charge. Farber acknowledges in her charge that the first time she filed any action against AFSCME was in September, 2003, about seven months beyond the statutory deadline. No facts suggest that Farber's omission was beyond her control. This circumstance varies from that in Kaczmarek, where the Respondent was served with a civil complaint during our statutory six-month period. No facts suggest that AFSCME concealed or misrepresented its decision not to arbitrate Farber's termination grievance. Under these circumstances, I find that our statute of limitations should not be tolled. N.J.S.A. 34:13A-5.4c.

ORDER

The unfair practice charge is dismissed.^{4/}

Very truly yours,



Gayl R. Mazuco
Director of Unfair Practices

DATED: January 27, 2014
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 February 06, 2014.

^{4/} No facts suggest that section 5.4b(5) was violated. I
dismiss this allegation.