

P.E.R.C. NO. 2001-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 152 and
NEW JERSEY STATE PBA,

Respondent,

-and-

Docket No. CI-H-99-55

KENNETH SMITH,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission reinstates allegations in a Complaint based on an unfair practice charge filed by Kenneth Smith against PBA Local 152 and the New Jersey State PBA. A hearing examiner had granted the respondents' motion for summary judgment and dismissed the allegations as untimely. The allegations concern disciplinary charges against Smith and the PBA's decision regarding those charges. The Commission reinstates these allegations finding that the statute of limitations was tolled while Smith was pursuing his internal union appeal.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

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

For the Charging Party, Kenneth C. Smith, pro se

DECISION

On February 1, 1999, Kenneth C. Smith filed an unfair practice charge against PBA Local 152 and the New Jersey State PBA. The charge alleges that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4b(1) and (5),^{1/} by retaliating against Smith by filing three internal disciplinary charges against him on May 28, 1998; wrongfully finding him guilty on July 21, 1998; wrongfully denying him an appeal; and violating a previous Commission order.

^{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 October 14, 1999, a Complaint and Notice of Hearing issued. The respondents filed an Answer denying that they violated the Act and asserting, in part, that the charge is untimely.

On January 3, 2000, the respondents moved for summary judgment. On February 16, the charging party filed a response.

On May 15, 2000, Hearing Examiner Arnold H. Zudick granted summary judgment with respect to the allegations in the Complaint concerning the May 28, 1998 internal disciplinary charges and the PBA's July 21, 1998 decision regarding those charges. H.E. No. 2000-11, 26 NJPER 255 (¶31100 2000). He found that those allegations were untimely because they referred to events more than six months before the unfair practice charge was filed. He denied the motion with respect to the September 8 and October 13, 1998 refusals to conduct an appeal hearing; and the disciplinary charges resulting from an October 13, 1998 verbal altercation.

On May 30, 2000, the charging party requested special permission to appeal. He claims that due to the requirement of exhausting all internal union remedies, his claim could not be filed on time. He also claims that he is representing himself and is ignorant of certain procedural matters.

On June 5, 2000, the respondents filed a response asserting that the request was untimely and did not raise any extraordinary circumstances warranting interlocutory review.

On June 22, 2000, the Chair granted special permission to appeal and issued a stay of further proceedings pending Commission review.

The PBA brought internal union disciplinary charges against Smith. He was fined and suspended from the PBA for 30 days. He filed a timely internal union appeal, but arrived 15 minutes late and his appeal hearing was postponed and rescheduled. Three weeks before the next hearing date, Smith was notified that he had to pay the fine before his appeal would be heard. When he arrived at the union appeal hearing, he was advised that his appeal would not be heard because he had not paid the fine. A verbal altercation ensued and the appeal was not heard. New internal union disciplinary charges were brought as a result of the altercation and Smith was expelled from the PBA. He then filed this unfair practice charge.

The unfair practice charge was filed more than six months after Smith was charged by the PBA, fined and suspended from the union. The Hearing Examiner dismissed these allegations as untimely. We now reinstate them.

The duty of fair representation exists because it is the policy of our Act to allow a single labor organization to represent collectively the interests of all employees within a negotiations unit, thereby depriving employees in the unit of the ability to negotiate individually or to select a minority union as their representative. See D'Arrigo v. State Bd. of Mediation, 119

N.J. 74 (1990); Lullo v. IAFF, 55 N.J. 409 (1970); see also Vaca v. Sipes, 386 U.S. 171 (1967). With such exclusive and collective authority comes a responsibility to the individuals whose negotiations rights are correspondingly limited. A breach of the duty of fair representation occurs when a union's representational conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976).

In Clayton v. UAW, 451 U.S. 679 (1981), the Supreme Court addressed the relationship between the policies requiring that a judicial forum be available to enforce the duty of fair representation and the conflicting national labor policy of encouraging nonjudicial resolution of labor disputes. The Court held that, in most cases, exhaustion of internal union remedies should be required before a suit alleging a breach of the duty of fair representation will be permitted. Such a policy affords a union the opportunity to resolve internal union dispute. But where internal union remedies would be futile, it would be unfair to the employee to require exhaustion.

As in our unfair practice litigation, employees in the private sector have six months to file a duty of fair representation case in court or before the National Labor Relations Board. DelCostello v. Teamsters, 462 U.S. 151 (1983). The Seventh Circuit Court of Appeals has addressed the

relationship between that six month statute of limitations and the obligation to exhaust internal union remedies. Frandsen v. Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees, 782 F.2d 674, 121 LRRM 2465 (1986). The Court stated:

Clayton and DelCostello, read together, envisage the following scheme: an employee seeking to vindicate his right to fair representation has six months from the date of his injury to file suit in federal court. At the same time, however, he must pursue internal union procedures that possibly may provide him with a remedy. Thus, during the pendency of those union procedures, the six-month statute of limitations is tolled, to commence running only when the union procedures are exhausted. [782 F.2d at 681]

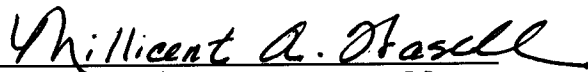
Accord Volkman v. United Transp. Union, 73 F.3d 1047 (10th Cir. 1996); Robinson v. Central Brass Mfg. Co., 987 F.2d 1235 (6th Cir. 1993); see also Ghartey v. St. John's Queens Hosp, 869 F.2d 160, 130 LRRM 2816 (2d Cir. 1989); Legutko v. Local 816, IBT, 853 F.2d 1046, 128 LRRM 3228 (2d Cir. 1988); Adkins v. Electrical Workers (IUE), 769 F.2d 330, 119 LRRM 3594 (6th Cir. 1985). We need not decide all aspects of Clayton's application to New Jersey's public sector or to any possible difference between unfair practice charges and court suits. Under the circumstances of this case, we adopt the Frandsen approach and hold that where Smith attempted to resolve his dispute with his union through internal union procedures, the statute of limitations should be tolled for the period he was pursuing his internal union appeal. Smith may litigate his claims that the May 28, 1998 internal union

disciplinary charges and the July 21, 1998 decision and penalties violated the Act. We express no opinion on the merits of the allegations.

ORDER

The allegations in the Complaint regarding the May 28, 1998 internal union disciplinary charges and the July 21, 1998 decision are reinstated.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: July 20, 2000
Trenton, New Jersey
ISSUED: July 21, 2000

H.E. NO. 2000-11

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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NEW JERSEY STATE PBA,

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-and-

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Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants in part and denies in part the PBA's motion for summary judgment. The Hearing Examiner granted the motion as to those elements of the charge that alleged violations over incidents occurring more than six months before the charge was filed. The Hearing Examiner denied the motion regarding those allegations concerning events that occurred within the six months prior to the filing of the charge.

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(Paul L. Kleinbaum, of counsel)

For the Charging Party, Kenneth C. Smith, pro se

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT

On February 1, 1999, Kenneth C. Smith ("Smith") filed an unfair practice charge with the Public Employment Relations Commission against PBA Local 152 and New Jersey State PBA ("Local" and "PBA," respectively). The charge alleged that the Respondents violated 5.4b(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by retaliating against Smith by the Local's filing of three internal disciplinary charges

^{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."

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against him on May 28, 1998 for sending a letter to the editor of various newspapers proposing that corrections officers secede from the union due to the PBA's alleged inadequate attention to corrections issues. Smith further alleged in his charge that he was wrongfully found guilty and wrongfully denied an appeal of the State PBA's decision regarding the three charges because he refused to pay the fines imposed prior to his appeal hearing. Finally, Smith alleged that the Local violated a previous Commission order which found that but for his filing of an unfair practice charge against the union, the union would not have sought to oust him from membership. See PBA Local 152, P.E.R.C. No. 99-18, 24 NJPER 450 (¶29208 8/20/98), adopting H.E. No. 98-29, 24 NJPER 304 (¶29146 5/28/98).

A Complaint and Notice of Hearing was issued on October 14, 1999, scheduling a hearing for February 1 and 2, 2000. An Answer was filed on behalf of both PBA Local No. 152 and New Jersey State PBA. The Respondents denied certain factual allegations and denied violating the Act. The Respondents also asserted several affirmative defenses including that the Charging Party failed to state a claim upon which relief can be granted; failed to exhaust his available internal remedies; the complaint is an unwarranted interference into the internal operations of the PBA; waived his right to challenge the discipline imposed by the State PBA; the complaint is barred by the doctrine of unclean hands, laches, and waiver; and the unfair practice charge is untimely.

On January 3, 2000, the PBA filed a brief, certification, and affidavits in support of a motion for summary judgment and/or dismissal of the complaint in its entirety. The PBA requested a stay of proceedings pending issuance of a decision on their motion. The motion was assigned to me on January 5, 2000, pursuant to N.J.A.C. 19:14-4.8. By letter of January 21, 2000, I granted the request for the stay. Smith filed a reply to Respondent's motion for summary judgment on February 16, 2000.

Based upon the information placed before me to date, I make the following:

FINDINGS OF FACT

1. Respondent, New Jersey State PBA is a statewide organization made up of local affiliates, including the Middlesex County Correction Officers PBA Local No. 152.
2. PBA Local No. 152 represents Correction Officers employed by the Middlesex County Department of Adult Corrections.
3. Charging Party, Kenneth Smith is a Corrections Officer employed by the County and was a member of PBA Local No. 152.
4. The Constitution and By-Laws of the State PBA include provisions for the processing of internal union disciplinary charges in Articles XV and XXIV. Generally, in accordance with these provisions, union disciplinary charges filed within a local PBA would be heard by a local PBA Judiciary

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Committee and any appeal from that decision would be heard by the State PBA Judiciary Committee. (Respondent's Brief p. 2).

5. On May 24, 1998, a letter written by Charging Party appeared in a local newspaper, promoting secession by Correction Officers from the New Jersey State PBA.

6. As a result of the letter, the State Delegate from PBA Local No. 152, Michael Kaniuk, filed union disciplinary charges against Smith on May 28, 1998, alleging that publication of the letter violated provisions of the State PBA By-Laws.

7. Also on May 28, 1998, a Commission hearing examiner issued her recommended report and decision in prior litigation involving PBA Local No. 152 and Smith (H.E. No. 98-29 above). That case resulted in a recommended finding of an unfair practice by the Local against Smith. (Respondent's Brief p. 3).

8. The State PBA Judiciary Committee conducted a hearing on the union disciplinary charges on July 21, 1998 and found Smith guilty of the charges, ordering that he be suspended for 30 days and fined \$200.00. (Respondent's Brief p. 3-4).

9. Smith filed a timely appeal. The matter was originally scheduled to be heard on September 8, 1998. On that date, Smith arrived approximately 15 minutes late resulting in the PBA refusing to hear the matter at that time. The hearing was rescheduled for October 13, 1998.

10. Approximately three weeks before the appeal hearing, State PBA Judiciary Committee Chairman Michael Materazzo wrote to

Smith advising him that the By-Laws required that he comply with the penalty by paying the \$200.00 fine before his appeal could be heard. Smith claims he had requested a stay of the penalty pending appeal.

11. When Smith arrived on October 13, 1998, he was advised that his appeal would not be heard because he had not paid the fine. A verbal altercation ensued, and the appeal was not heard. (Respondent's Brief p. 4).

12. As a result of the verbal altercation, Materazzo filed new union disciplinary charges against Smith. Those charges were heard by the State PBA Judiciary Committee on December 10, 1998, which found Smith guilty of the charges and expelled him from the PBA. (Respondent's Brief p. 4-5).

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute, and if the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

The Commission's summary judgment rule, found in N.J.A.C. 19:14-4.8(d), states:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary

judgment may be granted and the requested relief may be ordered.

N.J.S.A. 34:13A-5.4(c) provides 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-month period shall be computed from the day he was no longer so prevented.

Smith alleges that the union disciplinary charges filed against him on May 28, 1998, relating to the publication of his editorial letter promoting secession from the union, constituted a form of retaliation. In connection with those charges, he alleged that the hearing and decision of July 21, 1998 was also a form of retaliation. Smith argues that the charges were in response to the decision issued on May 28, 1998 in H.E. 98-29, 24 NJPER 304 which made a recommendation against Local 152.

Respondents' argue that the instant charges against the Local are untimely and should be dismissed. Smith filed his unfair practice charge on February 1, 1999, approximately eight months after the May 1998 union disciplinary charges were brought, and more than six months after the July 1998 hearing was held. Since N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge, the unfair practice charge brought by Smith relating to the May 28, 1998 union disciplinary charges as well as the July 21, 1998 hearing and decision in connection with those charges is untimely. Consequently, Respondent's motion is granted

regarding those specific instances. I, therefore, will not decide whether the Local or the PBA violated the Act by filing the May 1998 charges against Smith or by issuing its decision of July 1998. Any events after February 1, 1999, will also not be considered as violative of the Act.

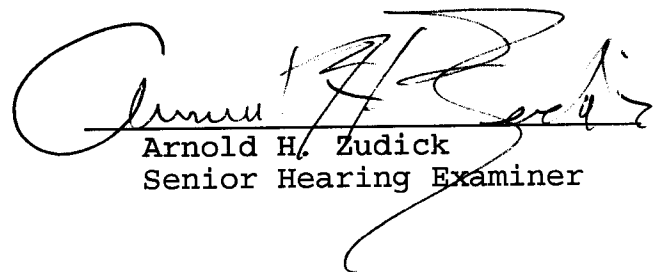
Smith's appeal of the July 21, 1998 decision was scheduled to be heard by the State PBA Judiciary Committee on September 8, 1998. But the Judiciary Committee refused to hear and rescheduled the matter because Smith was late. Smith does not dispute that he was late, but his lateness does not foreclose his opportunity to prove that the PBA's action was an unfair practice. Thus, Respondent's motion with respect to the September 8, 1998 appeal hearing is denied. Smith shall have the opportunity to show whether the PBA violated the Act by not hearing his appeal on that date.

The appeal hearing was rescheduled for October 13, 1998. On that date, the PBA advised Smith that his appeal would not be heard because he had failed to pay the fine imposed by the July decision. The PBA argued that Smith failed to request a stay of the penalty and therefore must pay the fine before the appeal is heard. Smith, however, claims that he did request a stay at his hearing on July 21. Whether or not a stay was requested is a disputed material fact. Smith must be allowed to present his case on whether a stay was requested and, therefore, whether the PBA violated the Act by not hearing his appeal on that date. Consequently, Respondent's motion is denied with respect to this incident.

After the hearing was denied on October 13, 1998, a verbal altercation occurred between Smith and Michael Materazzo, Chairman of the State PBA Judiciary Committee, resulting in Materazzo filing internal union disciplinary charges against Smith which eventually led to his dismissal from the PBA. Smith is entitled to proceed to show that the PBA violated the Act by filing these charges against him. Thus, Respondent's motion is denied with respect to the disciplinary charges filed in response to the October 13, 1998 altercation.

Accordingly, based upon the above findings and analysis, Respondents' motion for summary judgment is granted with respect to the May 28, 1998 disciplinary charges and the July 21, 1998 decision regarding those charges. The motion is denied and Charging Party may proceed with respect to the September 8, 1998 refusal to conduct the appeal hearing; the October 13, 1998 refusal to conduct the appeal hearing; and, the disciplinary charges resulting from the October 13, 1998 verbal altercation.

The hearing will be rescheduled by separate correspondence.



Arnold H. Zudick
Senior Hearing Examiner

Dated: May 15, 2000
Trenton, New Jersey