

D.U.P. NO. 2000-5

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CI-99-56

FRED M. MONTGOMERY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge as untimely filed and a mere breach of contract which does not constitute an unfair practice.

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Appearances:

For the Respondent,
Phillip Dowdell, attorney

For the Charging Party,
Fred M. Montgomery, pro se

REFUSAL TO ISSUE COMPLAINT

On February 1 and February 16, 1999 Fred Montgomery filed an unfair practice charge and amended charge with the Public Employment Relations Commission (Commission) alleging that the City of Newark violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically section 5.4a(1) and (7).^{1/} Montgomery contends that the City failed to pay him

^{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. (7) Violating any of the rules and regulations established by the commission."

certain longevity benefits in accordance with his union contract. The City contends that the charge is untimely filed pursuant to N.J.S.A. 34:13A-5.4c and, therefore, should be dismissed.

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. In correspondence dated August 2, 1999, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the Complaint issuance standard has not been met.

Montgomery was hired by the City as a temporary/seasonal employee on September 12, 1977, and thereafter held consecutive, temporary titles until April 13, 1992 when he was appointed to the permanent title, motorbroom operator. Montgomery was apparently covered by a collective negotiations agreement between the City of Newark and District 6, International Union of Industrial Service, Transport and Health Employees (District 6) covering the period

January 1, 1993 through December 31, 1995.^{2/} The agreement's compensation clause, Article VIII, provides for longevity benefits subject to certain qualifications, including, inter alia, years of service and permanent salary level. Montgomery asserts in his charge that he believed he was entitled to longevity payments in 1988 but that the payments did not begin until April 4, 1994.

On November 17, 1993, Montgomery filed an earlier unfair practice charge (docket number CO-94-33) with the Commission alleging that he was entitled to receive longevity payments pursuant to the District 6 collective agreement after ten (10) years of service, but that the City delayed payments until after seventeen (17) years of service. Montgomery was advised by letter dated December 7, 1993, that the issue appeared to be purely a contractual dispute over which this Commission will not normally assert jurisdiction. It was suggested that Montgomery file a grievance through his union concerning his claims. No further action was taken on the file and it was closed on December 7, 1993. The City contends that no grievance was filed.

A December 30, 1993 memorandum from the City's Personnel Director, John K. D'Auria to Assistant Corporation Counsel, Phillip Dowdell ("the D'Auria memorandum") details Montgomery's work history with the City and cites the District 6 collective agreement to

^{2/} District 6 no longer represents the City's blue-collar employees. After a representation election, SEIU was certified to represent this negotiations unit on March 29, 1999.

support the conclusion that since Montgomery was not a permanent employee until 1992, he was not entitled to longevity payments under the agreement until January 1, 1994. At that time, the payments would be based on a percentage of his January 1, 1993 permanent salary, and he would be entitled to full credit for his seventeen (17) years of service to the City. It is not clear from the parties' submissions what prompted the D'Auria memorandum, nor whether any action resulted from the memorandum.

On June 2, 1994, Montgomery wrote a letter to the Mayor of Newark contending that the City owed him longevity pay from 1987 to 1994. On January 4, 1995, Montgomery's attorney wrote to City Business Administrator Glenn Grant again seeking retroactive longevity benefits to 1987. Grant responded on January 24, 1995, denying Montgomery's claim that additional payments were owed and explained that longevity pay was based on permanent salary, which in Montgomery's case accrued on April 13, 1992, making him eligible for the benefit January 1, 1994. Grant also enclosed a copy of the D'Auria memorandum.

Montgomery retired from the City on February 29, 1996. Sometime in early 1996, Montgomery filed a suit in Superior Court over the longevity payments. Montgomery asserts in his current charge that he was told in Superior Court that he "was in the wrong place and needed to contact P.E.R.C." He contends that he would have filed sooner if he "did not spend all [his] time trying to use the state court system." Montgomery did not specify the nature of

his superior court claim, nor state when or where it was filed or when it was considered by the court.^{3/}

ANALYSIS

The Act requires that to be timely filed, an unfair practice charge must be brought within six months of the alleged unfair practice. N.J.S.A. 34:13A-5.4c.^{4/} See New Jersey Sports & Exposition Auth. and Sports Arena Employees Local 137, D.U.P. No. 99-11, 25 NJPER 145 (¶30066 1999); City of Hoboken, D.U.P. No. 96-11, 22 NJPER 2 (¶27002 1995) (charge alleging City breached collective agreement in manner it paid retirement benefits dismissed as untimely filed, seven months after City's conduct occurred).

In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date of an alleged unfair labor practice, provided the person(s) affected thereby have notice of the action. The date of the action is known as the "operative date", and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must be filed within six months of the operative date.

^{3/} By letter dated April 9, 1999, the parties were requested to provide evidence of the court's directive that Montgomery contact the Commission. The parties advised that they did not receive a written order from the court.

^{4/} N.J.S.A. 34:13A-5.4c states, in relevant 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-month period shall be computed from the day he was no longer so prevented."

Charges and amendments filed past that date are generally untimely. Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the Charging Party that it was "prevented" from filing the charge prior to the expiration of the period.

The standard for evaluating statute of limitations issues was set-forth in Kaczmarek vs. N.J. Turnpike Auth., 7 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on his rights. But the Court still expected charging parties to diligently pursue their claims.

In Kaczmarek, the Court found there was no intent on the charging party's part to delay. The charging party filed the Superior Court action raising unfair practice issues within three months of the operative date, and promptly filed the charge with the Commission within days of learning the court action might be dismissed for lack of jurisdiction. The Supreme Court concluded that the Superior Court should have transferred the case to the Commission which would have preserved the timeliness of the case.

Considering the individual circumstances of this case, Montgomery contends that he was eligible to receive longevity

benefits in 1988, but that the City did not make any payments until 1994. He offers no explanation for why he failed to file an unfair payment charge within six months of the date he contends the payment was due. The charge merely alleges that he filed a claim in Superior Court; it was apparently dismissed and it was suggested that he contact the Commission. There is no evidence, however, that the Superior Court specifically transferred Montgomery's claim to the Commission.

Moreover, Montgomery does not state whether the specific issues raised in this charge were presented in his Superior Court filing. He does not state when he filed his Complaint in Superior Court or when that matter was finally adjudicated. Therefore, it does not appear that his Superior Court filing tolled the limitations period.

Moreover, Montgomery offers no facts to suggest that he was prevented from timely filing his charge here. Compare Kaczmarek; New Jersey Transit Bus Operations, D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995) (charge timely where action initiated in court within six months of alleged illegal conduct, then refiled with the Commission); New Jersey Turnpike Auth., D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). See also New Jersey Institute of Technology, P.E.R.C. No. 97-123, 23 NJPER 296 (¶28134 1997). Based on the foregoing, I find that the charge was not timely filed.

Even if the charge were timely filed, Montgomery's claim does not meet the Commission's Complaint issuance standards.

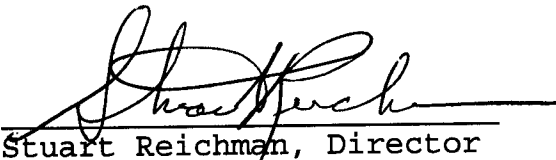
Montgomery alleges that the City failed to pay him certain longevity benefits within the time period he asserts the union contract requires. A breach of contract does not constitute an unfair practice. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984); New Jersey Sports & Exposition Auth. and Sports Arena Employees Local 137.

For all the foregoing reasons, I find that the Commission's Complaint issuance standard has not been met and I decline to issue a Complaint on the allegations of this charge.^{5/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: August 19, 1999
Trenton, New Jersey