

D.U.P. NO. 93-28

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

In the Matter of

PBA LOCAL 105,

Respondent,

-and-

STATE OF NEW JERSEY
(DEPT. OF CORRECTIONS),
Respondent,

Docket No. CI-93-29

-and-

JESSE J. AVERHART,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue complaints on the charges filed by Jesse Averhart. The operative events alleged in the charges are tied to Averhart's 1989 discharge and his 1990 appeals. The charges were not filed for more than one year after these events, therefore, they are untimely filed.

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STATE OF NEW JERSEY
(DEPT. OF CORRECTIONS),
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JESSE J. AVERHART,

Charging Party.

Appearances:

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

For the Respondent, State of New Jersey
Office of Employee Relations
(Melvin L. Gelade, Director)

For the Charging Party,
Jesse J. Averhart, pro se

REFUSAL TO ISSUE COMPLAINT

On September 28, 1992, Jesse J. Averhart filed an unfair practice charge with the Public Employment Relations Commission against PBA Local 105 alleging that in June and July 1992, Local 105 refused to represent him in a disciplinary matter. Averhart amended his charge on October 6, 1992, alleging that the representation provided to him by Local 105 at a February 1990 Office of

Administrative Law ("OAL") hearing appealing his 1989 discharge from the New Jersey Department of Corrections was inadequate. On October 21, 1992, Averhart amended the charge again to include the New Jersey Department of Corrections as a respondent. He alleges that the State and Local 105 violated his rights under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") when they entered into a 1988 agreement, which he was coerced into signing, making his continued employment conditioned upon an improvement in his attendance record. Averhart alleges that the State's actions violated subsections 5.4(a)(1), (3), (5) and (7)^{1/} of the Act and that Local 105's actions violated subsections 5.4(b)(1), (3) and (5)^{2/} of the Act.

1/ These subsections 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."

2/ These subsections 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

Local 105 asserts that the charge is untimely filed and that during 1989 and 1990, adequate and appropriate representation was provided to Averhart. The State also asserts that the charge is untimely filed and further, that Averhart has failed to allege facts sufficient to establish a prima facie violation of the Act.

Averhart was discharged on March 24, 1989 for violating a 1988 agreement tying his continued employment to an improvement in his attendance record. Local 105 provided representation to him during an OAL hearing in February 1990, appealing his discharge. Averhart was dissatisfied with the Local 105 representative's presentation at the hearing. After his discharge was upheld by OAL, Averhart wanted to appeal the decision to the Merit System Board which Local 105 was willing to do. Averhart prepared his own appeal submission which he gave to Local 105, but it included "inept representation" as a reason why his discharge should be overturned. Local 105 then refused to represent him further. Ultimately, on May 7, 1990, the Merit System Board upheld his discharge. Since 1990, Averhart has continued to ask for assistance from Local 105, and they have refused to further represent him.

The Commission is precluded from issuing a complaint where the unfair practice charge has not been filed within six months of the occurrence of the alleged unfair practice unless a charging party has been prevented from filing an otherwise timely charge. See N.J.S.A. 34:13A-5.4(c); UMDNJ, D.U.P. No. 92-22, 18 NJPER 321 (¶23137 1992); Camden Cty Bd. of Chosen Freeholders, D.U.P. No.

88-15, 14 NJPER 389 (¶19152 1988); Bor. of Pitman, P.E.R.C. No. 81-9, 6 NJPER 375 (¶111193 1980); No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

On December 28, 1992, I advised Averhart of my inclination to dismiss the charge against Local 105 and the State because it was untimely filed. Averhart responded on January 7, 1993, stating that he was unjustly discharged in 1989. Additionally, he asserts that Local 105's refusal to represent him in 1990, and again in June and July 1992, should be a continuing violation exception to the six-month statute of limitations set in N.J.S.A. 34:13A-5.4(c) for filing a charge.

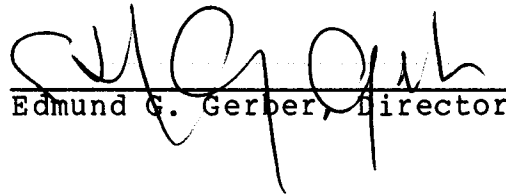
Appeals of Averhart's termination were addressed through an OAL hearing and a Merit System Board decision issued in May 1990 upholding the discharge. Averhart knew prior to the Merit System Board hearing, as well as in December 1990, that Local 105 would not pursue an appeal of his discharge. A year and one-half passed before he requested assistance from the State PBA and Local 105 in June and July 1992 on this same disciplinary matter. Averhart asserts that his 1992 requests for representation should be the dates from which the six-month statute of limitations runs. Therefore, he believes that the charge filed against Local 105 and the State in September and October 1992 should be considered timely filed.

The "continuing violation" theory is not applicable here. This claim is not based on new alleged violations, but rather on the

effect of an earlier alleged violation. See Salem Cty., P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987). The operative events alleged in the charge and the amendments are tied to Averhart's 1989 discharge by the State, his 1990 appeals and the representation then provided by Local 105 to Averhart. Averhart did not file his charges until September and October 1992.

Accordingly, the charges against Local 105 and the State are untimely filed. Therefore, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: January 29, 1993
Trenton, New Jersey