

D.U.P. NO. 90-16

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

In the Matter of

POLICEMAN'S BENEVOLENT ASSOCIATION, LOCAL 105,

Respondent,

-and-

Docket No. CI-90-61

SUSAN B. BAKER,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint in a matter brought by Susan Baker, an individual, against Policeman's Benevolent Association, Local 105 ("PBA"). The charge was filed in an untimely manner. The unfair practice alleged by Ms. Baker occurred on August 29, 1989. Ms. Baker mailed her charge on February 28, 1990 which was received in this office on March 2, 1990. To be timely filed with the Commission, the charge had to be received in the Commission's offices before March 1, 1990; that is, within six-months of the occurrence of the alleged unfair practice.

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Appearances:

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

For the Charging Party,
Susan B. Baker, pro se

REFUSAL TO ISSUE COMPLAINT

On March 2, 1990, Susan Baker ("Charging Party" or "Baker") filed an Unfair Practice Charge against the Policeman's Benevolent Association, Local 105 ("Local 105") with the Public Employment Relations Commission ("Commission") alleging a violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsection 5.4(b)(1).^{1/} Baker claims that Local 105 violated its duty of fair representation when it abruptly refused to take her grievance to the third step of the grievance

^{1/} This subsection prohibits 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."

procedure. Baker alleges that: an institutional vice-president of Local 105 represented her at the first two steps of the grievance procedure; she was later told that Joseph Buchowski, Local 105's executive vice president, would represent her at step three; Buchowski did not appear for the step-three grievance hearing because he was not notified of the date; the step-three hearing was rescheduled to August 30, 1989; on August 28, 1989, Baker called Buchowski to remind him of the new hearing date and learned that he had left for the day and that the PBA would not page him; on August 29, 1989, Phyllis Rush, another executive vice-president of Local 105, called Baker at home and told her that she did not have a valid grievance and the PBA would not represent her further; and the PBA did not represent Baker at the August 30 hearing.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{2/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may

^{2/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.^{3/} The Commission's rules provide that I may decline to issue a complaint.^{4/}

N.J.S.A. 34:13A-5.4(c) precludes the Commission from issuing a Complaint where an unfair practice charge has not been filed within six (6) months of the occurrence of the alleged unfair practice, unless the aggrieved person was prevented from filing the charge. Here, the alleged unfair practice occurred on August 29, 1989, when Baker learned that Local 105 would not continue to represent her in the grievance process. In order to be filed within six months of the occurrence of the alleged unfair practice, the charge had to be filed before March 1, 1990. However, the charge was not filed until March 2, 1990.^{5/}

Baker told the Commission staff agent who investigated this charge that she mailed the charge on February 28, 1990, and that she believed the charge would be received and filed with the Commission in a timely manner.

^{3/} N.J.A.C. 19:14-2.1.

^{4/} N.J.A.C. 19:14-2.3.

^{5/} The fact that February has only 28 days is not controlling. One simply counts months to determine timeliness. However, even if one were to interpret "within six-months" to mean 1/2 year, to be timely the charge would have to have been filed within 183 days of August 29, 1989 or by February 28, 1990. Since the charge was not filed until March 2, it would still be untimely.

In Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978), the New Jersey Supreme Court defined how one is prevented from filing a timely charge within the meaning of the Act.

The term "prevent" may in ordinary parlance connote that factors beyond the control of the complainant have disabled him from filing a timely complaint. Nevertheless, the fact that the Legislature has in this fashion recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon the fairness of imposing the statute of limitations. Cf. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S. Ct. at 1055, 13 L.Ed.2d at 946. The question for decision becomes whether, under the circumstances of this case, the equitable considerations are such that appellant should be regarded as having been "prevented" from filing his charges with PERC in timely fashion.
Kaczmarek, at 340.

In State of New Jersey (OAL), D.U.P. 88-4, 13 NJPER 767 (¶18292 1987) aff'd P.E.R.C. No. 88-65, 14 NJPER 127 (¶19048 1986), I adopted the standard used in Leake v. Bullock, 104 N.J. Super. 309 (App. Div. 1969). In Leake, the Court stated:

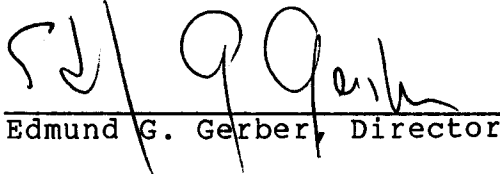
An automobile accident occurred on February 1, 1966. The end of the two year statute of limitation period was reached on February 1, 1968. The plaintiff mailed a complaint on Monday, January 29, 1968. The complaint was received and stamped by the Clerk of the Court as filed on February 2, 1968, a Friday. The complaint was dismissed as untimely. The Court held that due diligence required the plaintiff to have personally delivered the complaint or made prompt inquiry as to whether the complaint was received by the clerk. The Court held that the risk of a delay in mail delivery rested with the plaintiff.

State of New Jersey (OAL), at 768.

Baker mailed the charge on the last day the charge could be filed within the six month period. She could not have reasonably expected mail delivery on that same day.

For the reasons set forth above, I find that the charge is not timely filed and therefore, the Commission's complaint issuance standard has not been met. Accordingly, the charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: May 23, 1990
Trenton, New Jersey