

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME COUNCIL 13 :
 :
 v. : Case No. PERA-C-01-386-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF TRANSPORTATION :
 BARBARA SMITH :
 JAMES KEYS :

FINAL ORDER

The American Federation of State, County and Municipal Employees (AFSCME), Council 13 (Complainant) filed Exceptions with the Pennsylvania Labor Relations Board (Board) from the decision of the Secretary declining to issue a complaint on its Charge of Unfair Practices. Complainant alleged that the Commonwealth of Pennsylvania, Department of Transportation, Barbara Smith and James Keys (Respondents) violated Section 1201(a)(1), (2) and (3) of the Public Employe Relations Act (PERA) by intimidating and threatening employes for discussing work place issues with James Keys, Barbara Smith's supervisor, and as a retaliatory measure. Upon review of the Specification of Charges, and statements from employes that were attached to the Charge, the Secretary determined that the actions complained of did not rise to the level of an unfair labor practice under Section 1201(a)(1), (2) or (3) of PERA. Accordingly, by letter dated November 1, 2001, the Secretary advised Complainant that no complaint would be issued on the Charge.

The Board received Complainant's Exceptions to the Secretary's decision on November 26, 2001, under cover of a letter requesting an extension of time to file a brief. The envelope enclosing the Exceptions bore a private postage meter mark from Philadelphia, Pennsylvania dated November 16, 2001. Because there was a question of whether the Exceptions were timely filed under the Board's holding in Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 31 PPER ¶ 31036 (Final Order, 2000), the Secretary granted the Complainant's request for an extension of time, and directed Complainant to also address this timeliness issue. On November 28, 2001, the Board received Complainant's brief in support of the merits of the Exceptions, and on November 30, 2001, Complainant filed a letter brief addressing the timeliness of the Exceptions.

With regard to the timely filing of the Exceptions, Complainant included affidavits asserting that the Exceptions were deposited in the mail on November 16, 2001. Complainant argued that although there appeared to be sufficient time for the Exceptions to be received by the Board by the filing deadline, in light of the recent current events disrupting the service of the United States mail, the Exceptions should be accepted by the Board as timely.

Section 95.98(a)(1) of the Board's Rules and Regulations provide that a party filing exceptions by mail is to utilize a United States

Postal Form 3817 Certificate of Mailing to demonstrate the date upon which the exceptions were deposited with the United States Postal Service. 34 Pa. Code §95.98(a)(1). Accordingly, the Board has adopted the Pennsylvania Supreme Court's holding in Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999), and disallowed a private postage meter mark as evidence of timely deposit in the mail. City of Philadelphia, supra. The Board stated that "there must be independent evidence that the documents were timely deposited with the United States Postal Service other than the date set by the filing party's meter." Id. at 87.

However, in recognition of the Pennsylvania Supreme Court's prior statement in Miller v. Unemployment Compensation Board of Review, 505 Pa. 8, 13, 476 A.2d 364, 366 (1984), that there may be substantial compliance with the filing requirement where it is "possible to determine the timeliness of a filing from either the face of the document or from the internal records of the court[,] " the Board has interpreted Section 95.98(a)(1) to allow compliance by two means other than a Form 3817 Certificate of Mailing. First, the Board has allowed an official United States Postmark or Postmark cancellation in lieu of the Form 3817 Certificate of Mailing. International Union of Operating Engineers, Local 542 v. Delaware County Solid Waste Authority, 18 PPER ¶18027 (Final Order, 1986). The other instance is where there has been a timely deposit with a private courier as evidenced on the package. Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 32 PPER ¶32137 (Final Order, 2001), appeal pending on other grounds, No. 1776 C.D. 2001 (Pa. Cmwlth.). In City of Wilkes-Barre, the Board noted that in order to be in substantial compliance with Section 95.98(a)(1) there must be independent, third-party evidence of timely deposit provided by either the United States Postal Service or private courier appearing on the face of the mailing.

While we are aware that the United States Postal Service has been affected by recent events, the Board allows only specific types of evidence of the deposit of exceptions with the United States Postal Service, or private courier, to preserve the filing. The envelope containing Complainant's exceptions bore a private postage meter mark, and accordingly it cannot suffice as evidence of the date the Exceptions were mailed. City of Philadelphia, supra. Furthermore, we do not contend with the veracity of the affidavits supplied by Complainant alleging that the Exceptions were mailed on November 16, 2001, however they are not the type of independent, third-party evidence appearing on the face of the mailing that is required by City of Wilkes-Barre, supra.

Complainant cites "unusual circumstances" regarding the United States mail, which it contends should excuse the late filing of its Exceptions. We believe, however, that the recent events referenced in Complainant's letter brief, in addition to any usual delays in the mail, constituted more than adequate reasons for Complainant to utilize an authorized means to assure timely filing of its Exceptions rather than compound normal risks of mail handling with additional delays occasioned by unusual circumstances. We do not believe it was reasonable for Complainant to assume the Board's timely receipt of the Exceptions, especially in light of the unusual circumstances and the well known, convenient, and readily available alternative means to assure timely filing of exceptions.

Because the Complainant's Exceptions were mailed by United States first-class mail but did not have an official United States Postmark or Postmark cancellation, they are deemed filed when received. The Secretary's dismissal of the Charge was issued on November 1, 2001, and accordingly timely Exceptions were due November 21, 2001. As such, the Exceptions received by the Board on November 26, 2001 were filed beyond the twenty-day time period allowed for filing exceptions under Section 95.98, and therefore the Complainant's Exceptions are dismissed as untimely. Accordingly, we will not address the merits of the Secretary's November 1, 2001 decision refusing to issue a complaint.

After a thorough review of the Exceptions, supporting briefs, and all matters of record, the Board hereby dismisses the Exceptions, and affirms the Secretary's decision declining to issue a complaint.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the Exceptions are dismissed and the Secretary's decision declining to issue a complaint is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this eighteenth day of December, 2001. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.