

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-02-10

(UNFAIR LABOR PRACTICE)

BRYAN L. SISNEY,)	
)	
Complainant,)	
)	
v.)	DISMISSAL ORDER
)	
IBEW LOCAL 659, and EUGENE)	
WATER AND ELECTRIC BOARD,)	
)	
Respondents.)	
_____)	

Pamela A. Harrison, Attorney at Law, Eugene, Oregon, represented Complainant.

Lennie Ellis, Assistant Business Manager, IBEW Local 659, Central Point, Oregon, represented Respondent IBEW Local 659.

Sharon A. Rudnick, Attorney at Law, Harrang Long Gary Rudnick PC, Eugene, Oregon, represented Respondent Eugene Water and Electric Board.

On January 12, 2010, Bryan L. Sisney attempted to file this unfair labor practice complaint against IBEW, Local 659 (IBEW), and the Eugene Water and Electric Board (EWEB). As explained more fully below, we dismiss the complaint because it was not accompanied by a valid payment of the statutorily required filing fee.

This is a duty of fair representation case.¹ The complaint, as amended on February 22, 2010, alleges that EWEB violated ORS 243.672(1)(g) when it terminated Sisney's employment without just cause, contrary to the terms of the collective bargaining agreement. It further alleges that IBEW violated ORS 243.672(2)(a) when it refused to arbitrate a contract grievance challenging Sisney's termination.

ORS 243.676(1)(b) requires this Board to investigate unfair labor practice charges to determine if a hearing is warranted. We may dismiss a complaint without hearing if, after the investigation, we determine that no issue of law or fact exists that warrants a hearing. For purposes of deciding whether to dismiss a complaint without a hearing, we assume that the well-pled facts in the complaint are true. *Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institution, and Association of Oregon Correctional Employees*, Case Nos. UP-49/50-98, 17 PECBR 907, 908 (1999). We may also rely on undisputed facts we discover during our investigation. ORS 243.676(1)(b); *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 867-68 (2007); *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 498 n 2 (1993).

On July 16, 2009, Sisney received a letter from IBEW notifying him that IBEW would not pursue his grievance to arbitration. This Board received his unfair labor practice complaint on January 12, 2010, with a check for the \$250 filing fee. The check was written on the account of Sisney's attorney and signed by the attorney. On February 1, 2010, the bank notified this Board that the check had been returned because there were insufficient funds in the account. That same day, the Board notified Sisney's attorney of the status of the filing fee check.

By letter dated February 16, 2010, Sisney's attorney informed this Board that when she sent the check, she believed there were sufficient funds in the account, and she did not become aware of the shortfall until February 1 when the Board notified her that the bank refused to honor the check. Counsel sent another check for the filing fee, which the Board received on February 17, 2010.

¹For a discussion of the duty of fair representation, see generally *Chan v. Leach*, Case No. UP-13-05, 21 PECBR 563 (2006), and *Ralphs v. OPEU and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409 (1993).

DISCUSSION

Under ORS 243.672(3), “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” In a duty of fair representation case such as this one, the 180-day limitations period begins when a complainant knew, or should have known, that the union would not or did not pursue the complainant’s grievance. *Tancredi v. Jackson County Sheriff’s Employee Association and Jackson County Sheriff’s Office*, Case No. UP-31-04, 20 PECBR 967, 977 (2005); *Ralphs v. Oregon Public Employees Union, Local 503*, Case No. UP-68/69-91, 14 PECBR 409, 411 (1993). Sisney received a letter from IBEW on July 16, 2009 informing him it would not pursue his grievance. The 180-day clock began on that date.

In 1995, the legislature imposed fees for filing unfair labor practice complaints and answers to those complaints. ORS 243.672(3). Pursuant to that legislation, this Board adopted OAR 115-035-0000(4). It provides that “[a] filing fee of \$250 must be paid at the time the complaint is filed. Complaints that are filed without a filing fee are subject to dismissal for that reason.”

Sisney attempted to file this complaint on January 12, 2010, exactly 180 days after he learned that IBEW would not pursue his grievance to arbitration. Unfortunately, the check for the filing fee submitted with the complaint was not valid. Complainant submitted another check for the filing fee on February 17, 216 days after the unfair labor practice occurred. At that point, the complaint was no longer timely.

Complainant argues that the filing fee is not jurisdictional and that the language of OAR 115-035-000(4) provides only that “complaints filed without a filing fee are subject to dismissal.” Complainant contrasts this to the language regarding untimely answers in OAR 115-035-0035(4), which specifically states that an “answer will not be considered to be filed until the fee is paid.”

Since the enactment of filing fees in 1995, we have consistently required “complainants and respondents to file their pleadings and pay their filing fees in a timely manner.” *Laborers’ Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 899 (2007). *See also Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245, 249-250 (1999). In *Knowland v. Tri-County Metropolitan Transportation District*, Case No. UP-38-97, 17 PECBR 413, 415 (1997), this Board dismissed a complaint when the bank returned the check for the filing fee because there were insufficient funds in the account. We explained that “[t]his Board has consistently refused to process unfair labor practice complaints until the statutory filing fee is paid.” *Id.*

Complainant attempts to distinguish *Knowland*. There, both the complaint and the filing fee were untimely; here, the complaint was timely but the fee was not. We acknowledge that in *Knowland*, we discussed two alternative grounds for dismissal, *i.e.*, that the complaint was untimely and that the payment of fees was untimely. This Board explained, however, that “[t]he complaint is untimely on either of two bases.” *Id.* Untimely payment of the filing fee is sufficient reason to dismiss the complaint.

Sisney also argues that good cause exists to accept the late filing fee: when Complainant’s counsel sent the filing fee, she believed the account had adequate funds; after she filed the complaint, counsel was ill and out of the office; the bank documents she received on her return led counsel to believe that the bank had paid the filing fee; counsel did not discover that the fee was not paid until this Board notified her on February 1, 2010; and counsel subsequently provided a valid check for the filing fee.

An unstated premise of Sisney’s argument is that good cause can excuse the late filing of a complaint. We have allowed a late answer when the respondent established good cause. *E.g.*, *Laborers’ Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 899 (2007). The filing date for an answer is established by Board rule which specifically permits a late answer if good cause is established. OAR 115-035-0035(3). By contrast, the filing date for a complaint is established by statute, and it does not excuse late filings for any reason. We question, but need not decide, whether good cause can ever excuse a late complaint. For purposes of this Order, we will assume, *arguendo*, that good cause excuses a late filing.

These facts do not establish good cause. Counsel does not dispute that there were insufficient funds in the account at the time the check was filed. Inadvertent errors by a party’s counsel or counsel’s staff are not good cause for filing an untimely answer. *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 425 (2008). We will apply the same standard in our analysis of good cause regarding the timeliness of the filing fee. The fact that counsel was unaware of the status of the account does not establish good cause.

Last, Sisney points out that even after this Board identified the invalid fee as a potential cause for dismissal, the administrative law judge (ALJ) continued to process the complaint and even requested that the complaint be amended pursuant to OAR 115-035-0010. Sisney argues that the ALJ treated the complaint as timely filed, and we should find it to be so. We disagree. The ALJ properly began investigating the complaint on January 13, 2010, before we learned that the check was invalid. By so doing, the ALJ efficiently and expeditiously addressed various potential reasons for

dismissal simultaneously. An ALJ does not need to delay the investigation of a complaint until the check for the filing fee clears. The fact that an ALJ began and continued processing a complaint does not preclude this Board from subsequently dismissing it as untimely.

The Complainant failed to file the complaint and a valid filing fee within 180 days of the occurrence of the alleged unfair labor practices. The complaint is therefore untimely under ORS 243.672(3), and we will dismiss it.

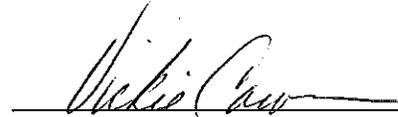
ORDER

The complaint is dismissed.

DATED this 14 day of May 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.