D.U.P. NO. 88-2

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

In the Matter of

PREAKNESS HOSPITAL and
AFSCME, COUNCIL 52, LOCAL 2273,

Respondents,

-and- Docket No. CI-87-85

JEREMIAH KELLY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint on a charge alleging that Preakness Hospital refused to compensate the Charging Party at a rate equal to that earned by a co-employee doing the same type of work. The Director further declines to issue on the charge that Council 52, Local 2273, refused to represent the Charging Party in this matter. The Charging Party filed charges against Local 2273 just 13 days after requesting its representation without giving the local an adequate opportunity to reply. Thus, the Charging Party has failed to allege facts sufficient to constitute a violation against the union under subsection 5.4(b)(1).

Further, the Charging Party has not alleged any unfair practice occurring within six months of the filing of the charge. The Charging Party has failed to show that he took any action under the asserted facts until 21 1/2 months after the cause of action arose; and, he has failed to offer facts sufficient to constitute a timely amendment to his charge. Moreover, he has failed to present facts sufficient to justify the lengthy delay in bringing the charge.

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Appearances:

For the Respondent Preakness Hospital
Thomas Lauricella, Assistant Hospital Administrator

For the Respondent AFSCME, Council 52, Local 2273
Art Delo, Council Representative

For the Charging Party,
Jeremiah Kelly, pro se

REFUSAL TO ISSUE COMPLAINT

On June 22, 1987, Jeremiah Kelly ("Charging Party") filed an unfair practice charge against Preakness Hospital and Council 52, Local 2273, AFSCME. The charge alleges that on May 1, 1985, Preakness Hospital engaged in unfair labor practices by refusing to pay the Charging Party at a rate equal to that earned by a co-employee doing the same type of work.[1/] The Charging Party

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1/ The Charging Party failed to allege specific subsections under either 5.4(a) or (b). N.J.A.C. 19:14-1.3(a)(3) requires that a charge shall contain "a statement of the portion or portions of the Act alleged to have been violated."

further alleges that on February 17 1987, he filed charges in this matter with the Division on Civil Rights and that on June 9, 1987, he wrote a letter to Council 52, Local 2273, AFSCME seeking representation by them. He alleges he received no reply.

N.J.S.A. 34:13A-5.4(c) provides 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 specific unfair practice charged.[2/] The Commission has delegated to me its authority to issue complaints and has established a standard upon which an unfair practice complaint may be issued. This 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/] If, however, this standard is not met, we may decline to issue a complaint.[4/] For the reasons stated below, we have determined that the Commission's complaint issuance standards have not been met.

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...."

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

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

Pursuant to N.J.S.A. 34:13A-5.4(c), 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. More specifically, subsection 5.4(c) provides:

> "that no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the six months period shall be computed from the day he was no longer so prevented."

In Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978), the Supreme Court interpreted subsection 5.4(c) as follows:

> [T]he Legislature, by its very choice of expression, evinced a purpose to permit equitable considerations to be brought to bear. It did not couch the period of limitations in terms of a flat and absolute bar but instead stated expressly that the limitation of the action shall be tolled if the charging party is "prevented" from filing within the six-months period. N.J.S.A. 34:13A-5.4(c). 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 fairness of imposing the statute of limitations. 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. Id. at 339-40.

In Kaczmarek, the statute of limitations did not ultimately bar the filing of an action before the Commission. The Court noted that the Charging Party filed in Superior Court within three months of the alleged violation of the Act. Observing that "[s]tatutes of limitations are primarily designed to assure fairness to defendants," Id. at 340, the Court pointed out that the Respondents were not in any way prejudiced by the Charging Party's late filing because they had timely notice of the matter as a result of the Superior Court action. In addition, had the trial judge transferred the case to the Commission, rather than dismissing it, the charge would have been timely filed. Under all the circumstances, the Court ordered that the charge proceed.

Here, as in Kaczmarek, the Charging Party filed an action before the Division of Civil Rights alleging race discrimination; however, he did not do so until February 17, 1987, some twenty-one and one-half months after the occurrence of the events which gave rise to the charge. The Charging Party alleged no impediment in filing, either before the Division on Civil Rights or this Commission. Additionally, Preakness Hospital asserts, and Charging Party does not dispute, that the case before Civil Rights ended with a negotiated settlement agreement. The Hospital alleges that this agreement was mutually intended to incorporate Charging Party's current arguments. The Charging Party agrees with May 1, 1985, as the date the action arose, and with the filing date of February 17, 1987, before Civil Rights. At an informal conference convened on

July 21, 1987, the Charging Party repeated the same dates and allegations after having been advised of the prohibitions contained in N.J.S.A. 34:13A-5.4(c); however, he disputes that the voluntary settlement agreement before Civil Rights was intended to include his current arguments.

With respect to the charge against the union, the Charging Party filed only 13 days after having complained to Local 2273 about a matter which arose nearly 21 months previously. At the conference, the union representative indicated he had not received the Charging Party's letter of complaint; however, the union indicated that it would agree to pursue the charge on his behalf, by any valid means available. The union further asserted that the reason for the Charging Party's current status was a direct result of his failure to log a sufficient number of hours in the boiler room to qualify for the higher-paying position that he alleges he is entitled to. Thus, the Charging Party filed a charge alleging facts which are disputed but, in any event, which arose nearly two years prior to the filing. He failed to file anywhere until 21 1/2 months following the alleged unfair practice; and apparently, he failed to give Council 52, Local 2273, AFSCME sufficient time to respond to his request for assistance.

The Charging Party has not alleged any unfair practice occurring within six months of the filing of the charge. He has failed to allege facts sufficient to constitute a violation against the union under subsection 5.4(b)(1). He has failed to show that he

took any action, under the asserted facts, until 21 1/2 months after the cause of action arose; and, he has failed to offer facts sufficient to constitute a timely amendment to his charge, or to present facts sufficient to justify the lengthy delay in bringing the charge. Accordingly, we decline to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: August 13, 1987
Trenton, New Jersey