

D.U.P. NO. 88-21

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

In the Matter of

N.J. MEMORIAL HOME FOR SOLDIERS &
AFSCME, LOCAL 2214,

Respondents,

-and-

Docket No. CI-87-8

AMERICA APONTE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint and Notice of Hearing on a charge filed more than eleven months after the 6 month statutory period expired. That charging party's first attorney may have failed to apprise her of the limitation period does not toll the statute and does not show that she was "prevented" from filing a timely charge. Kaczmarek v. N.J. Turnpike Authority, 71 N.J. 329 (1978).

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Appearances:

For the Respondent N.J. Memorial Home
Paul Serduik

For the Respondent AFSCME
Sherryl Gordon, Staff Rep.

For the Charging Party,
Press & Long, Esqs.
(Richard L. Press, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 4, 1986, America Aponte ("Charging Party") filed an unfair practice charge alleging that the New Jersey Memorial Home for Soldiers ("Employer") and AFSCME, Local 2214 ("AFSCME" or "Union") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). She alleged that the employer violated subsections 5.4(a)(1), (3) and (4) when it discharged her on November 19, 1984, or when she failed to timely file a medical report on February 28, 1985. She also alleged that AFSCME violated the Act when it failed to provide her representation at the

scheduled hearings concerning her discharge.

N.J.S.A. 34:13A-5.4(c) states in 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 charge. 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. The Commission rules also state that I may decline to issue a complaint. N.J.A.C. 19:14-2.3.

On August 8, 1986, we informed counsel for Aponte that the charge did not appear to be timely filed under N.J.S.A. 34:13A-5.4(c). We provided Charging Party additional time to allege other facts. On August 26, Charging Party filed a statement asserting that her previous counsel had failed to advise her of the six month filing requirement.

N.J.S.A. 34:13A-5.4(c) states:

...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 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 that subsection.

[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", the Court stated that the respondents were not in any way prejudiced by the Kaczmarek's late filing because they had timely notice 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.

Aponte was allegedly discharged from her position as Human Services Technician on November 19, 1984. She pursued the matter to a Civil Service hearing on January 30, 1985. She was allegedly denied union representation throughout those proceedings. By the

terms of a settlement agreement, Aponte was required to secure a satisfactory medical report by February 28, 1985. When she was unable to submit the medical report on time, a union representative allegedly tendered Aponte's resignation without her approval.

The six month period concerning the portion of the charge alleging that the employer engaged in unfair practices commenced on November 19, 1984, the date Aponte received notice of the discharge. Op. of Berkeley, D.U.P. No. 86-2, 11 NJPER 543 (¶16190 1985). The six-month period concerning the portion of the charge alleging that the union engaged in unfair practices commenced on or about February 28, 1985, more than 17 months before the charge was filed. Unlike the circumstances in Kaczmarek, Aponte filed no other administrative or legal action during the latter six month period. Further, Kaczmarek filed within three months after the six month period tolled; Aponte filed more than eleven months after the six month period tolled. The processing of this matter after such a period would not afford adequate notice to the employer. That Aponte's first attorney may have failed to apprise her of the six month period and failed to file a charge does not approximate the circumstances of the litigant described in Kaczmarek who was "prevented" from filing within the statutory period.

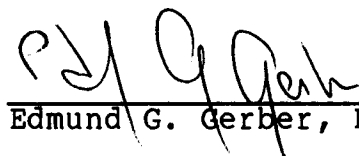
Accordingly, we determine that the Commission's complaint issuance standard has not been met and decline to issue a complaint. See also Burlington Cty. Spec. Serv. Schl. Dist., D.U.P. No. 85-3, 10 NJPER 478 (¶15214 1984); Preakness Hosp., D.U.P. No.

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88-2, 13 NJPER 686 (¶18256 1987); Camden Cty Bd. of Chosen Freeholders, D.U.P. No. 88-15, 14 NJPER ____ (¶____ 1988); Woodbine Develop. Ctr., D.U.P. No. 88-16, 14 NJPER ____ (¶____ 1988).

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: June 30, 1988
Trenton, New Jersey