P.E.R.C. NO. 77-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,
Respondent,

-and-

Docket No. CI-76-19-94

NEW JERSEY TURNPIKE EMPLOYEES UNION,
LOCAL 194, I.F.P.T.E., AFL-CIO,
Respondent,

-and-

WALTER A. KACZMAREK, JR.,
Charging Party.

SYNOPSIS

The Commission grants a motion for summary judgment dismissing a complaint in an unfair practice proceeding on the ground that the events alleged to constitute the unfair practice occurred more than six months prior to the filing of the unfair practice charge. The Commission assumes the accuracy of the factual allegations of the charge, but cannot conclude that such facts in any way prevented the Charging Party from filing within the time required by N.J.S.A. 34:13A-5.4 (c). The Commission also determines that a party that elects to seek vindication of its rights in the Courts, either by advancing legal theories other than violations of rights under this Act, or by alleging violations of this Act which are exclusively within the jurisdiction of this Commission, does so at its own risk. The six-month time limitation will not normally be tolled during the period spent in the judicial forum.

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WALTER A. KACZMAREK, JR.,

Charging Party.

Appearances:

For the Charging Party, Craner, Brennan & Nelson, Esqs.
(Mr. Ronald J. Nelson, of Counsel)

For the Respondent, Turnpike Authority, Bernard M. Reilly, Esq.

For the Respondent, Turnpike Employees Union, Parsonnet, Parsonnet & Duggan, Esqs.
(Mr. Victor J. Parsonnet, of Counsel)

DECISION ON MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission by an individual, Mr. Walter A. Kaczmarek, Jr., on April 13, 1976, and amended and supplemented by letter filed April 26, 1976, alleging that the New Jersey Turnpike Authority (hereinafter the "Turnpike Authority") and the New Jersey Turnpike Employees Union, Local 194, IFPTE, AFL-CIO (hereinafter "Local 194") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically alleging violations of

N.J.S.A. 34:13A-5.4(a)(1) and (7) and N.J.S.A. 34:13A-5.4(b)(1) and (5).[1/] The charge generally alleges that the Turnpike Authority improperly discharged Mr. Kaczmarek and that Local 194 improperly refused to proceed to arbitration of the discharge pursuant to the collectively negotiated agreement between it and the Turnpike Authority.

The charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Director of Unfair Practice Proceedings[2/] that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 29, 1976.

Following the issuance of the Complaint, the Turnpike Authority filed the instant motion for summary judgment contending that the Complaint should be dismissed as it relates to events occurring prior to six months before the filing of the charge,[3/] and as no unfair practice arises on the face of the Complaint.[4/] Local 194 thereafter joined in the motion. The

1/ Subsection (a) prohibits employers, their representatives and agents from "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this act...(7) Violating any of the rules and regulations established by the commission." Subsection (b) prohibits employee organizations, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this act...(5) Violating any of the rules and regulations established by the commission.

2/ On June 22, 1976 the Executive Director, Jeffrey B. Tener, was sworn in as full-time Commission Chairman. See N.J.S.A. 34:13A-5.2, as amended by Section 3 of P.L. 1974, c. 123. Effective immediately thereafter, the Commission approved the elimination of the Executive Director position, and named the Director of Unfair Practice Proceedings as its designee to perform those functions in unfair practice proceedings which the Executive Director had theretofore performed. See N.J.S.A. 34:13A-6(f).

3/ N.J.S.A. 34:13A-5.4(c) establishes a six-month statutory period of limitations on the filing of an unfair practice charge.

4/ The instant motion was originally filed as a motion to dismiss and later converted into a motion for summary judgment. Documents in the record relating to the instant motion bear either designation.

motion for summary judgment is appropriately before us at this time pursuant to N.J.A.C. 19:14-4.1.

All parties have been granted full opportunity to present briefs and/or affidavits with respect to the instant motion. The Turnpike Authority supported its motion by the simultaneous filing of a brief. Local 194's moving papers contain a short statement of position relative to the six-month limitation aspect of the motion. Mr. Kaczmarek's counsel has presented two affidavits and a brief in opposition to the motion pursuant to N.J.A.C. 19:14-4.3.

We shall at this time proceed to discuss the issue relative to the six-month limitation.

The Charging Party alleged, in assertions that are relevant to the disposition of the instant motion, that on July 15, 1975 the Turnpike Authority noticed him with discharge effective July 18, 1975.[5/] Pursuant to a hearing provided in accordance with Article XVII of the Respondent's negotiated agreement, the discharge was affirmed and the Executive Director of the Turnpike Authority, on August 28, 1975, approved the termination. A request of Local 194 by the Charging Party to proceed under Article XVII to binding arbitration was refused on September 10, 1975. As a result the discharge determination became final and binding. On September 22, 1975, Charging Party's prior legal counsel wrote to this Commission concerning the matter, in a Message Memorandum, and the Commission's Executive Director, then our designee for matters relating to unfair practice complaint issuance, responded on October 7, 1975, forwarding appropriate unfair practice forms.[6/]

5/ The allegations of the Charging Party are set forth in detail in the body of the charge. The charge incorporates therein a civil action complaint before the Superior Court of New Jersey, Law Division, Middlesex County, and several other exhibits.

6/ The Message Memorandum and letter in response were attached to the Charge as exhibits.

Thereafter, Charging Party's present Counsel, on or about December 9, 1975, filed a civil action complaint before the Superior Court of New Jersey, Law Division, Middlesex County, alleging that the Respondents, among other violations, violated rights granted under N.J.S.A. 34:13A-1 et seq.

The Charging Party's subsequent affidavit in opposition to the motion for summary judgment alleges that Motions for Summary Judgement before the Superior Court were not filed until March 15, 1976 by the Turnpike Authority and until March 30, 1976 by Local 194. On April 13, 1976, the instant Charge of unfair practice was filed before PERC. The summary judgment dismissal was entered by the Superior Court on April 27, 1976 on the grounds that PERC had exclusive jurisdiction over unfair practices.[1/] The Charging Party asserts that the Motions before the Superior Court were intentionally not filed until the statute of limitations for filing charges before PERC had passed. In addition, an affidavit filed by the Charging Party's prior legal counsel asserts that he was dissuaded from filing a charge before this Commission by the Executive Director's letter of October 7, 1975, and by subsequent telephone conversations with Commission staff personnel.

The factual assertions on behalf of the Charging Party are not disputed by the Turnpike Authority or Local 194 for the instant purposes except to the following extent: (1) The Turnpike Authority disputes that the alleged approval of the discharge determination by its Executive Director was an action pursuant to level 2 of the three step grievance procedure embodied in Article XVII of the Respondents' Agreement; and (2) Local 194

1/ We take administrative notice of the order entered by Judge Bradshaw filed May 4, 1976 (Docket No. L-11258-75) and dated April 27, 1976, to the effect that "it appearing that this Court has no jurisdiction over the subject matter of this action as the Complaint comes within the exclusive jurisdiction of the Public Employment Relations Commission, pursuant to N.J.S.A. 34:13A-1 et seq...."

asserts in a reply to Charging Party's brief in opposition to the instant motion that in its Answer to the civil action Complaint, dated December 24, 1975, Local 194 raised as its Second Separate Defense the argument that the matter was "pre-empted by the Public Employment Relations Commission pursuant to N.J.S.A. 34A(1), et seq. "(sic)". The Respondents do, of course, dispute the legal conclusions that Charging Party seeks us to draw from the asserted facts.

We do not find that the disputed factual allegations are relevant to the disposition of the instant motion. Accordingly, we shall proceed to rule on the motion, and in so doing, construe the allegations in the light most favorable to the Charging Party.

N.J.S.A. 34:13A-5.4(c) provides that unfair practice complaints may not 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 date he was no longer prevented." Pursuant to the above allegations, the final operative event constituting an alleged unfair practice, construed most favorably to the Charging Party, would have occurred on September 10, 1975 when Mr. Kaczmarek was notified by Local 194 of its refusal to proceed to arbitration.[8/] Accordingly, unless Mr. Kaczmarek was prevented from filing a charge before this Commission, or unless the statute was tolled by Mr. Kaczmarek's Superior Court filing, the last day on which a charge might have been cognizable before us was March 10, 1976.[9/]

8/ With respect to the alleged conduct by the Authority the last operative event appears to have been even earlier, when the Executive Director of the Turnpike Authority is alleged to have approved the discharge.

9/ It would appear that the Charging Party was aware of the potential six-month problem when he filed the charge, which states in part, "Finally, it is submitted that the six-month period of limitations in N.J.S.A. 34:13A-5.4(c) should not bar consideration of the within Charge on the merits in light of the correspondence between prior legal counsel and the Executive Director and the very serious question of coverage raised by counsel and the Court."

We shall first consider the question as to whether the Charging Party was prevented from filing his charge with the Commission. As stated above with respect to the affidavit of Mr. Kaczmarek's former attorney and as stated subsequently below in footnote 10, the Charging Party has claimed that a written communication from the Commission's Executive Director and informal conversations with certain Commission staff members, who are unidentified, dissuaded his counsel from filing a charge.

We cannot see how these allegations, assuming arguendo their accuracy, prevented Charging Party from filing a charge. As Respondent Local 194 notes, /"Mr. Kaczmarek's/ counsel inquired as to the procedure for filing a charge, was given the proper forms and thereafter decided not to file a charge." The letter of the Executive Director stated, in part, "Should you claim a violation of statute over which this agency may have jurisdiction, the enclosed forms may be of use." Also enclosed was a copy of the Commission's Rules with a reference to the appropriate chapter. Accordingly, we determine that the Charging Party was not prevented from filing a charge by the Commission's representatives.

The brief of the Charging Party, however, also refers the Commission "to the developing law under 'discovery exception' utilized most effectively in the medical malpractice field of law." Charging Party contends that the "following facts", which are set forth fully below,[10/] "constitute sufficient

10/ (1) The time lapse after the statutory six-month period involves a mere 30 days or so;

(2) The Respondents were fully apprised of the nature and extent of the Charging Party's claim on or about December 9, 1975 (less than three months after the Union's determination not to arbitrate) upon receipt of the pleadings in the Superior Court;

(3) The statute, N.J.S.A. 34:13A-5.4, pertaining to unfair practices and the "exclusive power" of PERC to prevent them is new, having become effective only in January, 1975;

(continued)

excuse under the 'discovery' rule, or the legal 'prevention' exception expressed in the statute" to warrant our consideration of the charge.

We are not persuaded that the Legislature intended this Commission to apply the discovery exception found in medical malpractice law to unfair practices, expecially under the circumstances presented herein. Neither are we persuaded by the novel arguments presented below in support of any criteria thereunder, nor do we feel constrained to comment upon them except as to the following. With respect to proferred excuse number (1), the fact

10/ (continued)

(4) That statute does not expressly or clearly contemplate in its detailed and enumerated circumstances the charge of Mr. Kaczmarek as constituting an unfair practice thereunder;

(5) That statute has not been construed by any authority, judicial or administrative, such as to include the Charge as an unfair practice;

(6) That statute does not expressly or clearly provide that PERC can remedy Mr. Kaczmarek's claim; rather, it speaks of prevention from engaging in unfair practices as within PERC's exclusive power;

(7) The acceptance of the Charge and issuance of the Complaint thereon is contrary to past decisional law establishing a duty of fair representation owed by public employee union to members of the bargaining unit, and judicial authority to consider complaints alleging breach thereof.(footnote omitted)

(8) Correspondence and discussions between prior counsel for the Charging Party and personnel of PERC lulled counsel into believing that there was no statutory basis for jurisdiction under the statute; (footnote omitted)

(9) There is no prejudice whatsoever to the Respondents arising out of the approximately 30-day delay, as documentary evidence and witnesses remain available, and notice of the claim, and the numerous theories advanced by the Charging Party including violation of the Act were set forth in the initial pleading of the civil litigation in December, 1975, see Complaint annexed to Petition;

(10) There has been no want of diligence by the Charging Party in seeking vindication of his rights and interests, although perhaps, it may appear in retrospect that rather than seek the aid of the courts, application should have been made to this Commission, whereas, in contract, the Respondents chose to wait approximately four months during the pendency of the civil litigation, and only after the six-month period had just passed, before asserting the preemption of the case by the Commission. See Jennings v. M & M Transportation Co. 104 N.J. Super. 265, 273 (Ch. Div. 1969) wherein it was stated that "(a) party may be estopped from pleading the statute of limitations if by his conduct it would be inequitable to permit him to do so."

that Charging Party filed "a mere 30-days or so" late does not reach the issue of prevention. We are persuaded that the Legislature intended a six-month limitation, not seven months. Secondly, notwithstanding the effect, if any, stated in excuse number (10) that Respondents waited until six months had passed before asserting that jurisdiction was preempted by this Commission,[11/] it appears that the Charging Party was on notice as early as the filing of Local 194's answer to the complaint, in December 1975, that at least one of the Respondents intended this defense.

Accordingly, we conclude that Charging Party was not prevented from filing a timely charge.

We shall secondly consider whether the statute of limitations was tolled by the filing of civil action in the Superior Court. Charging Party's instant unfair practice charge states: "Despite the foregoing and the position of the charging party before Judge Bradshaw that PERC does not have jursidiction over this matter, by reason of the dismissal of the Complaint, the Charging Party now seeks a clear determination from PERC as to its jurisdiction over this unfair practice charge, as more particularly set forth in the aforesaid appeal." It thus appears that the Charging Party perceived that its Complaint before the Superior Court was not grounded upon a claim of unfair practice. And yet we note that among the pleadings before the Superior Court, which as we have previously stated are attached to and incorporated as part of the Charge, violations of N.J.S.A. 34:13A-1.1 et seq. are alleged.

Our conclusion is that it makes no difference whether the Charging Party alleged or did not allege matters that constituted unfair practices

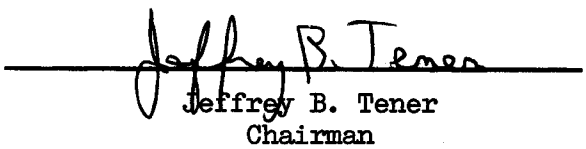
11/ If this were a factor considered by the Respondents in timing the filing of their motions with the court, it is not explained why the Respondents were aware of the six months limitations but the Charging Party was not.

before the Superior Court. If the Charging Party advanced theories of law other than unfair practice allegations before the Superior Court and awaited the disposition of those arguments before proceeding before us with unfair practice allegations, he was clearly proceeding at his own risk. If the Charging Party alleged among his pleadings before the Superior Court unfair practice matters that pursuant to N.J.S.A. 34:13A-5.4(c) are exclusively within the jurisdiction of the Commission, he was proceeding in the wrong forum. The time spent in an inappropriate forum does not serve to toll the six-month limitation of N.J.S.A. 34:13A-5.4(c).

Based upon the foregoing reasons, we conclude that the Charge alleges facts which occurred prior to the six-month limitation embodied in the Act, that the Charging Party was not prevented from filing a timely charge before this Commission, and that the filing before the Superior Court has not served to toll the six-month limitation. We agree with the Respondents that the Complaint issued herein should be dismissed on this basis. In view of the above, we need not proceed to discuss the second contention raised by the Respondent Turnpike Authority in support of dismissal.

Accordingly, the Motions for Summary Judgment are granted and the Complaint in this matter should be and hereby is dismissed.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Commissioner Forst did not participate in this matter.
Chairman Tener and Commissioners Hartnett, Hipp, Hurwitz and Parcells voted for this Decision.

DATED: Trenton, New Jersey
September 21, 1976
ISSUED: September 22, 1976