

D.U.P. NO. 99-14

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

In the Matter of

ATLANTIC CITY SPECIAL IMPROVEMENT  
DISTRICT AND SEIU, LOCAL 255,

Respondents,

-and-

Docket No. CI-98-89

JOSEPH W. POSTAL,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices refuses to issue a complaint upon allegations that the Atlantic City Special Improvement District violated the Act by terminating Postal after a random drug test produced a positive result. Postal further alleged that SEIU breached the duty of fair representation when it declined to pursue Postal's grievance to arbitration. The Director finds that Postal's charges were not filed within the Commission's six-month limitations period, and that neither Postal's filing with the National Labor Relations Board, nor his lack of knowledge of the Commission's jurisdiction, acted to toll the limitations period. Further, there is no evidence of bad faith, fraud or invidious discrimination in SEIU's representation of Postal.

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Appearances:

For the Respondent - Public Employer,  
Donald Guardian, Executive Director

For the Respondent - Employee Representative,  
Mark Reader, Organizing Director

For the Charging Party,  
Joseph W. Postal, pro se

**REFUSAL TO ISSUE COMPLAINT**

On May 22, 1998, Joseph Postal, a former employee of the Atlantic City Special Improvement District (ACSID) and a shop steward of the Service Employees International Union, Local 255 (SEIU), filed an unfair practice charge against ACSID. On June 23, 1998, Postal amended the charge to also name the SEIU as a respondent. Postal alleges that ACSID violated the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a).<sup>1/</sup> by terminating Postal on September 23, 1997 after a random drug test produced a positive result. Postal alleges SEIU violated 5.4(b)<sup>2/</sup> of the Act when it breached its duty of fair representation by initially agreeing, then declining to arbitrate Postal's termination.

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<sup>1/</sup> The charge fails to specify which provisions of N.J.S.A. 34:13A-5.4(a) were violated. N.J.S.A. 34:13A-5.4(a) prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

<sup>2/</sup> The charge fails to specify which provisions of N.J.S.A. 34:13A-5.4(b) were violated. N.J.S.A. 34:13A-5.4(b) prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

ACSID denies that it violated the Act. It asserts that all employees are tested for drug use as part of its policy of maintaining a drug-free work environment. It contends that Postal's termination was consistent with its treatment of other employees who have been terminated after testing positive for cocaine use.

SEIU avers that Postal's charge is outside the Commission's statute of limitation and should be dismissed. SEIU also argues that it did not violate the Act when it made a good faith decision not to arbitrate Postal's termination.

Postal contends that the six-month filing limitation set forth in N.J.S.A. 34:13A-5.4(c) should be relaxed because he did not learn that this Commission has jurisdiction over ACSID employees until he consulted with an attorney in March 1998, and he did file a timely charge with the National Labor Relations Board on December 9, 1997.

The Commission has authority to issue a Complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a Complaint. N.J.A.C. 19:14-2.3. In correspondence dated March 22, 1999, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at

that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

Postal began employment with ACSID as a courtesy patrol representative on December 27, 1993. On September 12, 1997 hair samples were collected from Postal and several other employees for random drug screening. Postal's employment was terminated on September 23, 1997 after his hair produced a positive result for cocaine. At SEIU's expense, Postal took a second drug test on September 24, 1997 at an independent facility, which also produced a positive result. Postal grieved his termination and on November 12, 1997, ACSID Executive Director Donald Guardian denied Postal's grievance.

On December 9, 1997, Postal filed a charge against the employer with the National Labor Relations Board. On January 2, 1998, Postal withdrew the charge after having been advised by the assigned Board Agent that the charge concerned a state agency outside the Board's jurisdiction.

Postal alleges that the drug testing was not part of the employer's policies or the negotiated agreement and violated Postal's personal and civil rights; that his pharmacist indicated that a July 1997 lidocaine injection Postal received from his dentist would mimic a positive result for cocaine; and that he was targeted for termination due to his union activities as a shop

steward. Postal further alleges that SEIU organizer Mark Reader reversed an initial promise to pursue Postal's termination to arbitration, advising him that SEIU felt the case would be too costly and could not be won.

#### ANALYSIS

N.J.S.A. 34:13A-5.4(c) establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

...that 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 a charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

Postal's charge against ACSID was filed with the Commission on May 22, 1998 -- more than six months after his termination on September 23, 1997. Postal's allegations against SEIU were filed on June 23, 1998, more than six months after SEIU declined in November 1997 to arbitrate his grievance. Therefore, all of the allegations here are outside the Commission's six-month period for filing.

Postal asserts however that the statutory provision is relaxed because he filed at the National Labor Relations Board, and because he did not learn about this Commission's jurisdiction until March 1998. For the reasons that follow, this claim is rejected.

The Legislature included a six-month statute of limitations in the Act to induce parties to file charges expeditiously and to

prevent the litigation of stale claims. The Legislature provided only one exception to the statute and that was under circumstances where a party is "prevented" from filing a charge. City of Margate, P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993). Equitable considerations are relevant when determining if a person has been prevented from filing a timely charge and should be weighed against the Legislature's objectives in imposing a limitations period. In Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978), the New Jersey Supreme Court described how someone is "prevented" from filing a timely charge within the meaning of the Act.

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 the fairness of imposing the statute of limitations. Cf. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S. Ct. at 1055, 13 L.Ed.2d at 946. 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 340.]

Here, there is apparently no evidence that Postal was prevented from filing a timely charge with the Commission. Although Postal filed a charge with the NLRB, it is a forum that does not have the power to transfer cases to the Commission. Kaczmarek, supra. Filing with another administrative agency does not toll the statute of limitations for filing unfair practice charges with the Commission. New Jersey Sports and Exposition Auth., D.U.P. No.

89-6, 15 NJPER 58 (¶20021 1988). The initiation and processing of a grievance does not toll the statute of limitations concerning the charge against ACSID. Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984). The operative event here occurred on September 23, 1997, when Postal was terminated, not on November 12, 1997, when ACSID's Director denied Postal's grievance. A charging party's lack of knowledge of the Commission's jurisdiction is insufficient to toll the six-month filing deadline. Burlington Cty. Spec. Serv. Schl. Dist., D.U.P. No. 85-3, 10 NJPER 478 (¶15214 1984). While Postal asserts that he did not learn about his rights under our Act until March 1998, that lack of knowledge is insufficient to toll the statute of limitations. Based upon the foregoing, I find that Postal's allegations against ACSID are outside the Commission's statute of limitations and, therefore, no Complaint may issue on those allegations and the charge against ACSID is dismissed.

The charge against SEIU was filed on June 23, 1998. Accordingly, any event which occurred before December 22, 1997, cannot be the subject of a Complaint. N.J.S.A. 34:13A-5.4(c). Postal's charge against SEIU is also untimely and I dismiss it.

The charge does not specify the date that Postal was informed that SEIU would not continue to represent him in the grievance process by pursuing the matter of his termination to arbitration. SEIU determined not to pursue the termination grievance any further after ACSID's Director denied the grievance in



November 1997 -- more than six months before Postal filed charges against SEIU in June 1998. In any event, it is the responsibility of the charging party to allege the date(s) when the unfair practice(s) charged occurred. In the absence of timely allegations, I decline to issue a Complaint. N.J.S.A. 34:13A-5.4(c). No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977); N.J. Turnpike Employees Union, Local 914, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). Therefore, I find that Postal's charge against the SEIU is untimely and does not meet the Commission's Complaint issuance standards.

Further, none of the facts alleged, even if true, would support a finding that SEIU breached its duty to fairly represent Postal.

N.J.S.A. 34:13A-5.3 provides in part:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary,

discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ; New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [10 NJPER 13].

Vaca further held that an employee has no absolute right to have a grievance taken to arbitration. (386 U.S. at 191, 64 LRRM at 2377). Employee organizations are entitled to a wide range of reasonableness in determining how to best service their members. New Jersey Transit, D.U.P. No. 96-19, 22 NJPER 144 (¶27074 1996); Jersey City Bd. of Ed., D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992). Therefore, a union does not necessarily breach its duty of fair representation by refusing the employee's request. See PBA Local No. 183 et al. (Brian Moriarity), H.E. No. 92-10, 17 NJPER 518 (¶22258 1991), adopted P.E.R.C. No. 92-81, 18 NJPER 96 (¶23043 1992) (Union's decision not to take the officer's grievance to arbitration was based upon a good faith determination that it could not be sustained); Fair Lawn Ed. Ass'n, P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984) (no violation where union in good faith refused to take grievance to arbitration since it lacked merit); N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) (no breach of the duty of fair representation found where the union competently represented the complaining grievant at

an administrative hearing and, thereafter, concluded that proceeding to arbitration would be a "can't win" situation).


Here, there is no evidence of bad faith, fraud or invidious discrimination. Rather, SEIU objectively determined that it could not succeed in arbitrating Postal's termination in the face of a second positive drug test from an independent facility of SEIU's own selection.

Based upon all of the above, I find that the Commission's complaint issuance standard has been not been met and I decline to issue a complaint on the allegations of this charge.<sup>3/</sup>

**ORDER**

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES

  
Stuart Reichman, Director

DATED: May 12, 1999  
Trenton, New Jersey