P.E.R.C. NO. 94-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MARGATE,

Respondent,

-and- Docket No. CI-H-93-10

DAVID J. CATTIE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the City of Margate's motion for summary judgment and dismisses a Complaint based on an unfair practice charge filed by David J. Cattie. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act by refusing to hire him in June 1991, as a City lifeguard. The Commission finds no equitable justification for tolling the statute of limitations.

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DAVID J. CATTIE,

Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, P.C., attorney (Lisa A. Sanders, of counsel)

For the Charging Party, Jules R. Cattie, Jr.

DECISION AND ORDER

On July 24, 1992, David Cattie filed an unfair practice charge against the City of Margate.[1/] The charging party alleges that the respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(3) and (7),[2/] by refusing to hire him in June 1991 as a City lifeguard.

1/ Because the charging party is a minor, the charge was filed by his father, Jules Cattie, Jr.

2/ These subsections prohibit public employers, their representatives or agents from: "(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. (7) Violating any of the rules and regulations established by the commission."

On January 20, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 17, the Director denied the City's motion for reconsideration. On March 16, the City moved for summary judgment arguing that the charge was untimely filed. The motion was referred to Hearing Examiner Arnold H. Zudick.

On June 8, 1993, the Hearing Examiner recommended that summary judgment be granted. H.E. No. 93-28, 19 NJPER 296 (¶24153 1993). He found that the charge was untimely under N.J.S.A. 34:13A-5.4(c). This subsection provides, in relevant part:

> 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.

According to the Hearing Examiner's findings, on June 16, 1991, David Cattie and his brother Jules III were administered a three-part test to become lifeguards at the Margate City Beach Patrol. Both received failing scores and were not hired. Beginning on June 19, their father wrote a series of letters to various Margate officials protesting his sons' scores and claiming that both were retaliated against for Jules III's protected activity. Although the father learned by July 1991 that Jules III's scores had been altered, it was not until April 1992 that he learned that David's scores had been altered as well. The Hearing Examiner rejected the charging party's argument that since he did not know

about the falsification of his scores until ten months after the City refused to hire him, he was prevented from filing a charge; thus tolling the statute of limitations. The Hearing Examiner instead concluded that letters sent by the father to the City demonstrated sufficient knowledge of retaliation against both brothers in 1991 so that the statute of limitations should not be tolled.

On June 18, 1993, the charging party filed exceptions. He argues that the Hearing Examiner improperly relied on inferences drawn from his father's letters and incorrectly concluded that even if an October 1991 date triggered the statute of limitations, the charge would still be untimely. In addition, he contends that since a Complaint issued, the matter should receive a hearing.3/

On June 25, 1993, the City filed an answering brief. According to the City, the Hearing Examiner relied on facts clearly stated in the father's letters to the City and the Director's decision to issue a Complaint does not restrict the Hearing Examiner from determining that the charge was untimely. It urges us to adopt the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-18) are accurate. We incorporate them here.

When considering a motion for summary judgment, all inferences and doubts must be drawn against the moving party and in

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3/ We deny the charging party's request for oral argument.

favor of the non-moving party. N.J.A.C. 19:14-4.8(d); see also Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). In addition, no material factual issues can exist. Id. at 74. The granting of such a motion must be made with extreme caution.

Using this standard, we now consider whether the charge is barred by the six-month statute of limitations imposed by N.J.S.A. 34:13A-5.4(c). David Cattie alleges that the unfair practice occurred in July 1991 when the City refused to hire him, but he did not file this charge until a year later. Consequently, unless the charging party can demonstrate that he was prevented from filing within six months of July 1991, his claim is time-barred. See City of Margate, P.E.R.C. No. 93-1, 18 NJPER 391 (¶23175 1992); see also State of New Jersey, P.E.R.C. No. 77-14, 2 NJPER 308 (1976).

Equitable considerations are relevant when determining if a person has been "prevented" from filing a timely charge under N.J.S.A. 34:13A-5.4(c) and should be weighed against the Legislature's objectives in imposing a limitations period. Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329, 339 (1978); see also Galligan v. Westfield Centre Services, Inc., 82 N.J. 188, 193 (1980). In Kaczmarek, the diligent pursuit and timely filing of a charge, although in an inappropriate forum, justified the tolling of the statute of limitations as the plaintiff "at no time 'slept on his rights.'" Id. at 341.

In this case, the charging party asserts that his lack of knowledge of the falsified test scores prevented him from filing a

timely charge. However, his father's October 21, 1991 letter demonstrates an intent to pursue "all remedies available including the deposition and subpoenaing of those who conspired...to violate the civil rights and fair hiring practices of my sons." Although the alleged falsification of the charging party's test scores may not have been known by him then, he believed that an unfair practice might have occurred. The October 1991 letter specifically alleges that the charging party may not have been hired due to retaliation for his brother's protected activity. Unlike Kaczmarek, the charging party did not attempt to further this claim and the Legislative purpose of encouraging the diligent pursuit of causes of action and preventing stale claims would be frustrated by ignoring the statute of limitations. Absent an equitable justification for tolling of the statute, we must grant summary judgment and dismiss the Complaint.

ORDER

The City of Margate's motion for summary judgment is granted. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: October 25, 1993
Trenton, New Jersey
ISSUED: October 26, 1993

H.E. NO. 93-28

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MARGATE,

Respondent,

-and- Docket No. CI-H-93-10

DAVID J. CATTIE,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employmnent Relations Commission ganted a motion for summary judgment and recommended the Commission adopt his decision on the motion and dismiss the Complaint. The Hearing Examiner concluded that the charge was untimely filed. The Charging Party had alleged that he was "prevented" from filing a charge because he had no knowledge of certain supporting evidence until ten months after the alleged unlawful act. The Hearing Examiner, however, found that the Charging Party had ample knowledge, basis and intent to file a timely charge.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 93-28

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MARGATE,

Respondent,

-and- Docket No. CI-H-93-10

DAVID J. CATTIE,

Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, P.C.
(Lisa A. Sanders, of counsel)

For the Charging Party, Jules R. Cattie, Jr. (father of Charging Party)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION
ON MOTION FOR SUMMARY JUDGMENT

On July 24, 1992, an unfair practice charge was filed with the Public Employment Relations Commission on behalf of Charging Party David J. Cattie, a minor, by his father Jules R. Cattie, Jr. (Jules Jr.), against the City of Margate and the leadership of the Margate City Beach Patrol.[1/] The charge alleged that the City

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1/ It is clear from the charge and other documents related to this case that Jules Jr. is David Cattie's chosen representative to pursue and prosecute this case before the Commission on his behalf. Such action is consistent with N.J.A.C. 19:14-1.1 which provides:

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violated subsections 5.4(a)(3) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[2/] by allegedly assigning David a failing score in a lifeguard exam in retaliation for his older brother, Jules R. Cattie, III (Jules III or Jules), having previously exercised his right to file an unfair practice charge. The Charging Party sought lost wages for the summers of 1991 and 1992, a posting of the corrected lifeguard score, and certain fees.

A Complaint and Notice of Hearing was issued on January 20, 1993, scheduling a hearing for March 24, 1993. By letter of January 26, 1993, the City objected to the Director of Unfair Practices' decision to issue a complaint, and by letter of February 8, 1993,

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1/ Footnote Continued From Previous Page

> A charge that any public employer...has engaged or is engaging in any unfair practice listed in...N.J.S.A. 34:13A-5.4 may be filed by any public employer, public employee, public employee organization, or their representative. (emphasis added).

Like any other chosen representative, a union business agent, a management consultant, or an attorney, who is prosecuting, or defending against, a charge, Jules Jr. became a party in this matter on David's behalf, and all the knowledge and information Jules Jr. had related to this charge was attributable to David.

2/ These subsections prohibit public employers, their representatives or agents from: "(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. (7) Violating any of the rules and regulations established by the commission."

the City formally filed a request for reconsideration of the Director's decision. On February 17, 1993, the Director denied the request. On March 16, 1993, the City filed a motion for summary judgment with the Commission seeking dismissal of the complaint. The City argued that the charge was untimely filed. I stayed the hearing on March 17, 1993. On March 18, 1993, the Chairman referred the motion to me pursuant to N.J.A.C. 19:14-4.8. On April 5, 1993, Jules Jr. filed a response to the motion on his son's behalf. Neither party submitted affidavits regarding the motion, but both parties submitted other documents in support of their positions.

This decision is only in response to the issue raised in the motion. It is not intended to review the merits of the charge. The focus here is on whether the Charging Party, which includes Jules Jr., was "prevented" from filing a timely charge within the definition of that term. If he was not prevented from filing the charge within six months of the operative date, the charge/complaint must be dismissed.

The filing of this charge was the culmination of a series of events that began in 1989 involving the Charging Party's brother Jules III. The allegation in the charge, and the statute of limitations issue in particular, cannot be understood or analyzed in a vacumn. They must be considered within the historical context that lead to the filing of the charge. In deciding whether the Charging Party was prevented from filing a timely charge the focus here is on whether the Charging Party was aware of and understood

the historical background of the charge, whether the City took any action to intentionally prevent the Charging Party from timely filing the charge, or whether any other entity or any circumstances prevented him from filing a timely charge.

Based upon the documents filed by the parties in this proceeding to date, and upon certain documents and information of which I took administrative notice, I make the following:

Findings of Fact

1. In the summer of 1989, the Charging Party's brother, Jules III, was employed as a lifeguard by the Borough of Longport. He was also a member of the Longport Lifeguard Association. On August 29, 1989, Richard Smallwood, Captain of the Longport Beach Patrol, charged Jules III with an offense which led to his discharge on September 4, 1989. Jules filed a grievance which progressed to arbitration. On January 11, 1990, an arbitrator reinstated Jules III retroactive to August 1989 and ordered him returned to work for the 1990 summer season.

On September 5, 1990, Jules III was suspended for certain alleged offenses. A disciplinary hearing was held before Captain Smallwood on September 11, and a separate hearing officer found him guilty of charges on September 15, 1990. By letter of September 25, 1990, Captain Smallwood notified Jules that he was dismissed from his lifeguard position.

On October 16, 1990, Jules III filed an unfair practice charge with the Commission against Longport (Docket No. CI-91-22)

which he amended on November 7, 1990, alleging that he was harassed and dismissed for exercising protected activity. A complaint and notice of hearing was issued on January 2, 1991 scheduling a hearing for June 18, 1991.[3/]

2. On June 15, 1991, brothers Jules and David Cattie took the lifeguard test for the City of Margate. A passing score of 70 was required for hiring. According to the City, neither brother passed. Jules was assigned a score of 69 and David a score of 67 (see attachment to City's motion).[4/] On June 16, 1991, Lieutenant Cinquatta of the Margate Beach Patrol allegedly told Jules Jr. that the Margate Beach Patrol Co-Directors, Carl Smallwood (the brother of Longport Captain Richard Smallwood) and Mr. King, altered Jules III's score because he had filed the Longport charge against Captain Richard Smallwood.[5/]

3/ The facts developed above were obtained from a review of the file in Docket No. CI-91-22 of which I took administrative notice pursuant to N.J.A.C. 19:14-6.6. These facts are not relied upon to determine the motion, but provide background to understand the charge.

4/ Attached to the City's motion and to the charge in CI-92-61 filed by Jules III which was attached to the Charging Party's response to the motion, is a document called "Results Posted By Margate City Beach Patrol." That document shows Jules' and David's lifeguard score, but there is no date on the document, and no other evidence shows when it was issued.

5/ Attached to the Charging Party's response to the motion is a letter of October 7, 1992 from Jules Jr. to the Commission's Director of Unfair Practices. In that letter, Jules Jr. recounts the conversation he allegedly had with Lieutenant Cinquatta on June 16, 1991. While I am not ruling on the ultimate veracity of that exchange, for purposes of deciding the motion I accept Jules Jr. statement to show that he knew that Jules III's score was altered.

Jules Jr. spoke to Carl Smallwood on June 16 regarding the test results.[6/] As a result of that conversation, Jules Jr. wrote the following letter to Carl Smallwood on June 19, 1991:

> Per our telephone conversation of June 16, you have agreed to review the scoring of my sons Jules and David Cattie who applied and were administered the Lifeguard test on June 15th. I believe there is a strong possibility of a gross error in the mathematical processing of the raw data that was submitted to you and left for your processing by independent rowing experts. As I discussed with you on Sunday, Jules placed #10 in the swim and rowed in accordance with his training for seven years as a lifeguard and rowing competitor for the Longport Beach Patrol. I think you will agree that the integrity and public perception of the testing process should be absolutely preserved and I certainly hope that there is no relationship between the calculation of the scores of my sons and the differences (which are being adjudicated) that your brother, Captain Smallwood, of the Longport Beach Patrol, has had with my son Jules. (emphasis added).
>
> Perhaps, for example, you could review the scores of qualifiers #8, #9, and 10 in relation to Jules and several of your alternates in relation to Jules, some of whom finished last or close to last in the swim and received a total score of 70 to 75 versus the 69 you calculated for Jules. After this analysis I believe you will find it a mathematical impossibility for Jules not to have finished in the top ten let alone the top 15.
>
> As you indicated, you will contact me at the phone number listed on the applications with the results of your review. I hope to hear from you

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6/ Since the Charging Party included a copy of the charge in CI-92-61 with its response to the motion, I have taken administrative notice of the documents referred to and attached to that charge. Letters of June 19 and June 27, 1991 indicate that Jules Jr. had a telephone conversation with Carl Smallwood on June 16, 1991. The June 19, 1991 letter was also included as an attachment to the City's motion.

> shortly on this matter as an administrative error could be depriving someone of a job opportunity that was earned in the physical competitive testing. I hope this matter can be handled in a fair and expeditious fashion.

I infer from the language in that letter that Jules Jr. had already developed the suspicion that Carl Smallwood changed both Jules III's and David's scores because of Jules' Longport charge. The first sentence of the June 19th letter refers to reviewing both Jules' and David's scores, and the last sentence of the first paragraph raises the question of whether both Jules and David's scores were miscalculated because of the differences between Richard Smallwood and Jules III.

Carl Smallwood did not respond to the June 19th letter, thus, on June 27, 1991, Jules Jr. sent Carl Smallwood another letter repeating most of the first, and the entire last sentence, referred to above from the June 19th letter, again raising suspicion about both Jules' and David's scores.

Carl Smallwood responded to Jules Jr. by letter of July 19, 1991.[7/] Jules Jr., apparently not satisfied with Smallwood's response, requested Sigmund Rimm, Margates' Commissioner of Public Safety and Public Affairs, to review the matter. On August 20, 1991, Rimm notified Jules Jr. that he was satisfied that the lifeguards hired for 1991 were appropriately selected. Jules Jr. responded to Rimm by letter of September 17, 1991. He indicated he

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7/ That letter was referred to in, and attached to the charge in CI-92-61.

was disappointed with Rimm's response; he referred to Carl Smallwood and Mr. King's intentional altering of Jules' score because of the differences Jules had in Longport with Richard Smallwood; he explained that he considered Smallwood's and King's actions a case of unfair hiring; and he threatened to pursue all civil remedies.[8/] But he concluded the September 17 letter with the following note that referred to David:

8/ The letter of September 17, 1991 was attached to the City's motion and referred to in CI-92-61 and provides as follows:

> I am extremely disappointed in the results of the review that you communicated to me by letter on August 20, 1991. As you know, I have been trying to resolve this matter in a fair and expeditious fashion since I contacted your organization on June 27 after Mr. Smallwood failed to respond to me as he promised on June 16. Your conclusion that the numerical score is not the basis of selecting a Margate lifeguard does not address the issue of why Messrs. Smallwood and King openly discussed at lifeguard headquarters in front of several lieutenants and a female beach patrol member, preventing my son from working the Margate Beach Patrol by altering the results of his score.
>
> Your assertion that work experience and references on the job application were pertinent is not valid as the decision to alter the score of my son was made on the 15th and 16th of June and I have verified with previous employers that they were not contacted on or after those dates. The sole reason for Messrs. Smallwood and King altering the score of my son was to prevent him from working in retaliation for differences my son had with Captain Richard Smallwood of Longport (Brother of Carl Smallwood).
>
> You should be aware that the files of my son in Longport were not to be discussed as they were

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> In addition to becoming aware of those present when Messrs. Smallwood and King decided to alter the score of my son Jules, it has also come to my attention that Margate hired lifeguards who were not on the passing or alternate list thus, again, by passing my son Jules and my younger son David who were given scores of 69 and 67 respectively by your subordinates.

Based upon the language of the September 17 letter and the preceding letters, I find that by September 17, 1991, Jules Jr. knew (or certainly believed) that Carl Smallwood and Mr. King had altered Jules' III lifeguard score because he had pursued the Longport matter; suspected that David's score was altered for the same reason; believed that the City hired guards bypassing both Jules III

8/ Footnote Continued From Previous Page

> sealed as a result of a favorable ruling my son received on February 1, 1990 from the Public Employment Relations Commission.
>
> You should also be aware that the Atlantic County prosecutor directed Richard Smallwood to stand trial for criminal harassment and assault on my son for which he is being monitored by the court for six months. I hardly think that Carl Smallwood and Mr. King should retaliate against my son for exercising his right to defend himself in legal proceedings.
>
> Since I view the actions of Messrs. Smallwood and King as a clear case of unfair hiring and violation of the civil rights of my son, I am requesting that yourself and Mr. Ross look into the actions of Messrs. Smallwood and King. I believe you will find that their moral judgment and action in this matter are not ethically and legally sound.
>
> I hope this matter can be resolved informally as I am prepared to pursue all criminal and civil remedies available including the deposition and subpoenaing of all those who were aware of or conspired (including public officials) to violate the civil rights and fair hiring practices of my son.

and David; and believed that the City's actions were illegal and he indicated his readiness to pursue legal action. By that time there was enough evidence and information for Jules Jr. (or Jules III on his own behalf) to file a charge against the City on behalf of both Jules III and David. There is no evidence that Jules Jr. was then prevented from filing such charges.

On September 27, 1991, Jules III withdrew his charge against Longport in CI-91-22. On October 10, 1991, a letter was sent to Jules Jr. by the City's attorney advising him that the City acted correctly regarding Jules III. In his subsequent charge against the City, CI-92-61, Jules III stated that the October 10 letter left him with "no choice but to pursue remedies on a formal basis." Since Jules III did not agree with the October 10 letter, he asked his father (see CI-92-61), Jules Jr., to contact the City's Mayor. By letter of October 21, 1991, Jules Jr. notified Mayor Ross that he was: "trying to resolve the unfair hiring and rights violation of my sons...." (emphasis added), and that he would:

> ...pursue all remedies available including the deposition and subpoenaing of those who conspired...to libel my son and violate the civil rights and fair hiring practices of my sons. (emphasis added).

He also told the Mayor he found that the lifeguard Co-Directors retaliated "not only against my older son but also against my younger son." (emphasis added).9/

9/ The October 21, 1991 letter was included in both the City's motion and the Charging Party's response to the motion. The complete letter is as follows:

> I am writing to you as a follow-up to my letter to Mr. Rimm and yourself of September 17, 1991. As I indicated to you, I am trying to resolve the unfair hiring and rights violations of my sons in an informal manner. Mr. Rimm directed Marvin Pacman to write to me directly. His letter to me was threatening in tone and full of misinformation (indicating his due diligence was superficial).
>
> In any event, I am advising you that I am prepared to deal with his threat of a frivolous lawsuit action and will pursue all remedies available including the deposition and subpoenaing of those who conspired (including those who used their public office) to libel my son and violate the civil rights and fair hiring practices of my sons.
>
> The bottom line of this matter is that Messrs. Smallwood and King openly discussed and did alter the test results of my son and are trying to create a smokescreen to divert attention from that fact.
>
> The application of my son was accepted, both parties of the test administered and the results "rigged."
>
> I believe that the moral judgment of these men should be called into question by your administration and I feel it may be necessary to contact your local media (Margate or Atlantic City) to let your constituents have full disclosure of these events and the quality and character of supervision that is being permitted to direct the Margate City Beach Patrol.
>
> I find it particularly interesting that your Co-Directors hired lifeguards who were not on the passing or alternate list thus retaliating not only against my older son but also against my younger son.
>
> I hope that my feelings on this matter are clear and that you are aware there is no potential that a letter of the nature sent by Marvin Pacman will deter my pursuing a fair resolution of this matter (formal or informal).

Based upon the language in the October 21 letter, particularly when combined with the language in the June 19 and September 17 letters, I find that Jules Jr. had, by October 21, formulated the belief that the City had violated hiring practices for both his sons, and had retaliated against both Jules III and David because of Jules' Longport activities. The October 21 letter shows that Jules Jr. was not intimidated by the City attorney and was ready to proceed with legal action. He gave no reason for not proceeding for both Jules III and David at that time.

3. An unfair practice charge, Docket No. CI-92-61, was filed by Jules III against the City on February 6, 1992 and amended on February 19, 1992. He alleged the City discriminated against him regarding his June 1991 lifeguard score. He further alleged that Margate Co-Director Carl Smallwood would not hire him because of the charge he (Jules III) filed against his (Carl's) brother Captain Richard Smallwood of Longport.

On March 5, 1992, the Commission's Director of Unfair Practices sent a letter to Jules Jr., as Jules III representative, regarding the charge filed in CI-92-61.[10/] The Director informed Jules Jr. that the Act contained a six-month statute of limitations

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10/ The director's March 5th letter (which is contained in the file in CI-92-61) is addressed to Jules R. Cattie, Sr., Re: Jules R. Cattie, Jr. I believe the Director was confused by Jules III's and his father's names. The charging party in CI-92-61 was Jules R. Cattie, the son, who I believe is really Jules R. Cattie, III. The father is Jules R. Cattie, Jr. My references to Jules Jr. refer to the father and Jules III to the son/charging party in CI-92-61.

(N.J.S.A. 34:13A-5.4(c)), and that a charging party was required to file a charge within six-months of the occurrence of any unfair practice unless he was prevented from filing. The Director explained that the operative date took place in June 1991, and the charging party was aware of the City motives that same month. The Director concluded that in the absence of a withdrawal or an amendment warranting the issuance of a complaint he would dismiss the charge.

Jules Jr. responded by letter of March 18, 1992. In the fist sentence of the first paragraph of that letter he indicated he had contacted the City about the scores given his "sons." In the first sentence of the second paragraph, he indentified the City's actions as a "blatant unfair practice event." After explaining that he had taken time to seek informal resolution of the matter, he argued that the "operative event" should have been October 1991, not June 16, 1991.[11/]

11/ The relevant portions of the March 18, 1992 letter, are as follows:

> In response to your letter to me of March 5, 1992, please be advised that I had contacted Margate City, New Jersey starting on June 16, 1991 in person and by telephone regarding "scores" given my sons. I was told directly in person by Mr. Smallwood that he would review the scoring. From June 19, 1991 and forward their was continuous correspondence and telephone conversation with the Commissioner's and Mayor's office regarding the resolution of this matter.
>
> Attached is correspondence from (Cattie to Margate) and (Margate to Cattie) dated June 19, 1991, June 27, 1991, July 19, 1991, August 20, 1991, September 17, 1991 and October 21, 1991 along with correspondence from (Pachman to Cattie) on October 10, 1991 advising us that he

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On April 16, 1992, the Director issued a decision, City of Margate, D.U.P. No. 92-17, 18 NJPER 259 (¶23107 1992), refusing to issue complaint on Jules III charge. He considered the charging party's argument that Jules Jr.'s voluntary attempts to resolve the matter should toll the statute of limitations, but concluded that June 16, 1991 was the operative date. He explained that the Commission had held that attempts at voluntary resolution do not extend the statute of limitations, and he noted that Jules III had not been prevented from filing a timely charge.

11/ Footnote Continued From Previous Page

> had reviewed the matter as counsel for Margate. (emphasis added).
>
> I have made every attempt to resolve this blatant unfair practice event from June 16, 1991 to October 21, 1991 on an informal basis and was hopeful of a satisfactory informal resolution until the notification on October 10, 1991 from Mr. Pachman advising me of the results of his review of this matter.
>
> I had no reason to formalize an unfair labor charge earlier than October 1991 as correspondence and information from the Mayor's and Commissioner's office advised that the matter was still being reviewed internally by Margate and by Margate counsel (October 10, 1991 letter).
>
> I am confident that the time taken to review this matter by Margate internally and with counsel, cannot then be used to discriminate against us in the timing of filling (sic) of this unfair labor change (sic).
>
> Based upon the foregoing facts, I am appealing by this letter any decision to make the "operative event" June 16, 1991 when all of the correspondence and review activity clearly continued into October 1991 by both parties.

Jules Jr. responded to the Director's decision on April 24, 1992. He argued that the "operative date" had to be October 10, 1991, because it was the date the City's attorney notified him that the City had not acted improperly, and because his voluntary settlement attempts should not be used to "discriminate" against the charging party. That letter was treated as an appeal of the Director's decision.

Also in April 1992, an attorney for a former Margate employee allegedly told Jules Jr. that a Margate Beach Patrol Co-Director told his (the attorney's) client that Jules III and David's passing scores were switched with candidates who did not pass.12/

On July 17, 1992, the Commission issued its decision regarding Jules III charge, City of Margate, P.E.R.C. No. 93-1, 18 NJPER 391 (¶23175 1992), sustaining the Director's refusal to issue complaint. The Commission stated that the charging party's attempts to informally resolve the matter did not toll the statute. The Commission explained that since the City consistently indicated since June 1991 that Jules III would not be hired, formal action had to commence within six months from that date.

4. On July 24, 1992, Jules Jr. filed the charge in CI-93-10 on David's behalf. He alleged that David was not hired by Margate because of Jules III charge against Longport and Captain

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12/ See Jules Jr. October 7, 1992 letter to the Director in CI-93-10.

Smallwood. He further alleged that in April 1992 he was told that Margate Beach Patrol Co-Directors switched David's and Jules III's passing scores with candidates who had failed. By letter of October 1, 1992, the Director of Unfair Practices notified Jules Jr. that he was not inclined to issue complaint, but gave the Charging Party time to submit additional argument or information. The Director referred to the decisions in Jules III's case against the City and compared similar facts from both cases. He also explained that the Charging Party was aware of his failing score in June 1991 and had a suspicion of impropriety. The Director did not believe the Charging Party was entitled to an equitable tolling of the statute of limitations; noted the Charging Party had not asserted facts showing continuous diligence in investigating his test score; and explained that the Charging Party had not alleged that the City took action to delay the filing of the charge.

Jules Jr. responded by letter of October 7, 1992. He explained how he learned about the alleged remark from a Co-Director about switching David's score. He argued that David had been equitably prevented from filing.

5. On January 20, 1993, the Director issued a complaint in CI-93-10. By letter of January 26, 1993, the City's attorney objected to the issuance of a complaint. He argued that the charge was untimely filed and that the complaint issuance standard had not been met. He focused on Jules Jr.'s knowledge of the allegations in the charge by September 1991, and argued that the information Jules

Jr. allegedly learned in April 1992 was of such distant hearsay that it could not be relied upon to issue complaint. The Director responded on February 1, 1993. He explained that he issued complaint because of the issues of law and fact raised by the alleged April 1992 information, but gave the City additional time to file an opposing statement.

On February 8, 1993, the City filed a request for reconsideration with the Director regarding the issuance of complaint. The City reviewed many of the events and documents discussed above and argued that the Charging Party: had knowledge that David had not been hired; believed it was discriminatorily motivated; and that he had not been prevented from filing a timely charge.

On February 17, 1993, the Director denied the City's request for reconsideration. On March 16, 1993, the City filed its motion for summary judgment advancing and expanding upon many of the arguments it raised in its February 8th request for reconsideration. The City attached Jules Jr.'s June 19, September 17 and October 21, 1991 letters to its motion. On March 17, 1993, I stayed the hearing scheduled for March 24, and on March 18, 1993, the Commission referred the motion to me for determination.

The Charging Party's response to the motion was received on April 5, 1993. Jules Jr. argued that prior to April 1992, it had never been suggested to or inferred by him that David's score was falsified. He attached a copy of Jules III's charge in CI-92-61,

and his (Jules Jr.'s) letters of September 17, October 21, 1991 and October 7, 1992 to support his response. Jules Jr. concluded his response to the motion with the following paragraph:

> I am looking forward to a rescheduling of the formal hearing which Mr. Gerber had directed by his Complaint and Notice of Hearing correspondence of January 20, 1993. As Mr. Gerber indicated, formal proceedings would allow the parties an opportunity to litigate the legal and factual issues.

ANALYSIS

To better understand the decision in this case, one must first understand the difference between the Director's responsibility to issue complaint and the inherent meaning of a complaint, and my responsibility to decide the motion for summary judgment. In addition, I am concerned about the Charging Party's language in the last paragraph of its response to the motion. I infer two problems from that language. First, that the Charging Party believes that the Director's decision to issue complaint obviates the need to resolve the statute of limitations issue. Second, that the Charging Party believes that only a hearing would give him the opportunity to litigate the legal issues.

The Complaint Issuance Standard

The Act at 34:13A-5.4(c) provides that when it is charged that an entity has engaged in an unfair practice, the Commission's designee shall issue a complaint. But that section of the Act also states that a complaint shall not issue based upon an unfair practice occurring more than 6 months prior to the filing of the

charge unless the charging party was prevented from filing.[13/] The first part of section (c) was implemented by the Commission's Rules and Regulations where it provides that if it appears to the Director of Unfair Practices that the allegations of a charge, if true, may constitute an unfair practice, the Director shall issue a complaint (emphasis added).[14/]

Thus, while the Act mandates the Director not issue a complaint based upon a charge occurring more than 6 months prior to the filing of the charge, the Rule requires him to issue a complaint if it appears that the allegations "if true, may constitute" an

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13/ 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 listed in subsections a. and b. above. 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; provided 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 charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

14/ N.J.A.C. 19:14-2.1(a) provides: After a charge has been filed and processed, if it appears to the director of unfair practices that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings in respect thereto should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues, the director of unfair practices shall issue and cause to be served on all parties a formal complaint including a notice of hearing before a hearing examiner at a stated time and place. The complaint with notice of hearing shall contain:...

unfair practice. The practical application of the Rule in N.J.A.C. 19:14-2.1(a) narrows the Director's discretion on whether or not to issue complaint. He must make a determination on whether to issue complaint based upon the wording of the charge. He may review related documents and other information in deciding whether the wording of the charge "if true, may constitute" a violation of the Act, but when in doubt he must issue a complaint.

Often the impact of applying the Rule is that a complaint will issue without the Director being certain whether it complies with the statute of limitations requirement. In those situations, the statute of limitations issue may be raised by the respondent on a motion, and/or at hearing. Such was the result here. The Director's October 1, 1992 letter obviously shows that he believed the operative date occurred in 1991 and made the charge untimely filed. But since David's charge did not refer to Jules Jr.'s specific letters, the Director could not rely on the letters of June 19, September 17 and October 21, 1991 to overrule the doubt created by the April 1992 allegation. The Director was obligated to rely on that allegation which, "if true", presented the possibility that the Charging Party may have been prevented from filing a timely charge. Thus, the Director was required to issue the complaint, but that complaint only meant that the Charging Party was entitled to move on to more formal proceedings, it did not resolve the statute of limitations issue, and it did not absolutely guarantee a hearing to resolve the issues.

The Commission's Rules also provide at N.J.A.C. 19:14-4.8(a), that subsequent to a complaint (and normally before a hearing) a party(s) may file a motion for summary judgment. When such a motion is filed prior to hearing, the hearing is normally postponed until the motion is decided. At section 4.8(d), the Rule provides that if it appears from the pleadings, the briefs, "and other documents filed"

> ...that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law, the motion...may be granted....

Based upon the above Rule, a hearing examiner has significant discretion in deciding a motion for summary judgment. A hearing examiner is specifically required to consider all the pleadings, briefs and other documents filed related to the motion in deciding the motion. Here, the letters of June 19, September 17, October 21, 1991 and October 7, 1992, were not referred to in David's charge, but they were referred to by the parties in their motion papers, and those documents, as well as other documents of which I was entitled to take administrative notice, provide sufficient information for me to decide this case without a hearing. It is through this motion procedure that the Charging Party has had the opportunity to formally litigate the legal issues.

Summary Judgment

It is well settled law in this State that in considering motions for summary judgment, all inferences are drawn against the

moving party and in favor of the party opposing the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Additionally, in considering a motion for summary judgment, no credibility determinations may be made. The motion must be denied if material factual issues exist. Id. at 74. A motion for summary judgment must be granted with extreme caution, all doubts resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super 182, 185 (App. Div. 1981); State of N.J., Dept. of Personnel, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), certif. den. 122 N.J. 395 (1990); AFT Local 481 (Jackson), H.E. No. 87-9, 12 NJPER 628 (¶17237 1986), adopted P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Essex County Educational Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

However, the Court in Judson also established that if the opposing party offers "no affidavits or matter in opposition," to the moving party, summary judgment may be granted, taking the movant's uncontradicted facts and documents as true, provided those facts or documents did not raise a disputed material fact. Id. at 75. See also, In re City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), adopted P.E.R.C. No. 86-121, 12 NJPER 376 (¶17145 1986); In re CWA, Local 1037, AFL-CIO, H.E. No. 86-10, 11 NJPER 621 (¶ 16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶ 17032 1985). The Court in Judson specifically held that:

> ...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature...he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. 17 N.J. at 75.

In deciding this motion, there are no credibility determinations to be made, and there are no material factual issues in dispute.[15/] The Charging Party offered no affidavits or documents to prove how he might have been prevented from filing a timely charge. He only relied on the wording of the charge which alleged he became aware of information in April 1992 which could affect his case, and he relied on his own letters of September 17, October 21, 1991 and October 7, 1992 to support his case.

The wording of the charge is nothing more than an allegation, it is not support for the allegations contained therein. In addition, it is unnecessary for me to draw inferences in deciding the meaning of Jules Jr.'s letters. Those letters show, on their face, that in 1991 Jules Jr. believed the City, through

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15/ Information in the file shows that the City disputes Charging Party's allegation in the charge that a former employee testified that David's and Jules III's scores were switched with candidates who did not pass. That allegation, thus, is a disputed fact. But that fact is not a material fact here because I need not resolve the dispute over that fact in order to decide the motion. For motion purposes, I can assume the former employee's testimony was as alleged in the charge. The issue in the motion then remains whether the discovery of that information showed that the Charging Party was "prevented" from filing what was otherwise a late charge.

Smallwood and King, engaged in unfair hiring practices by bypassing both Jules III and David; that he (Jules Jr.) was prepared to pursue all civil remedies; that he had informally tried to resolve the unfair hiring practices of both his sons; and, that he believed that the City retaliated against both Jules III and David. The combination of those facts show Jules Jr. had the knowledge and ability to file a charge on David's behalf by October 1991.

The Statute of Limitations

The Legislature included a six month statute of limitations in the Act, in part to prompt charging parties to expeditiously commence proceedings before the Commission, and, in part to prevent the litigation of stale claims. The Legislature included only one exception to the statute, that was in the event a party was prevented from filing a charge.

The New Jersey Supreme court in Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), described how someone is prevented from filing a charge:

> The term "prevent" may in ordinary parlance connote that factors beyond the control of the complaintant 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. 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. [Kaczmarek at 340.]

Having considered all of the circumstances of this case (as well as Jules III's case), I find that there are insufficient equitable considerations here to support a finding that the Charging Party was prevented from filing a timely charge. There were no factors beyond the Charging Party's control that "disabled" him from filing the charge, and there was no showing of any personal problems that may have impeded his ability to bring a timely charge.

In his letter of October 7, 1992 to the Director, Jules Jr. seems to explain the factor he thought "disabled" his ability to file a charge. He said:

> ...it was beyond our control to issue a complaint on behalf of David because we had no knowledge of the falsification of the results of my younger son and were addressed...on June 16, 1991 by Lt. Mike Cinquatta...of only the falsification of the results of my older son Jules....

But that statement is both inaccurate and misleading at best. By the time Jules Jr. authored the October 7, 1992 letter, he had already participated in Jules III's case and "filed the charge" in David's case. He knew, or should have known, that he has no control over the "issuance of complaint", only the Director can issue complaint, he (Jules Jr.) was only required to "file the charge." To the extent Jules Jr. meant to say "it was beyond our control to file a charge on behalf of David" etc., then the statement would still be legally incorrect and factually misleading.

Anyone with the intent and ability may file a charge with the Commission. Jules Jr.'s September 17, 1991 letter demonstrated he had the intent to pursue legal action, and contrary to his above assertion that he had no knowledge of the alleged falsification of David's test results, his October 21, 1991 letter establishes that, at least as of that date, he believed, i.e. had knowledge, that the City retaliated against both Jules III and David. David's charge should have been filed at that time, and if it had it would have been timely.

Jules Jr. may have believed that he had to have all of his evidence together before filing the charge. But there is nothing in the Act or Rules that requires that supporting evidence be filed with a charge. All Jules Jr. had to do was file a charge alleging that David was discriminated against for rights guaranteed by the Act. Based upon his suspicions, the mere allegations of a violation would have been enough to file the charge. He would have had sufficient time to gather evidence and prepare for hearing after the charge was filed.

Just as in Jules III's Margate case, the operative date here for statute of limitation purposes was June 16, 1991, the date both Jules III and David learned they would not be hired by the City. A charge had to be filed by December 16, 1991 to be timely. As suspicion of an alleged violation grew in the fall of 1991 culminating in Jules Jr.'s October 21, 1991 letter, there was sufficient basis and knowledge to file a charge by December 16,

1991. There is no evidence that Jules Jr. was prevented from filing by that date. Had a charge been filed by that time, Jules Jr. would have had the opportunity to engage in discovery pursuant to N.J.A.C. 1:1-10.1 et seq., and perhaps learn at an earlier date the information which was allegedly revealed to him in April 1992. The Charging Party's lack of knowledge of that information, however, was insufficient to rise to the level justifying an equitable tolling of the statute of limitations. Compare, Burlington Cty. Spec. Serv. Schl. Dist., D.U.P. No. 85-3, 10 NJPER 478 (¶15214 1984).

In fact, assuming arguendo that the operative date here was "October 1991" as argued by Jules Jr. in his March 18 and April 24, 1992 letters to the Director, David's charge would still be untimely. If October 1991 was the operative time, then the charge had to be filed by the end of April 1992. Once Jules Jr. learned the "new information" in April 1992, theoretically he could have filed the charge that month and been timely. But the charge was not filed until July 1992, and even assuming that October 1991 was the operative time, the Charging Party did not show what, if anything, prevented him from filing the charge by April 30, 1992. He offered no explanation for waiting to file the charge until July 1992.

While Jules Jr. acted reasonably by asking the City to reconsider David's and Jules III's test scores, his voluntary delay in filing a charge does not toll the statute. City of Margate, P.E.R.C. No. 93-1, supra.

Based upon the undisputed facts and the law, I find that the charge was untimely filed, and the Charging Party had not been prevented from filing a timely charge.

Accordingly, based upon the above findings and analysis, I grant the motion and make the following:

RECOMMENDATION

I recommend the Commission adopt my decision on the motion and dismiss the Complaint.

Arnold H. Zudick
Hearing Examiner

DATED: June 8, 1993
Trenton, New Jersey