

D.U.P. NO. 90-5

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

In the Matter of

U.M.D.N.J. &
FOP, LODGE NO. 74

Respondents,

-and-

Docket No. CI-88-90

DENNIS W. CASSIDY, SR.,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint against UMDNJ. The charging party failed to file a charge within 6 months of the alleged unfair practice. The charging party alleged he relied on the misrepresentation of FOP Lodge 74 (FOP) that a timely grievance was filed on his behalf and, therefore, did not file his charge sooner. Such a misrepresentation does not prevent the charging party from filing a charge against an employer. City of Orange, P.E.R.C. No. 88-31, 13 NJPER 762 (¶18288 1987). However, it is not clear that City of Orange also applies to the FOP. Accordingly, a Complaint and Notice of Hearing was issued against the FOP.

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Appearances:

For the Respondent UMDNJ
Department of Law & Public Safety
(Patricia C. Valladares, DAG)

For the Respondent FOP
Markowitz & Richman, Esqs.
(Stephen C. Richman, of counsel)

For the Charging Party
Fox and Fox, Esqs.
(Dennis J. Alessi, of counsel)

REFUSAL TO ISSUE COMPLAINT

On June 17, 1988, Dennis W. Cassidy, Sr. ("Charging Party"), filed an unfair practice charge against the University of Medicine and Dentistry of New Jersey ("UMDNJ") and the Fraternal Order of Police, Lodge No. 74 ("FOP"). The charge alleges that UMDNJ and the FOP violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically

subsections 5.4(b)(1) and (3),^{1/} when UMDNJ discharged him without just cause in violation of the parties' collective negotiations agreement and when the FOP breached its duty of fair representation by failing to actively pursue his meritorious grievance through the grievance procedure and through binding arbitration in a timely manner.^{2/}

Cassidy's allegations are as follows: On December 11, 1986, Cassidy was terminated from his position as a police officer by UMDNJ. The parties' collective negotiations agreement (contract) provides that UMDNJ may not discipline employees except for just cause. Cassidy contacted the FOP to initiate a grievance, and the FOP apparently did so in a timely manner. By letter dated December 18, 1986, UMDNJ denied the grievance on the grounds that Cassidy's termination was done in accordance with the terms of the contract. Thereafter, on December 29, 1986, the FOP filed a timely appeal from the denial of the step 1 grievance. However, UMDNJ apparently never responded to this appeal. Cassidy received no further decision on his grievance after the December 29, 1986 appeal by the F.O.P. The

1/ These subsections prohibit 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. (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.

2/ The Charging Party failed to allege the specific subsections of the Act allegedly violated by UMDNJ.

contract's grievance procedure, Article V, states that if no response is given to a grievance within five working days, the grievance may be submitted to the next higher level of the grievance procedure -- here, arbitration.

Cassidy periodically communicated with the FOP in order to determine the progress of his grievance. Cassidy alleges that the President of the F.O.P. consistently advised him that the F.O.P. was pursuing his grievance.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent 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 charged.^{3/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.^{4/}

^{3/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

^{4/} N.J.A.C. 19:14-2.1.

The Commission's rules provide that I may decline to issue a complaint.^{5/}

The Act requires that an unfair practice charge be filed within six (6) months of the occurrence of the alleged unfair practice unless the charging party was prevented from filing a charge. N.J.S.A. 34:13A-5.4(c). In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), the New Jersey Supreme Court interpreted the term "was prevented from filing such charge":

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. Kaczmarek at 340.

In Kaczmarek, the plaintiff's delay in filing the charge was excused by his previous filing of a timely action in an improper forum.

Here, the charging party asserts that the filing delay was caused by the F.O.P.'s continued reassurance that it was handling

^{5/} N.J.A.C. 19:14-2.3.

his grievance. Such an assertion will not toll the running of the six-month time limitation against the employer as per Kaczmarek.

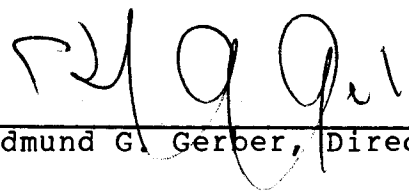
In City of Orange Tp., P.E.R.C. No. 88-31, 13 NJPER 762 (¶18288 1987), the charging party argued that his charge against his employer was timely filed because the employee representative had misled him to believe that his grievance against the City was being processed and he filed the charge within six (6) months of discovering this was not so. The Commission held that such a misrepresentation did not prevent the charging party from filing his charge against the employer in a timely manner and, therefore, did not extend the six-month statute of limitations.

Here, pursuant to Article V of the contract, the F.O.P. had until January 6, 1987, five working days after the F.O.P.'s December 29, 1986 letter appeal to file for arbitration on Cassidy's grievance. To be timely filed as against the employer, charging party had to file an unfair practice action within six months of January 6, 1987 or July 7, 1987. Cassidy filed this charge on June 17, 1988. Under the facts of this case, I must conclude that the charge against UMDNJ is not timely. I therefore find the Commission's complaint issuance standards have not been met with regard to the charges against UMDNJ and decline to issue a complaint against UMDNJ.

However, it is not clear that City of Orange also applies here to the actions of the employee representative. It may be inequitable for an employee representative to profit from an

intentional misrepresentation -- here, the charging party claims the Association misrepresented that a grievance was still being processed. If I were to conclude that the statute of limitations began to run on January 6, 1987 -- the last date on which the charging party's discharge grievance could have been filed -- charging party's claim against the FOP would be untimely and, the FOP would avoid liability even if it intentionally misled the charging party into believing that it was properly processing his grievance. However, it would not be reasonable to toll the six-month statute of limitation for an excessive or indefinite period of time. There may be a point when a charging party is presumed to have realized that a grievance was not processed and the statute of limitation should begin to run from that time. These circumstances are "relevant considerations bearing upon the fairness of imposing the statute of limitations". Kaczmarek, at 340. A full record is needed to make a determination on this issue. Accordingly, I am issuing a complaint and notice of hearing against FOP Lodge No. 74.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: October 23, 1989
Trenton, New Jersey