D.U.P. NO. 2001-12

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

In the Matter of

COUNTY OF HUDSON
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and- Docket No. CI-2000-18

TELISSA E. DOWLING,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that the Hudson County Department of Corrections retaliated against PBA President Telissa Dowling by having her arrested in front of other unit employees as they entered the County prison to vote in a PBA local election, suspending and then terminating her, all in violation of N.J.S.A. 34:13A-5.4(c). The Director found that the charge was filed outside the Commission's six-month statute of limitations and that no equitable considerations warranted relaxing the limitations period.

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Appearances:

For the Respondent,
Scarinci & Hollenbeck, attorneys
(Sean D. Dias, of counsel)

For the Charging Party,
Telissa E. Dowling, pro se

REFUSAL TO ISSUE COMPLAINT

On December 3, 1999, and January 13, 2000 Telissa Dowling filed an unfair practice charge and amended charge against Hudson County (County). The charge alleged that the County Department of Corrections retaliated against Dowling, the PBA president, by having her arrested in front of other unit employees as they entered the County prison to vote in a PBA local election; and by

suspending and then terminating her all in violation of N.J.S.A. 34:13A-5.4a(1), (2) and (3).[1/]

The County denies engaging in unfair practices and responds that the charge is filed outside the Commission's six month statute of limitations. N.J.S.A. 34:13A-5.4(c). The County asserts that no equitable considerations warrant relaxing the limitations period.

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. By letter of September 29, 2000, I advised the parties that I did not intend to issue a complaint on any of the allegations as set forth in the charge, and I explained the basis for that conclusion. I provided the parties with an opportunity to respond. Charging Party filed a response on October 23, and the County filed a response on November 2, 2000.

1/ These provisions prohibit 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."

Based upon the following, I find that the complaint issuance standard has not been met.

Telissa Dowling began employment as a corrections officer for the Hudson County Corrections Department in May 1990. She took office as secretary of Policeman's Benevolent Association Local 109 (Local 109) in June 1992, and became Local 109's acting president in May 1993. Dowling alleges that Chief Warden Ralph Green and PBA State Delegate Robert Ortiz conspired to conduct a PBA election of officers at the County prison on June 10, 1994. During the election, a fire broke out in a clothes dryer inside of the prison. Dowling apparently parked and locked a prison van near the building in which the fire occurred and entered the building in order to respond to the emergency situation. At Warden Green's direction, Dowling was arrested and charged with criminal conduct for improper use of the van and blocking public access to a fire lane. Dowling alleges she was handcuffed in view of fellow PBA members who were entering the prison to vote in the local PBA election. Dowling was suspended for five days effective June 13, 1994, returned to work on June 17, 1994, and was later indefinitely suspended pending the outcome of the criminal charges arising out of her June 10, 1994 arrest.[2/]

2/ By Preliminary Notice of Disciplinary Action dated August 10, 1995, and a disciplinary hearing decision dated September 25, 1995, Dowling was also indefinitely suspended

Footnote Continued on Next Page

Dowling contends that the employer had her arrested to restrain and retaliate against her for the exercise of rights protected under the Act; that her arrest was a sham designed to disgrace her and eliminate support for her by those voting in the election; and that the County dominated the PBA when Warden Green influenced PBA Local 109 officials to hold the June 10, 1994 election of officers in violation of PBA by-laws.

On September 22, 1995, the County served Dowling with a Preliminary Notice of Disciplinary Action charging her with conduct unbecoming a public employee, neglect of duty, and failure to perform duties, in connection with the van incident. The Notice sought Dowling's suspension and/or removal. After several departmental disciplinary hearings, on February 26, 1997 Dowling was terminated effective June 10, 1994. Dowling appealed her removal to the Merit System Board. On July 27, 1999, an administrative law judge issued an initial decision upholding Dowling's removal. The ALJ's recommendation was adopted by the Merit System Board on September 11, 1999. Dowling's appeal of the Merit System Board's decision is now pending before the Appellate Division.

2/ Footnote Continued From Previous Page

on a separate charge of conduct unbecoming a public employee related to her May 19, 1995 indictment, by the Hudson County Grand Jury on charges of theft by deception and forgery regarding PBA funds. The criminal charges arising out of the June 10, 1994 arrest were later downgraded to a disorderly persons offense and consolidated with the indictment. Ultimately, all criminal charges against Dowling were dropped.

On December 3, 1999, Dowling filed this unfair practice charge. On December 20, 1999, the Director of Unfair Practices advised Dowling that her charge failed to allege the occurrence of unfair practices within six months of the filing of the charge, and on its face seemed to be out of time. On January 13, 2000 Dowling filed an amendment containing additional facts concerning her inability to file her unfair practice charge within the six-month limitations period. Dowling states that as a result of at least ninety-six court appearances in criminal court, the Office of Administrative Law and federal court related to the appeal of her termination, Dowling and her child were placed in a homeless shelter for approximately 22 months, during which Dowling had neither the time nor the economic resources to continue to pursue her claim for reinstatement. Dowling submits that she filed timely lawsuits in good faith and never gave up her fight to be reinstated to her employment, and asks that the equitable considerations of Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978) be applied to permit the consideration of her unfair practice charge.

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-month period shall be computed from the day he was no longer so prevented.

Dowling's charge against the County was filed with the Commission on December 13, 1999 -- more than five years after her termination effective June 10, 1994, and more than two years after the date of the County departmental decision finally terminating her on February 26, 1997. Therefore, all of the allegations here are outside the Commission's six-month period for filing an unfair practice charge.

Dowling asserts however, that the statutory provision should be relaxed because she filed timely actions in State and federal courts and before the Merit Systems Board and that she was prevented from filing an unfair practice charge due to homelessness. For the reasons that follow, these claims are 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, 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 no evidence that Dowling was prevented from filing a timely charge with the Commission. Although Dowling filed a timely appeal before the Merit Systems Board, filing with another administrative agency does not toll the statute of limitations for filing unfair practice charges with the Commission. Kaczmarek; Atlantic City Special Improvement Dist. (Postal), D.U.P. No. 99-14, 25 NJPER 272 (¶30115 1999); N.J. Sports and Expo. Auth. (Ragen), D.U.P. No. 89-6, 15 NJPER 58 (¶20021 1988). Dowling offers no explanation concerning why she did not file a timely charge with the Commission after the June 10, 1994 incident. Moreover, it appears that Dowling's claim that her termination was motivated by anti-union animus was never raised before the Administrative Law Judge, whose initial decision Dowling included with documents she submitted in support of her charge. If that claim had been so

raised, the administrative law judge could have transferred the matter to the Commission or determined whether the Commission or the Merit System Board had the predominant interest in the matter. N.J.A.C. 1:1-17.5. Instead, Dowling waited until the conclusion of the process before the Merit System Board (MSB Decision issued September 11, 1999) before she initiated an action with this Commission. The Merit System Board found that the County had cause to terminate Dowling. This Commission cannot now afford Dowling a second bite at the apple by effectively permitting her to relitigate her termination here.

Moreover, the assertion that Dowling became homeless, while truly unfortunate, is insufficient to toll the six-month filing deadline. Dowling states that she became homeless for a period of 22 months but does not indicate when her homelessness began and ended. Even if it is assumed that Dowling's homelessness prevented her from filing this charge within six months of her termination, over four and a half years elapsed before the charge was filed. Moreover, many of the documents submitted by Dowling in support of her charge, including the departmental hearing decision finally dismissing her appeal of the County's action and the administrative law judge's initial decision, seem to indicate that Dowling was represented by counsel at those times. Finally, no filing fee is required to file an unfair practice charge with the Commission.

Dowling's response raises factual disputes concerning the events leading to her discharge, and submits additional documents

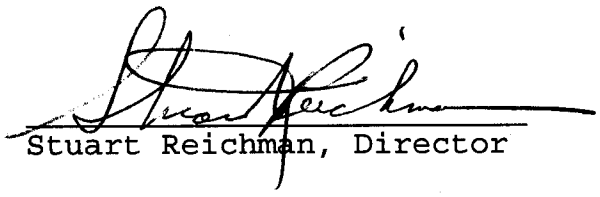
not attached to her original unfair practice charge in support of her position. However, those facts concern the underlying basis for the discharge and are not material to the determination of the timeliness of this charge. Dowling further asserts that the issue of her PBA involvement was raised in all prior proceedings related to her discharge, and that any legal representation she had in prior proceedings was ineffective, but presents no additional explanation of why she was prevented from filing her charge within the six-month limitations period. Therefore, there is no evidence that Dowling was prevented from filing a timely unfair practice charge.

Based upon the foregoing, I find that Dowling's allegations against the County are outside of the Commission's statute of limitations. Therefore, no complaint may issue on those allegations and I dismiss the charge. N.J.S.A. 34:13A-5.4(c). Kaczmarek; No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977). Thus, I find that the Commission's complaint issuance standard has not been met.3/

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: December 29, 2000
Trenton, New Jersey

3/ N.J.A.C. 19:14-2.3.