

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE ADMINISTRATOR OF UNFAIR PRACTICE PROCEEDINGS

In the Matter of

STATE OF NEW JERSEY  
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

DOCKET NO. CO-84-71

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Administrator of Unfair Practice Proceedings declines to issue a complaint with respect to an unfair practice charge alleging that the State reprimanded a shop steward of CWA "to punish [him] for acting in his official capacity as a Shop Steward." The Administrator finds that the Charging Party failed to timely file its charge, noting that the filing of a grievance concerning the unfair practice does not toll the six month filing requirement. The Administrator also finds that equitable considerations recognized by the Supreme Court in Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978) are not applicable to toll the running of the limitations period in this matter and that policy considerations regulating the processing of unfair practice charges established in In re State of N.J. (Stockton State College), P.E.R.C. No. 77-14, 2 NJPER 308 (1976 aff'd 153 N.J. Super 91 (App. Div. 1977), pet. for certif. den. 78 N.J. 326 (1978) require that all claims be presented at the outset.

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Appearances:

For the Respondent  
Honorable Irwin Kimmelman, Attorney General  
(Michael L. Diller, Deputy Attorney General)

For the Charging Party  
Robert Pursell, Staff Representative, CWA

REFUSAL TO ISSUE COMPLAINT

On January 3, 1984, an Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") by the Communications Workers of America, AFL-CIO ("CWA") alleging that the State of New Jersey, Department of Corrections ("State") was engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act"), specifically §§ 5.4 (a) (1), (2), (3), (5) and (7). <sup>1/</sup>

CWA alleges that the State improperly reprimanded a shop steward "to punish [him] for acting in his official capacity as a Shop Steward."

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 charge. <sup>2/</sup> The Commission has delegated its authority to issue complaints to the undersigned and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint

<sup>1/</sup> 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. (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. (7) Violating any of the rules and regulations established by the commission."

<sup>2/</sup> 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 and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof..."

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 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. <sup>3/</sup> The Commission's rules provide that the undersigned may decline to issue a complaint. <sup>4/</sup>

For the reasons stated below the undersigned has determined that the Commission's complaint issuance standards have not been met.

Subsection 5.4(c) of the Act provides that an unfair practice complaint shall not issue with respect to unfair practice charges that are not filed within six months of the claimed unfair practice. More specifically, §§ 5.4(c) states:

...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.

Although the Charge references November 11, 1983 as the operative date for the alleged unfair practice, additional documentation which the Charging party has submitted reveals that the reprimand in question was actually issued on June 13, 1983. While grievance proceedings were initiated by CWA seeking to remove the

3/ N.J.A.C. 19:14-2.1

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

reprimand from its steward's file, resulting in the Department's denial of the grievance on November 11, 1983, the propriety of the reprimand itself is the gravamen of the Charge and the actionable unfair practice. In this regard, the Commission has held that the filing of a grievance concerning the unfair practice does not toll the six month filing requirement. In re State of N.J. (Stockton State College), P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super 91 (App. Div. 1977), pet. for certif. den. 78 N.J. 326 (1978).

CWA further alleged that the State's "failure to remove the reprimand from [the steward's] file constitutes a failure to process the grievance in good faith." However, the fact that the grievance procedure failed to achieve CWA's desired result does not constitute a failure to process grievances pursuant to §§ 5.4(a)(5). It is not alleged that the State failed to process or to respond to the grievance consistent with the terms of the contractual grievance procedure and there are no facts submitted to substantiate any claim that departmental animosity pervaded the grievance process.

Further, the factual allegations do not support a viable claim of domination and interference with the majority representative in violation of §§ 5.4(a)(2).

On March 14, 1984, the CWA was advised of the undersigned's inclination to decline to issue a complaint. On March 19, 1984, the CWA filed a letter requesting further consideration.

The CWA request is predicated upon its judgment that equitable considerations, as recognized by the Supreme Court in Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), are present in the instant matter to toll the running of the six month filing requirement. Specifically, CWA claims that it was "prevented" from filing within the terms of the statute by its own attempts to pursue a contractual resolution of the dispute. CWA asserts that it initiated the grievance apparently believing that a remedy under the grievance procedure was attainable. <sup>5/</sup> CWA also states that the CWA representatives presenting the grievance believed that they had to "exhaust our internal appeals before going to PERC...."

On March 30, 1984, the State filed a response to the CWA statement.

The undersigned has fully examined the issues herein and concludes for the reasons stated below that the unfair practice charge has not been timely filed.

Primarily, two considerations compel the undersigned's conclusion. First, the equitable considerations involved in Kaczmarek, supra, are not applicable to toll the running of the limitations period in the present matter. Second, the Commission's

<sup>5/</sup> CWA's contract covering the Administrative & Clerical Unit permits advisory arbitration over some disciplinary actions, but apparently a written reprimand may be grieved only to the departmental level. CWA suggests that there is confusion under existing caselaw as to whether disciplinary action may be arbitrated under a union nondiscrimination clause. Notwithstanding, CWA did not attempt to present a demand for arbitration.

decision in Stockton State College, supra, which found Appellate Division approval, presents important policy considerations regulating the processing of unfair practice charges which are designed to harmonize a dual processing of statutory and contractual violations and, thus, satisfy the legislative policy goal of promoting labor peace through appropriate administration of the Act.

Kaczmarek, supra, concerned a discharged employee who filed a Superior Court action on December 1, 1975 against his employer, based upon unjust dismissal in August 1975, and against his union, for its purported failure to provide fair representation in September 1975 by declining to pursue the employee's grievance to arbitration. The cause of action was rooted in a claim of a statutory violation of the Act. Concededly, the Law Division was the appropriate forum for filing such claims prior to 1975. However, effective January 20, 1975 amendments to the Act vested the Commission with the authority to resolve unfair practice claims. After the filing of a complaint in the Law Division the defendants moved to dismiss the action on jurisdictional grounds. Kaczmarek then filed an unfair practice charge with the Commission. Perceiving PERC's new unfair practice authority as "exclusive" the Superior Court then dismissed the employee's complaint. Although the Charging Party urged that his time spent pursuing the same action in Superior Court should toll the running of the limitations period, the Commission held that the Charging Party's filing was outside the limitations period and dismissed the complaint issued

with respect to the charge. PERC No. 77-15, 2 NJPER 309 (1976).

Eventually, on Petition for Certification, the Supreme Court reversed. The employee's action, said the Court, "shows the proper diligence on the part of the plaintiff which statutes of limitations were intended to insure." Kaczmarek, supra, at 341. The Court noted that the respondents had timely notice of the substance of the charges "as a result of the Superior Court action" (emphasis added). In addition, the appellant was permitted "reasonable error" as to the proper forum because the law underlying the claim involved untested jurisdictional issues. Finally, the Law Division's failure to transfer the case to PERC and thus to preserve the timeliness of appellant's filing was another mitigating factor in the court's determination that the employee was "prevented" from filing within the terms of the statute.

In the instant matter, the CWA elected to pursue its rights exclusively under the contractual grievance procedure. This election involved the invocation of a private dispute settlement procedure and not a court or administrative agency proceeding. Further, it does not appear that CWA notified respondent of its intent to seek statutory remedies, as well as contractual remedies; nor can CWA's grievance filing be constructively perceived as such. Additionally, CWA's claim of "prevention" from filing a charge, based upon its desire to pursue the matter contractually, lacks merit. The notion that internal grievance procedures must



be exhausted before filing a statutory claim with the Commission simply does not square with the holding of Stockton, supra.

Accordingly, in consideration of all the above, the undersigned concludes that the equitable principles applicable to the Kaczmarek case are not relevant to the matter at hand. <sup>6/</sup>

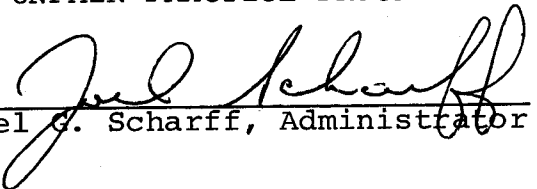
The Commission's policy requiring the filing of charges within six months of the unfair practice occurrence in order to preserve the unfair practice claim, even where a grievance is separately initiated, is clear, well settled, and judicially sanctioned. Stockton, supra. Although Stockton appears to have been based upon a perceived jurisdictional limitation to the Commission's authority to hear a charge filed outside the six month limitations period -- an approach rejected by the Court in Kaczmarek -- the decision also refers to the Commission's adherence to a deferral to arbitration policy. In the Commission's judgment labor relations policy is best served by the presentation of all claims at the outset. Where a statutory unfair practice charge is filed and a demand is made for arbitration under a contract, the Commission will review the matters and will urge, and where appropriate, regulate the proper presentation of the claims. Stockton, supra. The Appellate Division approved, stating: "We perceive

<sup>6/</sup> See also, Bd. of Ed. of Tp. of Bernards v. B.T.E.A., 79 N.J. 311 (1979), wherein the Court noted that the invocation of contractual advisory arbitration procedures would not toll the statutory 90 day Commissioner of Education filing requirement. It appears to the undersigned, that the statute of limitations analysis is the same, even assuming the availability of contractual binding arbitration procedures in this matter.

the interpretation of the Commission and its expressed administrative practice as an effort to harmonize the language of the statutory provisions in order that they may be administered in a workable and practicable manner." 153 N.J. Super, at 93.

To permit CWA's presentation of its unfair practice charge at this time would frustrate the Commission's policy efforts. Accordingly, the undersigned declines to issue a complaint.

BY ORDER OF THE ADMINISTRATOR  
OF UNFAIR PRACTICE PROCEEDINGS

  
Joel G. Scharff, Administrator

DATED: June 7, 1984  
Trenton, New Jersey