

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Respondent,

-and-

Docket No. CI-H-96-64

DAVID H. GIEGOLD,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants a Motion for Summary Judgment and dismisses a Complaint based on an unfair practice charge filed by David Giegold against the New Jersey Institute of Technology. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act by terminating Giegold, allegedly for insubordination and making threats, the same day he filed a grievance over prior suspensions. The charge also alleges that Giegold was denied a hearing on his grievance. The Commission finds that the charging party did not file his unfair practice charge until more than three months after a Superior Court action was dismissed and has not explained how he was prevented from filing a timely charge.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, NJIT Office of Legal and Employment Affairs (Holly C. Stern, Associate General Counsel)

For the Charging Party, Pope, Grossman, Bergrin & Toscano, attorneys (Anthony J. Pope, of counsel; Christopher M. Carnelli, on the exceptions)

DECISION AND ORDER

On March 29 and May 21, 1996, David H. Giegold filed an unfair practice charge and amended charge against the New Jersey Institute of Technology ("NJIT"). The charge, as amended, alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq., specifically subsections 5.4(a)(1), (2), (3) and (5),<sup>1/</sup> by terminating Giegold, allegedly

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<sup>1/</sup> These subsections 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

for insubordination and making threats, the same day he filed a grievance over prior suspensions. The charge also alleges that Giegold was denied a hearing on his grievance.

On June 5, 1996, a Complaint and Notice of Hearing issued. A hearing was postponed and on November 1, NJIT moved for summary judgment. On November 6, the Acting Chair referred the motion to Hearing Examiner Arnold H. Zudick.

On December 2, 1996, the charging party filed a brief opposing the motion. On December 12, NJIT filed a reply.

On January 8, 1997, the Hearing Examiner recommended granting the motion and dismissing the Complaint. H.E. No. 97-16, 23 NJPER 104 (¶28053 1997). He concluded that the charge was untimely filed; a Superior Court action did not toll the statute of limitations; and the charging party had ample time to file a charge after the court action was dismissed, but did not diligently pursue his rights.

On January 22, 1997, the charging party filed exceptions. It asserts that the Hearing Examiner misapplied the

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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."

rationale of Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978) and that his decision was against the weight of the evidence. On January 27, NJIT filed a response asserting that the exceptions are deficient under N.J.A.C. 19:14-7.3(b) because they consist of conclusory statements rather than specific questions of procedure, fact, law or policy. NJIT contends that it cannot respond with any specificity except to reassert that the grounds for summary judgment are well-founded given the undisputed facts of record and controlling legal precedent.

Motions for summary judgment will be granted only if:

it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law.... [N.J.A.C. 19:14-4.8(d)]

See also Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

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

that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

Relying on Kaczmarek, the charging party contends that his filing an action in the Superior Court tolled the statute of limitations. We disagree. The Hearing Examiner properly applied Kaczmarek, the statute of limitations, and the standards for deciding motions for summary judgment. The charging party's Superior Court action was dismissed more than three months before he filed his charge. He has not explained how he was prevented from filing a timely charge and accordingly we grant NJIT's motion for summary judgment.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997  
Trenton, New Jersey  
ISSUED: April 25, 1997

H.E. NO. 97-16

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

In the Matter of

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-and-

Docket No. CI-H-96-64

DAVID H. GIEGOLD,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants a motion for summary judgment and recommends a complaint be dismissed. The Hearing Examiner concluded that the charge was untimely filed; that a Superior Court action did not toll the statute of limitations; that the Charging Party had ample time to file a charge after the Court action was dismissed, but did not diligently pursue his rights.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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For the Respondent, NJIT, Office of the General Counsel  
(Holly C. Stern, Associate General Counsel, of counsel)

For the Charging Party, Pope, Grossman, Bergrin &  
Toscano, attorneys (Anthony J. Pope, of counsel)  
(Christopher M. Carnelli, on the brief)

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

On March 29, 1996, David H. Giegold ("Charging Party")  
filed an unfair practice charge with the Public Employment  
Relations Commission alleging that the New Jersey Institute of  
Technology ("NJIT") violated subsections 5.4(a)(1), (2) and (5) of  
the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et  
seq.<sup>1/</sup> Giegold filed an amendment on May 21, 1996, alleging a

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<sup>1/</sup> These subsections prohibit public employers, their  
representatives or agents from: "(1) Interfering with,  
restraining or coercing employees in the exercise of the

violation of subsections 5.4(a)(1) and (3) of the Act.<sup>2/</sup>

The Charging Party alleged in pertinent part that he filed a grievance on August 21, 1995, over prior suspensions, and was terminated that same day, allegedly for insubordination and making threats. The Charging Party further alleged that he has been denied a hearing on his grievance.

A Complaint and Notice of Hearing issued on June 5, 1996. Hearings were originally scheduled for October 1 and 2, 1996, but were rescheduled for December 3 and 4, 1996.

On November 1, 1996, NJIT filed a Motion for Summary Judgment, a Request for a Stay of Proceedings, and a Request for Oral Argument. By letter of November 6, 1996, the Acting Chair assigned the Motion and Requests to me for consideration.

N.J.S.A. 19:14-4.8. NJIT argues that the charge was untimely filed. It seeks dismissal of the Complaint.

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rights guaranteed to them by this act. (2) Discriminating or interfering with the formation, existence or administration of any employee organization. (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."

2/ Subsection 5.4(a)(3) prohibits 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."



On November 19, 1996, I granted the request for a Stay and cancelled the hearings scheduled for December 1996, but I denied the Request for Oral Argument.

On December 2, 1996, the Charging Party filed an Answer in opposition to the Motion. NJIT filed a reply brief on December 12, 1996.

Based upon the pleadings filed to date I make the following:

**Procedural and Factual Findings**

1. By letter of August 21, 1995, Giegold was notified that he was terminated effective August 24, 1995.

2. On or about September 11, 1995, the Charging Party filed an Order to Show Cause with temporary restraints with the Superior Court of New Jersey, Law Division Essex County, seeking an order for his reinstatement. In that action, the Charging Party alleged that his due process/constitutional rights were violated because he was terminated without a hearing. The Charging Party did not allege before the Court that he was terminated for exercising his rights under the Act. After certain procedural actions, NJIT filed a motion with the Court on October 13, 1995, seeking to dismiss Giegold's case for lack of jurisdiction. NJIT argued that the Commission, and not Superior Court, had exclusive jurisdiction over Giegold's termination. On or about October 24, 1995, the Charging Party filed a response in

opposition to NJIT's motion, arguing that his case was a due process and disciplinary matter and that the Court, and not the Commission, had jurisdiction. The Court granted NJIT's motion on November 2, 1995, saying it lacked jurisdiction over the subject matter and it dismissed Giegold's case. The Court's decision was not appealed.

3. The Charging Party stated in his original charge that after the Court dismissed his case, his attorney advised him to have his union file an unfair practice charge. Giegold noted that he learned he could file the charge himself, or it could be filed by his union or his attorney. He acknowledged in the charge that the Commission had jurisdiction in this matter.

4. The Charge was filed on March 29, 1996, but the (a)(3) allegation was not filed until May 21, 1996. The Charging Party did not offer any explanation for, or any evidence of, how he might have been prevented from filing a charge prior to February 24, 1996.

#### ANALYSIS

A respondent can challenge the timeliness of a charge after the issuance of a complaint, and prior to hearing, through a motion for summary judgment. East Brunswick Bd. Ed., P.E.R.C. No. 97-75, \_\_\_ NJPER \_\_\_ (¶\_\_\_\_\_ 1996); Engelwood Bd. Ed., P.E.R.C. No. 93-119, 19 NJPER 355 (¶24160 1993); N.J.A.C. 19:14-4.8.

Summary judgement in this State is guided by Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), and Judson

v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). If material factual issues exist then summary judgment must be denied. But where the facts are not in dispute, and the movant is entitled to judgment as a matter of law, the motion must be granted.

The Commission's summary judgment rule provides:

N.J.A.C. 19:14-4.8(d) If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

Here, there is no dispute over the facts regarding the filing of the charge and amended charge. Giegold acknowledged that upon dismissal of the Court action he knew that the Commission had jurisdiction over his discharge, and that he could file the charge. Despite that knowledge, the original charge was not filed until nearly five months after the Court action (a month after the statutory period had run), and the (a)(3) allegation was not filed until nearly two months later (three months after the statutory period had run). If the charge was filed untimely, the Motion must be granted.

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

...that no complaint shall issue based upon any unfair practice occurring more than 6 months

prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

NJIT argued that the charge was filed outside the six months statutory period, and relying on Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978), it further argued that the Charging Party's Superior Court filing was insufficient to toll the statute. NJIT also argued, relying on res judicata and the entire controversy doctrine, that the charge be dismissed based upon the Superior Court's review of facts concerning the termination.

In response, the Charging Party, also relying on Kaczmarek, argued that the Legislature intended equitable considerations be part of any statute of limitations decision. The Charging Party believes that its Superior Court filing was sufficient to toll the statute. The Charging Party further argued that the Motion be denied because he had raised a constitutional claim, and because the Employer was not surprised by the charge, nor was the charge frivolous. Finally, the Charging Party argued that neither res judicata, nor the entire controversy doctrine, can bar a hearing in this matter.

NJIT's arguments over the impact of the Court's decision on the merits of the action filed there are irrelevant to a decision on this Motion. Its res judicata and entire controversy doctrine arguments are misplaced. The Court did not have jurisdiction to decide the merits of this case, and this Motion will not be decided

based upon a review of the merits of the charge. The issue before me is limited to whether the charge was timely filed.

The statute of limitations period normally begins to run from the date of some particular action, such as the date of a termination, if the affected person(s) has notice of the action. The date of the action is known as the "operative date", and the six month period runs from that date. The operative date here was August 24, 1995, the effective date of Giegold's termination. Giegold had prior notice that he was terminated effective August 24, 1995. Therefore, a charge had to be filed by February 24, 1996 to be timely filed within the statutory period. Since the charge and amendment were filed well past that date, they were, on their face, untimely. The charge and amendment cannot be considered timely unless the Superior Court filing tolled the statute, or the Charging Party demonstrates that he was "prevented" from filing the charge prior to February 24, 1996.

The New Jersey Supreme Court's decision in Kaczmarek set the standard for reviewing statute of limitations issues. The procedural facts there are instructive here. Kaczmarek was terminated on July 15, 1975. By September 10, 1975, his union refused to go to arbitration and the Commission accepted that as the operative date, thus, a charge had to be filed by March 10, 1976. On December 1, 1975, the charging party filed an action in Superior Court raising the unfair practice issue and seeking redress. On April 9, 1976, the employer moved for dismissal on jurisdictional

grounds. In anticipation of dismissal, the charging party promptly filed the charge on April 13, 1976. On April 22, 1976, Superior Court dismissed the complaint. It did not transfer the case to the Commission. The Commission dismissed the charge as untimely. The Supreme Court reversed.

The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on his rights. But the Court still expected charging parties to diligently pursue their claims.

In Kaczmarek, the Court found there was no intent to delay. The charging party filed the Superior Court action raising unfair practice issues within three months, and promptly filed the charge within days of learning the court action might be dismissed for lack of jurisdiction. The Supreme Court concluded that the Superior Court should have transferred the case to the Commission which would have preserved the timeliness of the case.

There are several key differences between the facts here and those in Kaczmarek. There, the charging party raised unfair practice issues in its court action, but the lower court dismissed the original filing more than a month after the six month statutory period had run. Thus, it was imperative there for the lower court

to transfer the case to the Commission to preserve timeliness. But that was not an issue in this case.

Here, the Court action did not toll the statute for two reasons. First, Giegold did not raise unfair practice issues before the Court. Second, the Court dismissed Giegold's due process argument with more than three months yet to run in the original six month statutory period. Thus, it was unnecessary for Superior Court to transfer the case to the Commission to preserve timeliness. If Giegold had acted promptly, as Kaczmarek did, he could have filed the charge well within the statutory period. His failure to do so between November 2, 1995, the dismissal of the Court action, and February 24, 1996, the close of the statutory period, without any evidence he was otherwise prevented from from filing, failed to demonstrate that he diligently pursued the charge. Compare, New Jersey Transit Bus Operations, D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995); New Jersey Tpk. Auth., D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979).

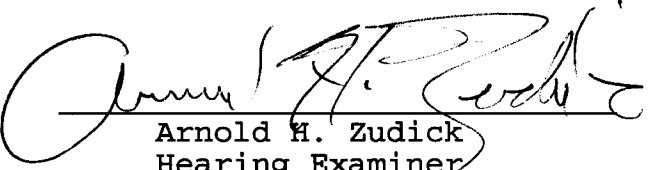
The Charging Party argued in his brief that NJIT was faulting him for pursuing his due process claim. I will not speak for the Employer, but I am not at all suggesting Giegold be penalized for filing his due process claim. Rather, I am finding that despite knowing he had to file a charge with the Commission, and absent any explanation for the delay, the Charging Party failed to diligently pursue his rights and opportunity to file a charge within the statutory period that was still open from November 2, 1995 to February 24, 1996.

Accordingly, based upon the above findings and analysis, I find the charge was untimely filed, and I grant NJIT's Motion for Summary Judgment.

Pursuant to N.J.A.C. 19:14-4.8(e), I make the following:

Recommendation

I recommend the Complaint be dismissed.



Arnold H. Zudick  
Hearing Examiner

Dated: January 8, 1997  
Trenton, New Jersey