H.E. NO. 2000-8

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-298

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, John Farmer, Attorney General
(Mary Cupo-Cruz, Sr. DAG)

For the Charging Party, Weissman & Mintz, Attorneys
(Steven P. Weissman, Esq., of counsel)

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

On March 4, 1997, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge with the Public Employment Relations Commission against the State of New Jersey, Department of Human Services ("State" or "DHS"). CWA alleges that the State violated sections 5.4a(1) and (5)[1/] of the New Jersey

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; and (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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") when in March 1995, it unilaterally changed the terms and conditions of employment of four physicians employed at DHS' Trenton Psychiatric Hospital by laying them off and immediately rehiring them as independent contractors at lower rates of pay and benefits. The charge also alleges that from about July 1996 to March 1997, the State refused to provide CWA with information relevant to determine the physicians' employment status as either independent contractors or employees.

On September 11, 1997, a Complaint and Notice of Hearing issued. On October 15, 1997, the State filed an Answer denying the allegations in the charge.

On April 14, 1998, the State filed a Motion for Summary Judgment with the Commission. On May 26, 1998, the motion was referred to me for decision. N.J.A.C. 19:14-4.8. On October 1, 1998, CWA submitted a responsive brief together with certifications opposing the motion. On November 2, 1998, the State submitted a reply letter.

Summary judgment will be granted:

> ... 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 the movant...is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)].

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), specifies the standard to be used to determine whether there exists a genuine issue of material fact which precludes summary

judgment. A hearing examiner must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill at 540. Thus, if a disputed issue can only be resolved in one way, then it is not a "genuine issue" of material fact. "When the evidence 'is so one-sided that one party must prevail as a matter of law,' then the motion should be granted." Brill at 540, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). There must be evidence on which the factfinder can reasonably find for the charging party in order for the charge to survive the motion.

A motion for summary judgment should be granted with caution and may not be used as a substitute for a plenary hearing. See, Baer v. Sorbello, 17 N.J. Super.. App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J.. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying on the briefs and supporting documents, I make the following:

FINDINGS OF FACT

1. The State and CWA (Professional Unit) are parties to a collective negotiations agreement which includes physician specialists and clinical psychiatrists.

2. By letter dated February 3, 1995, the State notified Physician Specialists Irfan Hug, Ghousia Hashmi, Sarla R. Chhabria and Clinical Psychiatrist Nirmala Yarra-Karnam that "due to fiscal and budgetary constraints...[their] positions [at the Trenton Psychiatric Hospital] were being terminated, effective March 3, 1995." CWA Representative John McCool was sent a copy of each letter.

3. All four doctors had been assigned to the Medical Officer on Duty Program ("MOD") prior to their layoff.

4. On February 15, 1995,[2/] the State sent identical letters to the four doctors, stating:

> Thank you for taking the time to meet with me to discuss the changes in the structure of the MOD Program and to answer your questions related to that issue.
>
> As we discussed, the Hospital has submitted a request for approval to compensate participants in the program at a rate of $45 per hour. That request is currently in process in the Department of Personnel and is subject to their approval before the rate can be confirmed. As was indicated in your discussion with Mr. Jupin activities as M.O.D.'s would be covered under the Tort Claims Act since they would be employees of the Hospital.

2/ Although no evidence shows that a copy of this letter was sent concurrently to CWA, on May 1, 1995, CWA offered a copy into evidence at a step 1 grievance hearing contesting the changes in the doctors' terms of employment (May 2, 1995 step 1 grievance decision, page 4, attached as "exhibit B" to "Certification in Opposition to Summary Judgment" by Gledhill-Huff). CWA was aware of its contents as of May 1, 1995.

> I have provided you with cost figures relative to the maintenance of your Health Benefits pursuant to current COBRA legislation and I am enclosing an informational booklet regarding the Public Employee's Retirement System for your perusal. Your participation in the M.O.D. program under this arrangement will allow for continued participation as a service earning member of the Retirement System.
>
> It is my understanding pursuant to conversations I've had with Dr. Sheth that the duties and responsibilities of participants in the M.O.D. program under this new arrangement commencing March 3, 1995 will be essentially unchanged from the way they were prior to that date. Further more specific information in that regard can be provided to you upon request by Dr. Sheth, Clinical Director once the revised Hospital policy has been approved.(emphasis added)

5. On about March 3, 1995, the four physicians agreed to perform medical services for DHS. CWA was aware that the doctors continued to perform medical services, but believed that they were no longer employees but independent contractors or consultants (Certification of CWA Staff Representative Jenna Gledhill-Huff, October 1, 1998).

6. On March 17, 1995, Gledhill-Huff submitted a group grievance alleging that: "On 3/3/95, Trenton Psychiatric Hospital violated above stated Article XL by changing the terms and conditions of the Medical Doctors in the M.O.D. Program." The focus of the grievance was on Section B of Article XL, which provides:

> Regulatory policies initiated by the various institutions and agencies where these employees are working which have the effect of work rules governing the terms and conditions of employment within the institutions or agency and which conflict with any provision of this Agreement shall be considered to be modified consistent

> with the terms of this Agreement, provided that if the State changes or intends to make changes which have the effect of elimination in part or in whole such terms and conditions of employment, the State will notify the Union and, if requested by the Union within ten (10) days of such notice or of such change or of the date on which the change would reasonably have become known to the employees affected, the State shall within twenty (20) days of such request enter negotiations with the Union on the matter involved, providing the matter is within the scope of issues which are mandatorily negotiable under the Employer-Employee Relations Act as amended and further, if a dispute arises as to the negotiability of such matters, that the procedure of the Public Employment Relations Commission shall be utilized to resolve such dispute.

7. On May 1, 1995, DHS Hearing officer Paul Gulli conducted a step 1 grievance meeting. Gledhill-Huff put the February 15, 1995 letter containing the terms of the new MOD program into evidence as exhibit G-5 (see, Finding of Fact # 4). The Hearing officer described CWA's "grievance presentation as follows:

Grievance Presentation

> Ms. Gledhill indicated in her opening statement that the M.O.D. Program as it previously existed at Trenton Psychiatric Hospital was eliminated and that the elimination of this program was not brought to the attention of the Local President for CWA Local 1040 (Carolyn Wade). Even though the program was eliminated in its previous format, the program continues to exist with the same duties being performed but under a different method of operation and payment. (emphasis added) [May 2, 1995 step one decision, pg.2]

8. On May 2, 1995, Gulli denied the grievance (Step 1 Answer) on three grounds. First, he concluded that use of the grievance procedure was inappropriate because the grievance was filed after these former employees had been laid off. He wrote: "As

of the close of business on 3/3/95 these individuals are no longer employees as defined by the Agreement and accordingly not covered by the terms and conditions of the Agreement."(May 2, 1995, step one decision, pg. 6). Second, he found that the grievance was untimely. He found that the grievants and CWA knew about DHS' actions as of February 3, 1995, and should have filed the grievance within thirty days from that date, according to Article IV, Section E,1. of the negotiated agreement.[3/] Though dated March 17, 1995, the grievance was not signed until March 20, 1995 and was not received until March 28, 1995. Finally, he concluded that the State had complied with the contractual duty to notify CWA about the layoff when it sent a copy of the February 3, 1995 letter to CWA Shop Steward John McCool. On May 15, 1995, Gledhill-Huff appealed the decision and requested a step 2 hearing.

9. On June 7, 1995, DHS' Employee Relations Coordinator Anita Avolio denied the grievance at step 2. She also found that the grievance was untimely; that CWA had received timely notice of the relevant events; and that Article XL, Section B. was inapplicable to the issues raised by the grievance. She stated:

> Even though the grievants provide service to Trenton Psychiatric Hospital currently, it is no longer under the unclassified appointment of their respective titles. [step 2 decision at p.2]

3/ That section provides: "1. A grievance must be filed initially within thirty (30) calendar days from any date on which the act which is the subject of the grievance occurred or thirty (30) calendar days from the date on which the grievant should reasonably have known of its occurrence."

10. On October 30, 1995, CWA appealed the matter to the Department of Personnel's Division of Appellate Practices and Labor Relations. Gledhill-Huff's letter acknowledges her receipt of the step 1 and 2 decisions, together with "all pertinent documents." In the appeal she revealed that she knew that after the layoffs, the doctors were offered "...the same appointment at an hourly rate of pay....They would work 24 hours a week (part-time), and their benefits would be maintained through COBRA." Gledhill-Huff stated that the State's action was "...a method of eroding the bargaining unit, and a violation of Article XL of the negotiated contract."

11. By letter on November 2, 1995, DHS' Director of Employee Relations argued that the grievance should not be sustained and did not meet the Division's standard of review. The Director stated:

> ...As a result of operational decisions involving this program, the grievants were terminated from their unclassified positions of Physician Specialist and Clinical Psychiatrist. No rule, regulation or law was raised by the grievants that is related to the Hospital's decision to terminate their unclassified appointments.
> [November 2, 1995, letter, page 2.]

12. On July 17, 1996, CWA Attorney Steven Weissman sent a letter to David Collins of the Governor's Office of Employee Relations ("OER") advising him that CWA had only recently "learned for the first time" that since the physicians had been laid off, they were performing the same duties and working the same hours, but receiving lower wages and benefits; that they were not being treated as independent contractors but being paid as employees of the DHS.

Weissman asserted that the February 1995 layoff was an unlawful attempt to circumvent the union and the negotiated agreement, and requested reinstatement, back pay and back dues.

13. On July 29, 1996, Collins responded to Weissman's letter stating that he would look into it, but that the lapse between the layoff and the July 17, 1996 letter was problematic.

14 On August 8, 1996, Weissman learned from Collins "that it was his [Collins'] understanding that the doctors were being utilized as independent contractors on a consultant basis Weissman also states: "I advised Collins that if that was not the case and if the doctors were employed by the State, the State had committed and was continuing to commit an unfair labor practice ("Certification in Opposition to Summary Judgment" by Steven Weissman, Esq., page 2, dated October 1, 1998).

15. On January 6, 1997, Weissman renewed his request to Collins and on March 4, 1997, filed the instant unfair practice charge.

16. On October 6, 1997, after this charge was filed, the Department of Personnel denied CWA's appeal of the grievance, finding that the appeal had not satisfied the Merit Systems Board's standard of review.

17. On November 3, 1997, CWA served the State's Deputy Attorney General with interrogatories concerning the issues here, which were not answered as of the date of CWA's response to this Motion (Certification of Steven Weissman, October 1, 1998, page 3).

ANALYSIS

N.J.S.A. 34:13A-5.4(c) provides:

> 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.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court described how someone is "prevented" from filing a timely 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 P.E.R.C. in timely fashion. [Id. at 77 N.J. 340]

By March 17, 1995, CWA had filed a grievance which by its express terms complained that the State had "[changed] the terms and conditions of employment..." of the MOD doctors, and sought reinstatement of the "original M.O.D. program," and negotiations over "any change in conditions of employment."

By May 1, 1995, CWA representative Gledhill-Huff was aware that three physician specialist positions and one clinical psychiatrist position in which the four doctors were employed were eliminated; that the doctors were offered part-time employment at an hourly wage; that their malpractice liability insurance would be covered under the Tort Claims Act since they were to be "employees of the hospital"; that they could arrange to continue health insurance coverage under COBRA legislation; that they would continue receiving credit as "earning members" of the Public Employee Retirement System; and that their duties and responsibilities would be "essentially unchanged" from those preceding their layoffs.

The State's May 2, 1995 seven-page step 1 response includes "discussion" and "decision" sections. In the "discussion" section, the employer representative recounted various filing dates and wrote:

> ... There are two issues that need to be considered here by the Hearing Officer. The first is that the termination of the unclassified appointments on 3/3/95 occurred a good two weeks before the earliest date that appears on the grievance form. <u>These individuals at the time the grievance was filed [were] no longer employed by the State of N.J</u>. (emphasis added)

A few paragraphs later, at the conclusion of his "discussion" of the "first" issue, the employer representative wrote, "As of the close of business on 3/3/95 these individuals are no longer employees as defined by the Agreement and accordingly not covered by the terms and conditions of the Agreement" (step 1 decision at p.6).

In the "decision" section, the employer representative wrote in a pertinent portion:

> Utilization of the grievance procedure is not appropriate for these individuals because their employment as defined by the terms of Article I ended on 3/3/95 and the grievance was not filed until subsequent to that date. Thus they were not covered by the terms and conditions of the agreement at the time the grievance was filed. [step 1 decision at p.7]

The State's June 7, 1995 response at step 2 reiterated that the grievance was untimely. It denied any violation of Article XL, noting that the alleged "change" was the Hospital's decision to "terminate four unclassified appointments." The employer representative wrote:

> Even though the grievants provide service to Trenton Psychiatric Hospital currently, it is no longer under the unclassified appointment of their respective titles. [step 2 decision at p.2]

CWA representative Gledhill-Huff's October 30, 1995 appeal advised, " ...it is the position of this union that this action [terminating the doctor's "appointments" and then "offering them the same appointments" as part-time employees at a hourly wage, etc.] was a method of eroding the bargaining unit and a violation of Article XL of the negotiated contract." The State's November 2, 1995 reply stated, among other things, that "No rule, regulation or law was raised by the grievants that is related to the Hospital's decision to terminate their unclassified appointments."

More than 8 months later, on July 17, 1996, CWA counsel advised that the union had just learned "for the first time" that

the doctors were not being treated as "independent contractors"[4/] but are being paid as "employees of the Department of Human Services."

About 2 years lapsed between the dates on which the doctors were laid off and rehired and the date on which the charge was filed. CWA claims that it was "prevented" from filing a timely charge because the State asserted in the step 1 response to the grievance filed on behalf of the doctors (protesting a change in their terms and conditions of employment) that they were "no longer employed by the State of N.J."

I am not persuaded that this representation, viewed in the context of the express terms of CWA's grievance, the February 15, 1995 letter outlining new terms of employment, the State's step 1 decision and in the context of subsequent writings between the parties, fraudulently misrepresented the doctors' employment status.[5/] Nor should it have forestalled, not with due diligence,

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4/ This term is not used in any State correspondence during the relevant period. It appears in both Weissman's and Gledhill-Huff's certifications of October 1, 1998.

5/ Cases cited in the CWA's brief for the proposition that fraudulent concealment tolls a statute of limitations for as long as the concealment endures are inapposite. In Burgess Construction, 227 NLRB 765, 95 LRRM 1135 (1977) enfd. 596 F.2d 378, 101 LRRM 2315, (9th Cir. 1979), cert. denied 444 U.S. 940, 105 LRRM 2968 (1979), an unfair practice charge was filed timely where the union's knowledge of the employer's hiring of non-union carpenters was acquired within the prescribed six months limitations period, where

Footnote Continued on Next Page

CWA's further inquiries about the doctors' "terms and conditions of employment." See Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)(failure to exercise due diligence or care is exception to tolling of limitations period until fraud is discovered).

The step 1 decision also stated in the offending portion that the doctors were "no longer employees as defined by the agreement", a conclusion repeated in the "decision" portion. These representations suggest that the doctors were "employees" but not included in any negotiations unit. The June 1995 step 2 decision conceded that while the doctors "provided service" to the hospital, they no longer did so under their "unclassified appointments." This cryptic statement does not mean that the doctors were employed as "independent contractors." Gledhill-Huff conceded as much in her October 30, 1995 appeal, writing that the doctors, having had their "appointments" terminated, "... were then offered the same appointment" (my emphasis). Whatever their status, the State had allegedly "eroded the bargaining unit." It seems to me that CWA,

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5/ Footnote Continued From Previous Page

the employer concealed its unlawful employment of non-union carpenters by assuring the union on two occasions that it would no longer employ carpenters. In O'Neill Ltd., 288 NLRB No. 147, 129 LRRM 1315 (1988), the statute was tolled where the employer engaged in an elaborate scheme designed to avoid its legal duty to bargain, including making the false assertions that it was no longer in the meat packing business and had no intention of returning to it; falsely denying any interest in a business it controlled; and making misleading statements about a lease which had already been signed. The State's conduct here does not approach the level of deceit characteristic of these cases.

faced with these uncertainties, could have filed a charge in addition to the grievance. Furthermore, CWA had all the while been aware of the facts of the doctors' new employment - hours, wages, supervision, etc. Along with a pending grievance, CWA could have inquired about the source of salary payments, including the identity of payer. Other facts of their employment are inconsistent with "independent contractor" status, such as paid liability insurance and continuation in the Public Employee Retirement System.

Under all these circumstances, I decline to find that any material factual dispute exists which could demonstrate that CWA, as majority representative, was "prevented" from filing a timely charge. Specifically, I find for purposes of the Motion that the statute commenced tolling no later than October 28, 1995, when the CWA appealed the second step grievance denial.

Counsel Weisman's initial inquiry in July 1996 was more than two months beyond the statutory period. CWA's subsequent correspondence to the State was intended to more precisely define the doctors' employment status as of March 1995, inasmuch as no alleged facts suggest a change in their terms and conditions of employment. CWA relies on Barnard Engineering Co., 295 NLRB No. 30, 133 LRRM 1137 (1989), where the Board found that although the union might have filed a charge based on information it possessed as of September 1984, the union "pursued the reasonable alternative course of requesting additional information in order to determine whether a charge...would likely have merit," and did not file its "timely"

charge until over a year later on October 28, 1985. 133 LRRM at 1137-1138. Here, although CWA had information by either May or October 1995, it did not pursue that "reasonable alternative course" until July 17, 1996. (Perhaps CWA Counsel was unaware of the facts of this matter until the summer of 1996.) Despite the State's use of the term "independent contractor" for the first time on August 8, 1996, the charge was not filed for another seven months until March 4, 1997. Thus, even if I accepted August 8, 1996 as the relevant date, the charge is untimely.

CWA is entitled to details about the doctors' employment status in order to determine whether they are performing jobs covered by the recognition clause of the parties' collective agreement see e.g. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 88-110, 14 NJPER 342 (¶19130 1988). CWA is entitled to information that is potentially relevant and will be of use in carrying out its statutory duties. State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987) aff'd. NJPER Supp.2d 198 (¶177 App. Div.1988).

Accordingly, I grant the Motion on all portions of the Complaint alleging violations of the Act in March 1995, when four physicians were rehired at Trenton Psychiatric Hospital. Specifically, I find that paragraphs 2 through 7; 15 through 17, and 19 are untimely filed. I deny the Motion to the extent that the Complaint alleges that the State has refused to provide information

on the employment status of the four physicians, specifically paragraphs 8 through 13, and 18.

New hearing dates will be scheduled under separate cover.

Elizabeth J. McGoldrick
Hearing Examiner

DATED: April 18, 2000
Trenton, New Jersey