H. E. No. 83-24

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

In the Matter of

MERCER COUNTY COMMUNITY COLLEGE,

Respondent,

-and- Docket No. CI-81-79-13

DOROTHY KODYTEK,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner grants a motion brought by Charging Party to amend the original complaint brought in this matter to include allegations of events which had occurred during and subsequent to the litigation of the original charge. Charging Party further requested to reopen the hearings in order to proffer evidence concerning the additional allegations. Respondent opposed the motion to amend contending that if this motion were granted, the period of time which had elapsed between the close of the original hearings and the filing of this motion would subject Respondent to undue hardship and expense. Respondent further contended that the requested amendment was untimely and that it should not be consolidated with the original case because the parties named in the amendment were not identical to those named in the original charge.

In considering this motion, the Hearing Examiner reviewed relevant Commission rules, New Jersey Court Rules, Office of Administrative Law Rules and court decisions relating to motions to consolidate, amend or supplement pleadings. The Hearing Examiner determined that Charging Party's motion met the standards applicable to such proceedings -- the parties to the original proceedings and the requested amendment were essentially the same; the supplemental filing is related to and grows out of the allegations of the original filing; no undue prejudice to Respondent was discernible from the pleadings; and finally, Respondent's contention that the requested amendment was untimely was determined (to the extent that these pleadings would allow) to be incorrect. Accordingly, Charging Party's motion was granted.

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Appearances:

For the Respondent
Smith, Stratton, Wise and Herer, Esqs.
(Brian P. Sullivan, Esq.)

For the Charging Party
Hartman, Schlesinger, Schlosser, Faxon & Foy, Esqs.
(Thomas P. Foy, Esq.)

HEARING EXAMINER'S DECISION ON
MOTION TO PERMIT SUPPLEMENTAL PLEADINGS

A Motion to Amend the above-captioned Unfair Practice Charge, now pending before the undersigned Hearing Examiner, was submitted to the Public Employment Relations Commission (the "Commission") on November 3, 1982, by Charging Party Dorothy Kodytek. 1/ On November 10, 1982, the Respondent, Mercer County Community College, filed a response in opposition to the Charging Party's motion to amend its unfair practice charge.

1/ Charging Party's submission was initially received by the Director of Unfair Practices on October 18, 1982, with a request that said submission be consolidated with the charge before the undersigned. Subsequently, Charging Party submitted the formal motion referred to hereinabove at which time the matter was forwarded to the undersigned for consideration.

History of Proceedings

Dorothy Kodytek (President, AFT Local No. 2319) [2/] filed an Unfair Practice Charge (Docket No. CI-81-79-13) with the Commission on April 27, 1981, alleging that Mercer County Community College (the "Respondent") was engaged in conduct violative of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq (the "Act"). Said Charge was amended on May 14, 1981 and again on August 25, 1981. (Charging Party's unfair practice filings of April 27, 1981, May 14, 1981 and August 25, 1981, shall hereinafter be referred to as the "original charge.") More specifically, it is alleged in the original charge that the Respondent issued to the Charging Party several negative performance evaluations and negative work performance memos and, in various fashions, harassed Charging Party in retaliation for Charging Party's having engaged

2/ N.J.A.C. 19:16-1.1 states:

> A charge that any public employer or public employee organization has engaged or is engaging in any unfair practice listed in subsections (a) and (b) of N.J.S.A. 34:13A-5.4 may be filed by any public employer, public employee, public employee organization, or their representative.

N.J.A.C. 19:14-1.2 states:

> Such charge shall be filed with the commission. Upon receipt, such charge shall be date stamped and assigned a docket number, preceded by a letter designation indicating that the charging party is a public employer (CE), one or more individual public employees (CI), or a public employee organization (CO)....

The charge referred to hereinabove was filed by a Charging Party which designated itself as follows:

> Dorothy Kodytek, President, AFT Local #2319 American Federation of Teachers, Local #2319, c/o 6 Llewellyn Place, Groveville, N.J. 08620, Thomas P. Foy, Esq. for Dorothy Kodytek.

Based upon the designation of the Charging Party and the contents of the charge, the Commission docketed said charge as CI-81-79, a charge filed by an individual public employee. Accordingly, the charge has been processed and litigated as a charge filed by an individual public employee.

in protected activities. Such conduct is alleged to be violative of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3). 3/

On June 3, 1981, Mercer County Community College filed an Unfair Practice Charge (Docket No. CE-81-26-14) against American Federation of Teachers, Local No. 2319 alleging that Local No. 2319 had filed charges against the College which were "spurious, inaccurate and misleading" and which were filed for the purpose of harassing and intimidating the College during the parties' then ongoing negotiations for a successor collective negotiations agreement. Said conduct is alleged to be violative of N.J.S.A. 34:13A-5.4(b)(1) and (3). 4/

It appearing that the allegations of each of the foregoing charges, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued for each of those matters, respectively, on July 23, 1981. The Director of Unfair Practices also issued an Order Consolidating Cases in the above-referred matters consolidating these matters for hearing.

Pursuant to the Complaints and Notices of Hearing, hearings were held in the above-consolidated cases on October 22, 23, 26, 27 and 28, 1981. Briefs and reply briefs were filed by the

3/ These subsections provide that public employers, their representatives or agents are prohibited 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."

4/ These subsections provide that employee organizations, their representatives or agents are prohibited 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."

parties by June 30, 1982.

On November 3, 1982, Charging Party Kodytek filed a Motion to Amend the original complaint in this matter to include allegations of events which had occurred during and subsequent to the litigation of the original amended charge. Charging Party further moved to reopen the hearings in order to proffer evidence concerning the additional allegations set forth in its proposed amendment. In Charging Party's proposed amendment, it is alleged that Respondent was dismissed from employment on April 23, 1982 because she utilized the grievance procedure to dispute and correct violations by the College of the parties' collective negotiations agreement. It is claimed that Respondent issued several personnel memoranda and "Performance and Work Appraisals" concerning Charging Party during the period from October 18, 1981 to April 16, 1982, the purpose of which was to falsely substantiate and defend the contemplated dismissal. It is alleged that Charging Party was harassed by representatives of the Respondent with disciplinary threats, ultra-critical scrutiny of her work, constant supervision and frequent evaluations. It is asserted that such disparate treatment of Charging Party by Respondent was intended to chill and inhibit Charging Party's union activities and beliefs.

The Charging Party argues that its proposed amendment should be allowed inasmuch as the same parties were involved in both the original charge and the recently filed amendment. Further, Charging Party argues that the factual bases and questions raised in the amendment are but a continuation of those alleged and liti-

gated in the original charge. Finally, Charging Party asserts that consolidating the actions before the same Hearing Officer would produce judicial economies and that any inconveniences caused thereby would be outweighed by the propriety of the request.

Respondent opposes Charging Party's motion to amend the complaint and reopen the hearing. Respondent notes the length of time which has passed since the close of hearings in this matter and claims that granting the motion would subject Respondent to undue hardship and expense. Respondent further contends that consolidation of these matters would be inappropriate inasmuch as the parties named in the amendment are not identical to those named in the original charge. Finally, Respondent argues that the Commission cannot take cognizance of the majority of the events contained in the proposed amendment because they occurred outside the six-month limitations period prescribed by the Act.

Discussion and Analysis of Law and Facts

There are several rules provisions which are applicable, in varying measures, to the circumstances of this case.

N.J.A.C. 19:14-1.5 provides that the Director of Unfair Practices may permit the Charging Party to amend its charge at any time prior to the issuance of a complaint upon such terms as may be deemed just. N.J.A.C. 19:14-2.2(a) provides that "Any such complaint may be amended by the Hearing Examiner to conform to the allegations set forth in any amended charge thereafter filed by the Charging Party pursuant to N.J.A.C. 19:14-1.5(a).

N.J.A.C. 19:14-6.3 states:

> It shall be the duty of the hearing examiner to hear fully the facts as to whether the respondent has engaged or is engaging in an unfair practice as set forth in the complaint or amended complaint. The hearing examiner shall have authority, with respect to cases assigned to him or her, between the time of designation as hearing examiner and transfer of the case to the Commission, subject to these rules and the act:....(8) To dispose of procedural requests, motions, or similar matters, including motions... to amend pleadings;...to order hearings reopened; and upon motion, order proceedings consolidated or severed prior to the issuance of the hearing examiner's recommended report and decision.

In the Rules of the Office of Administrative Law, N.J.A.C. 1:1-6.3 states:

> The first pleading may be amended at any time, either before or after the presentation of proofs when, in the judge's discretion, an amendment neither imposes an unreasonable burden nor is precluded by statute or constitutional principle.... 5/

The Rules Governing the Courts of the State of New Jersey contain several provisions which are helpful in the treatment of circumstances such as those raised by the instant matter. Civil Practice Rule 4:9-1 (hereinafter referred to as R. 4:9-1) states:

> A party may amend his pleadings as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 20 days after it is served. Thereafter a party may amend his pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice....

5/ These rules sections are based upon the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. N.J.A.C. 1:1-11 provides that such rules as are set forth therein shall govern the conduct of all contested cases in the Executive Branch of State Government.

R.4:9-3 states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading....

And, perhaps most pertinent to this matter, R.4:9-4 states:

> On motion by a party the court may, upon reasonable notice and on terms, permit him to serve a supplemental pleading setting forth transactions or occurrences which took place after the date of the pleading sought to be supplemented....

Finally, in the Rules of the Office of Administrative Law, N.J.A.C. 1:1-14.1 provides:

> At any time after a contested case has been filed with the Office of Administrative Law, an agency head, any party or the judge may move to consolidate other contested cases involving common questions of fact or law between identical parties or between any party to the contested case and a state agency.

N.J.A.C. 1:14-2 provides:

> A motion to consolidate shall require the parties and the non-party agency or agencies to show why the matters should not be consolidated....

And finally, N.J.A.C. 1:14-3 provides:

> In ruling upon a motion to consolidate, the judge shall consider:
>
> 1. The identity of parties in each of the matters;
> 2. The nature of all the questions of fact and law respectively involved;
> 3. To the extent that common questions of fact or law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;

> 4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;
> 5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and
> 6. Other appropriate matters.

In Gudnestad v. Seaboard Coal Dock Co., 15 N.J. 210 (1954), the New Jersey Supreme Court addressed the propriety of an amendment to pleadings:

> It is well-settled that an amendment will not as a rule be held to state a new cause of action if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is in the same matter more fully or differently laid, or if the gist of the action or the subject of the controversy remains the same. Gudnestad v. Seaboard Coal Dock Co., supra, at 223.

However, the matter before the undersigned appears to be more a supplement to the original pleadings than an amendment of same -- rather, the motion presented herein would appear to be an amendment by way of supplement, not dissimilar to the supplemental pleadings considered in Shepard v. Ward, 5 N.J. 92 (1950).

In Shepard, Marilyn Shepard (Ward) had obtained a divorce in a Florida court and then sued thereon in New Jersey for alimony. Albert Ward, after wife Marilyn Shepard had obtained the Florida decree, filed for divorce in Chancery Court in New Jersey.

Mr. Ward had first received notice of the Florida proceeding on April 17, 1948. On April 27, 1948, he filed his suit for divorce and a request for injunctive relief to restrain his wife from proceeding further with the Florida suit. The injunctive order was issued and served upon Ms. Shepard in Florida, who promptly ignored the order and proceeded with the Florida action.

On September 14, 1948, Mr. Ward filed an amendment by way of supplement to the action in the Chancery court contending that his wife had obtained the Florida decree contrary to, and in defiance of, the Chancery restraint. Mr. Ward further requested that the Florida decree be determined to have no force or effect in this State. The Court subsequently adjudged the Florida decree to be void.

Thereafter, Mr. Ward supplemented his answer in Ms. Shepard's alimony action by pleading the injunctive order and asserting that the Florida decree was void. Judgment went against Ms. Shepard in her alimony suit and the Court awarded Mr. Ward a judgment nisi in his divorce action. On appeal to the Appellate Division, both judgments were reversed and remanded. On appeal to the Supreme Court,the Court reversed the Appellate Division and stated:

> ...[W]hat was done was the filing of an amendment to the bill, an amendment by way of supplement to be sure, but nevertheless an amendment; and it was, in effect, just what it was nominated, an amendment; no new parties, no really new issues, simply an amendment to recite what the wife had meanwhile done in violation of the proceedings theretofore had, acts the significance of which she was fully aware when she did them....The amendatory pleading came, in our opinion, within the rule that where new matters grow out of and are connected with the same transaction in which the litigation arose, and are germane to the object of the suit, it is proper to present them by a supplemental pleading, although the appropriate form of relief may be different;...Shepard v. Ward, supra, at 110-111.

Finally, in Galler v. Slurzberg, 22 N.J.Super. 477, (App. Div. 1952), the court considered whether an order allowing plaintiff to file a supplemental complaint was erroneous. In Galler, plaintiff filed suit against defendant subcontractors for damages based

upon an alleged breach of contract and conspiracy to destroy plaintiff's business. Subsequent to the institution of the suit, defendants retaliated against the plaintiff by picketing various of plaintiff's establishments. Whereupon, plaintiff submitted a motion to permit filing of a supplemental complaint detailing defendants' latest actions. After the trial court granted plaintiff's motion, the defendants appealed. On the appeal, the court, finding there was no error in allowing the supplemental complaint, stated:

> The system of equity jurisprudence that we derived from England permitted only a single subject of litigation, or a single, closely related group of causes for complaint, to be embraced in one suit. If there existed two or more separate and distinct controversies between the parties, several suits must be employed to solve them.... A supplemental bill was used to set up facts that occurred after the filing of the original bill, but it was not permissible by a supplemental bill to make a new and different case upon new matter.... Now, in the cause before us it appears that the acts of defendants alleged in the original complaint, as well as those stated in the supplemental complaint, had a common purpose and were parts of a single design, namely, to induce the plaintiff to agree to a change in her contract with the defendants in order that there should be a greater spread between defendants' purchase and resale prices. It is likely that even under the standards observed before enactment of the 1915 Chancery Act, the facts alleged in the supplemental complaint could have been brought before the court by a supplemental bill....
>
> In the course of the years, the idea has developed of joining all controversies between the same parties in a single action, where that course can conveniently be adopted, without producing a record so complicated as to impede justice. Rule 3:18 permits an unlimited joinder of claims, or causes of action, in an action by a single plaintiff against a single defendant....
>
> Supplemental complaints are not the express subject of any of our court rules but are comprehended in Rule 3:15-4 which provides that, by leave of the court, a party may "serve a supplemental pleading set-

> ting forth transactions or occurrences which have happened since the date of the pleading sought to be supplemented." Interpretation of the rule should be influenced by the general principle that all controversies between the parties may be determined in a single action. Professor Moore states his opinion:
>
> "While the matters stated in a supplemental complaint should have some relation to the cause of action set forth in the original pleading, the fact that the supplemental pleading technically states a new cause of action, should not be a bar to its allowance but only a factor to be considered by the court in the exercise of its discretion." Moore's Federal Practice, §§ 15, 16.

Applying the foregoing rules and standards to the instant matter, the undersigned has determined to grant Charging Party's motion to amend the original pleadings herein and to reopen the record to receive evidence concerning same.

Although there are no Commission rules (nor OAL rules) which deal directly with supplementary pleadings, it is clear that such procedural eventualities were contemplated by the Commission when it provided hearing examiners with the authority, inter alia, to rule upon such requests as motions to amend pleadings, to reopen hearings and to order proceedings consolidated. Further, R.4:9-4 (the text of which is set forth above) is directly on point and the undersigned finds it appropriate to be guided thereby -- the rule provides that the court may permit supplemental pleadings, upon reasonable notice and on terms.

In determining the instant motion, several factors were examined. The factors considered were principally those set forth in N.J.A.C. 1:14-3, the OAL rule concerning motions to consolidate. While the instant matter is not a motion to consolidate per se, the factors set forth in N.J.A.C. 1:14-3 are the same factors which the

courts have utilized through the years to determine motions to consolidate actions, and to amend and/or supplement pleadings.

The undersigned notes that the Charging Party in the original charge is the same party as that who now seeks the amendment by way of supplement -- Dorothy Kodytek. It is Ms. Kodytek whose rights are alleged to have been violated; she is the principal party at interest in both the charge filed on April 27, 1981 and in the supplemental pleading filed on November 3, 1982. While some derivative benefit might accrue to the union if Charging Party Kodytek should prevail in her charge, that should not cloud the issue of who is the principal party at interest herein --Dorothy Kodytek, the union officer, the union member, the union supporter.

The charge filed by the College against the union (Docket No. CE-81-26-14) was consolidated for processing with the original charge filed by Kodytek against the College. The College contends that the parties to the initial consolidated charge proceeding (Kodytek, the College and the union) are different from the parties to the proffered supplemental pleadings (Kodytek and the College). However, to contend now that Charging Party Kodytek should be estopped from amending her charge because the charge filed by the College (with which her original charge was consolidated) was brought against a "different party" is patently unfair. Further, it is clear that the interests of Kodytek and the union in many areas overlap and their respective interests have nowhere been shown to conflict to an extent which would preclude the granting of the amendment.

The issue underlying both the initial charge and the supplemental pleadings is the Respondent's alleged discriminatory treatment of Charging Party, which discriminatory treatment is alleged to have been in retaliation for Charging Party's protected activities. In the original charge, Charging Party alleged that she had received negative evalutions and had been harassed by management and supervisory representatives of the College due to her statutorily protected activities. In the supplemental pleadings, Charging Party alleges continued negative evaluations and harassment in retaliation for her protected activities -- all of which culminated in her discharge from employment. Charging Party alleges that the events asserted in the supplemental charge are but a continuation of the conduct about which she had originally complained.

An examination of the allegations of the original charge -- which was filed in April 1981 and subsequently amended twice (in May and August 1981) prior to the commncement of hearings -- and those set forth in the supplemental pleadings -- which contain allegations of illegal conduct by the College commencing approximately during the weeks of the hearing and extending up to the time of Charging Party's termination -- would indicate that the supplemental filing is related to and grows out of the allegations of the original filing.

Clearly the original charge and the supplement present similar questions of law. To the extent that the supplemental charge raises new factual allegations, they are of a similar nature to those alleged in the original pleadings and in some

instances involve the same persons. If the supplemental charge were tried separately, it would inevitably result in substantial duplication of effort by the parties in litigating the case and by the agency in hearing and deciding the case. Further, in trying the cases separately, varying end results may be reached in each case wherein a result reached in one case could have the effect of mooting the result reached in the other. Thus, it would seem that the most appropriate way in which to treat this matter would be to dispose of both the original charge and the supplemental charge in one proceeding.

Respondent states that it would be prejudiced in the event that Charging Party's motion to amend is granted. However, Respondent gives no supportive argument for that claim. Perhaps Respondent bases its claim of prejudice on the assertion that many of the events set forth in the supplemental charge are untimely under the Act's six-month limitations period and generally upon the long period of time between the initial filing and the supplemental filing. The undersigned, however, is not persuaded. As to timeliness, even assuming arguendo that the supplemental charge had been filed as a separate and independent charge, the discriminatory discharge claim would have been timely under the Act (Charging Party was discharged on April 23, 1982; the supplemental charge was filed on October 18, 1982). 6/

As to the College's claim of prejudice due to the passage

6/ If the supplemental charge had been filed as an independent charge, while the events alleged in support of Charging Party's claim of disciminatory discharge would be outside the six-month filing period, to the extent that those matters were alleged simply to support the discriminatory discharge, clearly they would be cognizable by the Commission as evidence of the claim of discriminatory discharge.

of time, the undersigned notes that the Charging Party was discharged while the parties were preparing their post-hearing briefs concerning the original charge. That the "disharmony" between the Charging Party and the College was continuing was fairly self-evident. For the College to claim at this time that Charging Party's supplemental filing was a surprise or that the College is now prejudiced by the filing due to the lengthy passage of time since the initial filing simply is not persuasive.

ORDER

Based upon the foregoing discussion, the Hearing Examiner hereby: (1) grants Charging Party's motion to amend by way of supplement the original charge in this matter (filed on April 27, 1981, and twice amended, on May 14, 1981 and August 25, 1981); with the pleadings submitted with this motion on November 3, 1982; (2) grants Charging Party's motion to amend the supplemental filing to include the "wherefore" clause; and (3) grants Charging Party's motion to reopen the record in this matter to receive evidence concerning the supplemental charge.

Charles A. Tadduni
Hearing Examiner

DATED: January 27, 1983
Trenton, New Jersey