D.U.P. No. 77-1

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

In the Matter of

ESSEX COUNTY BOARD OF CHOSEN FREEHOLDERS AND NICHOLAS CAPUTO, COUNTY CLERK,

Respondents,

- and -

Docket No. CO-7

ESSEX COUNTY COURT CLERKS ASSOCIATION,

Charging Party.

SYNOPSIS

The Charging Party filed a motion to reopen the proceedings, earlier closed by Refusal to Issue Complaint (E.D. No. 76-33, 2 NJPER 113), for the purpose of arguing that the six month statute of limitations was tolled during the pendency of a related Civil Service Commission proceeding initiated prior to the enactment of Chapter 123. The Director of Unfair Practice Proceedings, now performing the functions previously delegated to the Executive Director pursuant to an internal agency reorganization, grants the motion to reopen and proceeds to the merits. The Director rules that the Charging Party's Civil Service proceeding only related to the Civil Service laws, not the Employer-Employee Relations Act. Furthermore, even prior to Chapter 123, the Civil Service Commission lacked jurisdiction over claims of refusal to negotiate. When Chapter 123 was enacted, containing a six month limitations period concerning unfair practice claims, by its terms it did not go into effect for 90 days. Thus the Charging Party "and all others whose unfair practice claims had not yet been commenced in an appropriate pre-Chapter 123 forum and which claims would be barred by the six month provision of Chapter 123, had 90 days within which to take action in the appropriate pre-Chapter 123 forum." The Director concludes that 90 days provided a reasonable opportunity to take action in order to preserve a remedy that would be cut off. The Charging Party did not do so and is now barred by the six month provision.

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Appearances:

For the Respondents, Goldberger, Siegel & Finn, Esqs.
(Mr. Howard A. Goldberger, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION ON MOTION

On May 10, 1976 the Executive Director issued a formal Refusal to Issue Complaint in the above-entitled unfair practice proceeding. In re Essex County Board of Chosen Freeholders and Nicholas Caputo, County Clerk, E.D. No. 76-33, 2 NJPER 113 (1976). On May 19, 1976 the Charging Party, Essex County Court Clerks Association (the "Association") filed with the Executive Director a letter requesting reconsideration of E.D. No. 76-33 based upon certain facts stated to have been before the Executive Director but not considered in E.D. No. 76-33. In the alternative, the Association requested

that its application be treated as an appeal to the full Commission pursuant to N.J.A.C. 19:14-2.3.

By letter dated May 20, 1976 to the Association and to the Respondents, Essex County Board of Chosen Freeholders and Nicholas Caputo, County Clerk (collectively the "County"), the Executive Director stated that he would treat the Association's request as a motion to reopen the proceedings. The parties were afforded an opportunity to submit briefs and appendices addressed to whether the proceedings should be reopened and to the merits. Finally, he ruled that the time for the Association to appeal to the Commission under N.J.A.C. 19:14-2.3 shall not commence to run until final disposition of the motion to reopen. Thereafter the Association filed a memorandum and appendix in support of its motion, and the County filed letter memoranda in opposition. This matter is now before the Director of Unfair Practice Proceedings by virtue of an intervening internal agency re-organization. 1/

In E.D. No. 76-33 it was found that the instant unfair practice charge failed to allege prohibited conduct within the six month period prior to the filing of the charge, a condition precedent to the issuance of a complaint under N.J.S.A. 34:13A-5.4(c).

1/ On June 22, 1976 the Executive Director, Jeffrey B. Tener, was sworn in as full-time Commission Chairman. See N.J.S.A. 34:13A-5.2, as amended by Section 3 of P.L. 1974, c. 123. Effective immediately thereafter, the Commission approved the elimination of the Executive Director position, and named the Director of Unfair Practice Proceedings as its designee to perform those functions in unfair practice proceedings, including the complaint issuance function relevant to the instant case, which the Executive Director had theretofore performed. See N.J.S.A. 34:13A-6(f).

The County had raised the statutory six month limitation period in a statement of position filed during the processing of the case, and the parties had been requested to submit briefs on this issue, among others. In addressing this issue the Association argued a continuing violation as that concept has been developed by the National Labor Relations Board. In E.D. No. 76-33 the concept of continuing violation was accepted arguendo, but it was found that the charge nevertheless failed to allege "continuing violation" facts within the six month period. E.D. No. 76-33 at p. 5, 2 NJPER at 114.

In the instant application to reopen, the Association does not dispute the finding in E.D. No. 76-33 that the charge lacks relevant unfair practice allegations within the six month period. However the Association urges the reopening of these proceedings for the purpose of entertaining a tolling argument, not previously raised. The Association contends that a review of certain undisputed facts concerning its prosecution of a related matter before the Civil Service Commission will support the conclusion that "at no time had a six month period elapsed wherein the Association was not in the appropriate forum" prior to the filing of the instant charge. The County contends that the Association's tolling argument should have been raised previously when it was afforded ample opportunity to brief the six month limitation issue, that the argument in any event lacks merit, and that the motion to reopen should accordingly be denied.

As previously indicated, the parties had been requested to brief the six month limitation issue, which clearly encompasses any tolling arguments that might be available. To that extent the

County is correct in its contention that the Association was afforded an opportunity to present its tolling argument but nevertheless did not. On the other hand, the facts pertaining to the tolling question, upon which the Association relies, are not controverted by the County and it has not been shown that a reopening of these proceedings on that limited issue will work surprise, injustice or unfairness. See N.J.A.C. 19:19-1.1. In the interests of fairness and in order to best effectuate the purposes of the New Jersey Employer-Employee Relations Act, the instant motion is hereby granted and the proceedings reopened to entertain the tolling question.

The parties have briefed the issue and I will accordingly proceed to the merits. The uncontroverted facts relevant to the tolling question, as well as the background facts, are as follows. In December 1971 the Chief Justice of the Supreme Court directed that, effective January 31, 1972, all trial courts in the state, other than municipal courts, were to expand the hours during which they sat. To accommodate the increased court hours, many court-related employees throughout the state were directed to report to work earlier than in the past. In the instant case, the court clerks represented by the Association were directed to report to work at 8:30 A.M. effective January 31, 1972, whereas they had previously reported at 9:00 A.M.

There are no specific factual allegations with regard to the period of January 31, 1972 through September 26, 1973 insofar as the instant parties are concerned. However, during this period certain other court-related employees similarly situated initiated proceedings before the Civil Service Commission concerning the

refusal of Essex and Hudson Counties to compensate them for the extension of their hours. The Civil Service Commission consolidated three such proceedings involving the detectives, investigators, and clerical and stenographic employees employed in the office of the Essex County Prosecutor, and the court clerks employed in the Superior and County Courts of Hudson County (the "Prosecutor's Case"). On September 6, 1973 the Civil Service Commission issued its decision in the Prosecutor's Case, holding that the extended workday without additional compensation constituted a reduction without good cause violative of N.J.S.A. 11:22-38. Essex and Hudson Counties were ordered to pay the affected employees a pro rata amount in compensation for the extended hours.

Apparently in reaction to the decision in the Prosecutor's Case, the President of the instant Association on September 26, 1973 -- 20 days after the issuance of the foregoing Civil Service decision -- wrote to Nicholas Caputo, Essex County Clerk, stating that the Association "hereby formally requests reimbursement for the extension of the court day wherein court personnel are now required to be in court at 8:30 A.M. instead of at 9:00 A.M." Copies of the letter were sent to the County's Board of Freeholders and to the Department of Civil Service. Receiving no response, the Association's President on October 23, 1973 wrote to the President of the Civil Service Commission seeking advice as to "whether or not a disposition of our claim has been made as yet." Copies of this letter were sent to Mr. Caputo and to the Freeholders.

On November 14, 1973 the Civil Service Director of Local Government Services wrote to the Association's President advising that an earlier Civil Service Commission decision -- perhaps, but not clearly, the decision in the Prosecutor's Case -- did not apply to the court clerks. In response, on December 3, 1973 the Association's President wrote to the Director of Local Government Services and requested a hearing.

At this point, the decision in the Prosecutor's Case was appealed to the Appellate Division. The Department of Civil Service decided to hold the Association's claim in abeyance pending the outcome of the appeal in the Prosecutor's Case. On August 9, 1974 the Appellate Division rendered its decision, reversing the Civil Service Commission. Prosecutor's Detectives and Investigators Assn. of Essex County v. The Hudson County Board of Choasen Freeholders, 130 N.J. Super. 30 (App. Div. 1974). The court held that the Counties' failure to compensate court-related employees for additional working time required as a result of the Chief Justice's directive, did not constitute a "reduction without cause" within the meaning of N.J.S.A. 11:22-38 because it was done in good faith and in furtherance of the public interest, rather than constituting "political discrimination, personal favoritism, arbitrary infringement of rights or any of the abuses that Civil Service legislation was intended to rectify." 130 N.J. Super. at 47. The Court stated that in such cases, the remedy for organized employees was to "negotiate the matter of payment for longer hours with the respective Boards of Freeholders. In the event the latter fail to negotiate in good

faith, the organization may seek the aid of the courts to require them to do so." 130 N.J. Super. at 45. On October 29, 1974 the Supreme Court denied certification, 66 N.J. 330 (1974).

Subsequent to the above Appellate Division decision, the Association's Civil Service claim was brought on for hearing. Hearings were held before a Civil Service Hearing Officer on September 24, 1974 and February 20, 1975. Prior to the issuance of the Hearing Officer's report and recommendation, the Association filed the instant charge on January 30, 1975 alleging that the unilateral extension of hours in January 1972 violated N.J.S.A. 34:13A-5.4(a)(5) (refusal to negotiate). The charge also refers to and attaches in an appendix the correspondence of September, October, and November, 1973, described supra at pp. 5 and 6. Thereafter on April 15, 1975 the Civil Service Hearing Officer issued his report and recommendation, concluding that on the basis of the Appellate Division decision in the Prosecutor's Case, the Association's claim should be dismissed. On June 10, 1975 the Civil Service Commission agreed with its Hearing Officer, concluded that the extension of the court clerks' working day without compensation did not constitute a reduction without cause under N.J.S.A. 11:22-38, and dismissed the case.

The Association has apparently abandoned its earlier argument based upon the concept of continuing violation. Rather, based upon the foregoing Civil Service proceedings, the Association contends that even if the six month limitation period of N.J.S.A. 34:13A-5.4(c) applies retroactively to unfair practices occuring before the January 20, 1975 effective date of P.L. 1974, c. 123, the

limitation period contained therein must be tolled during the time that the Association's claim before the Civil Service Commission was pending. The Association argues that the latest events alleged in the instant charge manifesting the County's refusal to negotiate are the Association's September 26 and October 25, 1973 letters, previously referred to, requesting compensation for the extended hours. The Association states that it filed its Civil Service action within five weeks of the October 25 letter -- referring to its December 3, 1973 letter requesting a Civil Service hearing -- and that "since that time, the Association has vigorously pursued this action in all appropriate forums.... /T/he 6 month period of limitation has been tolled since December 3, 1973, the date the Association requested Civil Service to hear its case."

In support of its tolling argument, the Association relies on an earlier Commission decision, In re City of Newark, P.E.R.C. No. 87, 1 NJPER 21 (1975), and a May 11, 1976 Supreme Court decision, Patrolmen's Benevolent Association of Montclair, Local No. 53 v. Town of Montclair, 70 N.J. 130 (1976). In Newark, the Commission ruled that it could properly exercise jurisdiction over unfair practices occurring prior to the January 20, 1975 effective date of P.L. 1974, c. 123. However the Commission was not required in Newark to determine whether the six month limitation period is to be given retroactive effect: "Inasmuch as the instant allegations relate to events occurring within six months prior to the filing of the charge, it is unnecessary to consider whether the six months limitations period must be applied retroactively to all charges relating to pre-Chapter 123 conduct." P.E.R.C. No. 87 at p. 6, 1 NJPER at 22-3.

The Association does not argue that the limitation period should not be applied retroactively. Rather, assuming retroactivity, it presents a tolling argument. The Association cites Newark for the proposition that the Commission recognized that the Civil Service Commission was an appropriate pre-Chapter 123 forum for the protection and enforcement of rights guaranteed by the New Jersey Employer-Employee Relations Act. If the Association's Civil Service proceeding is viewed in that light, it cannot be said that the Association was in an inappropriate forum and the time spent in that forum should not be included when computing the applicable six month period. The Association cites the following language in Newark:

> Prior to Chapter 123, there were no "unfair practices", but the very same rights and duties were interpreted, protected, and enforced nonetheless, albeit elsewhere. By and large the judiciary performed this function, although on occasion other administrative agencies and officers, such as the Civil Service Commission and the Commissioner of Education, were called upon to interpret and protect these rights in the context of their respective specialized jurisdictions. /P.E.R.C. No. 87 at pps. 5-6, 1 NJPER at 22; emphasis added/

In the Montclair case, supra, the Supreme Court passed upon the retroactive application of that provision of Chapter 123 giving the Commission unfair practice jurisdiction. Well before the enactment of Chapter 123, the PBA commenced an action in the Chancery Division, not dissimilar to the instant charge, alleging that the Town unilaterally implemented certain changes in terms and conditions of employment. Neither the Chancery nor Appellate Divisions adjudicated these allegations, for reasons not relevant to this discussion. The Supreme Court found that the allegations should have been heard, and then had to determine whether to remand the matter

to the Chancery Division for a hearing or to apply the change of forum under Chapter 123 and refer the matter to the Commission. In that context, the Court stated as follows:

> While this appeal was pending, the New Jersey Employer-Employee Relations Act, as amended by L. 1974, c. 123 (approved October 21, 1974 to take effect 90 days after enactment), gave PERC jurisdiction to hear and decide unfair labor practice charges and to issue appropriate remedial orders respecting them. We determine that the foregoing amendment procedurally has retroactive effect and applies to the pending and unresolved charges of unfair practices in the dispute between plaintiff and defendants herein over the fixing of salaries and other wage benefits of police officers of the Town of Montclair for the calendar year 1974.
>
> Accordingly, we vacate the judgment of the Appellate Division and remand the matter to the trial court with directions to enter an order transferring the dispute to PERC for appropriate proceedings under the statute***.
>
> Under the particular circumstances of this case, the provision of N.J.S.A. 34:13A-5.4(c) that no complaint shall issue by PERC based upon any unfair practice occurring more than six months prior to the filing of the charge is hereby deemed to be inapplicable to the charges herein. /70 N.J. at 136/

The Association argues that reading Newark and Montclair together, its charge should not be affected by the six month limitation: In Newark the Commission recognized that the Civil Service Commission exercised pre-Chapter 123 jurisdiction over rights guaranteed by the New Jersey Employer-Employee Relations Act, and the Association did commence a Civil Service proceeding with respect to the subject matter of the instant charge; in Montclair a pending and unresolved unfair practice case, commenced in the then-appropriate forum, was referred to the Commission without application of the Chapter 123 six month limitation. The Association argues that in the last paragraph of Montclair cited above, the Court must have reasoned that the six month limitation would not apply because, as

with the Association's Civil Service case, "no 6 month period had elapsed wherein the Montclair P.B.A. had not pursued its relief in what at that time was an appropriate forum."

Without addressing itself to whether the six month limitation should be given retroactive application, the County argues that the Association's reliance on Newark and Montclair is misplaced, since the Association's Civil Service case cannot be construed as the equivalent of an unfair practice proceeding. While the Montclair PBA clearly commenced a pre-Chapter 123 action in the Chancery Division equivalent to what would now be an unfair practice proceeding before the Commission under Chapter 123, the Association's Civil Service case simply sought a "revision of its rates of pay" under Title 11, the Civil Service law. Thus the County contends that "no unfair labor practice charge had been filed in any form prior to the charge filed with P.E.R.C. on January 30, 1975." The County further argues that it is illogical for the Association to contend that its Civil Service proceeding should be considered as a toll, for if that were so why did the Association file the instant charge in January 1975 when the Civil Service Commission had not yet issued its decision?

The undersigned is in agreement with the County's contentions. It is difficult to perceive the nexus between a demand for compensation based upon a reduction without cause under N.J.S.A. 11:22-38, and an allegation of a unilateral change in terms and conditions of employment violative of the New Jersey Employer-Employee Relations Act. If the Association perceived such a nexus at some point, it must have been persuaded otherwise by the following unambiguous language of the Appellate Division in the

Prosecutor's Case, referring to the Civil Service Commission's decision on appeal:

> The /Civil Service/ Commission did not purport to exercise jurisdiction to rectify an unfair labor practice by the counties because of their failure to pay the additional compensation here. It acted solely under N.J.S.A. 11:22-38. In any event, we do not read Burlington Cty. Evergreen Pk. Mental Hosp. v. Cooper, supra /56 N.J. 579 (1970)/, as authorizing the /Civil Service/ Commission to consider whether the public employer has negotiated in good faith as to such compensation, to direct that the employer so negotiate, or to require the employer to make such additional payments under the circumstances here involved. /130 N.J. Super. at 46/

The cited language not only makes it abundantly clear that the Association's parallel Civil Service case only related to Title 11, and not to the New Jersey Employer-Employee Relations Act, but just as clearly states that even if the Association was attempting to allege refusal to negotiate as in the instant unfair practice proceeding, such an allegation could not be heard by the Civil Service Commission. Coupled with the Court's statement, cited supra at pp. 6 and 7, that the remedy for organized employees was to negotiate with the county and to seek the aid of the courts if the county failed to negotiate in good faith, the conclusion was inescapable that an action in Chancery -- not the then-pending Civil Service case -- was the Association's vehicle for remedying any failure to negotiate it felt existed. For these reasons, upon learning of the Appellate Division decision above, the Association was not, and must have known it was not, in an appropriate forum, and the time spent there cannot serve to toll the six month limitation of N.J.S.A. 34:13A-5.4(c).

The Association might not have felt pressured into immediately filing an "unfair practice" complaint in Chancery at that time, since the Appellate Division opinion in the Prosecutor's Case was handed down in August 1974 at a time when no statute of limitations applied specifically to actions to enforce the New Jersey Employer-Employee Relations Act. The situation changed drastically, however, when on October 21, 1974 the Governor signed Chapter 123 into law, containing a six month limitation provision. Chapter 123, by its terms (section 9), did not go into effect until 90 days after enactment. Thus the Association, and all others whose unfair practice claims had not yet been commenced in an appropriate pre-Chapter 123 forum and which claims would be barred by the six month provision of Chapter 123, had 90 days within which to take action in the appropriate pre-Chapter 123 forum. The undersigned is constrained to conclude that a 90 day period -- 50% of the full statutory six month period -- must be viewed as providing a reasonable opportunity to take timely appropriate action in order to preserve a remedy that would be cut off upon the effective date of the limitation. The Association did not do so, and its charge is now barred by the six month provision. The determination in E.D. No. 76-33 that a complaint should not be issued is hereby re-affirmed, and the case is closed,

subject to the Association's right to appeal to the full Commission under N.J.A.C. 19:14-2.3.

BY ORDER OF THE DIRECTOR OF UNFAIR PRACTICE PROCEEDINGS

Carl Kurtzman, Director
Unfair Practice Proceedings

DATED: Trenton, New Jersey
August 4, 1976