

D.U.P. No. 2013-2

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

In the Matter of

STATE OF NEW JERSEY
(JUVENILE JUSTICE),

Respondent,

-and-

Docket No. CI-2012-016

JUDY THORPE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Judy Thorpe, a former employee of the State of New Jersey, Juvenile Justice Commission (JJC). Thorpe alleged that JJC engaged in "abuse of process and spoliation of evidence" by allegedly failing to preserve 10 boxes of Thorpe's personal belongings after her termination in August 2008, in violation of 5.4a(1) through (7) of the Act. The Director found that in order for the charge to be timely, Thorpe would have had to allege unlawful conduct within six months of a date she could be considered a public employee. Thorpe claimed her belongings in May 2011, filed the charge in November 2011, and did not allege any facts indicating that she was "prevented" from seeking return of her property by August 2010. The Director found that Thorpe's charge was filed beyond the six month statutory period, and that as Thorpe was not a public employee after August 12, 2010, she lacked standing to file the unfair practice charge.

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

In the Matter of

STATE OF NEW JERSEY
(JUVENILE JUSTICE),

Respondent,

-and-

Docket No. CI-2012-016

JUDY THORPE,

Charging Party.

Appearances:

For the Respondent,
Jeffrey S. Chiesa, Attorney General
(Brady Montalbano Connaughton, Deputy Attorney
General)

For the Charging Party,
Judy Thorpe, pro se

REFUSAL TO ISSUE COMPLAINT

On November 9, 2011, Judy Thorpe, a former employee of the State of New Jersey, Juvenile Justice Commission (JJC), filed an unfair practice charge against JJC. Thorpe alleges that on May 9, 11, 12 and 13, 2011 and October 20 and November 7, 2011, the JJC engaged in "abuse of process and spoliation of evidence" violating 5.4a(1) through (7) of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3 et seq.^{1/} Thorpe

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)

seeks the remedy of back pay, reinstatement, reopening the (arbitration) case, voiding the award, scheduling a new arbitration hearing, and employment action against Roseanne Fairbanks and Harold Brown of JJC, among other things.

JJC asserts that the allegations in the charge concerning "abuse of process and spoliation of evidence," are causes of action not contemplated by the Act, and should be dismissed. JJC also asserts that the charge alleges facts occurring beyond the six month statute of limitations set forth in N.J.S.A. 34:13A-5.4c, and should be dismissed as untimely.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance

1/ (...continued)
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) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this act; and, (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and condition of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

standard has not been met, I may decline to issue a complaint.

N.J.A.C. 19:14-2.3. On October 5, 2012, I issued a letter to the parties advising that I was inclined to dismiss the unfair practice charge, setting forth reasons for that conclusion and inviting replies. On October 18, Thorpe filed a reply, together with attachments. On November 20, the State filed a response.

Thorpe began employment with the State in 1983. In 2005, she became the Supervisor of Nursing Services at JJC's New Jersey Training School.

On August 15, 2008, Thorpe received a final notice of disciplinary action, terminating her employment for insubordination for her refusal to submit to a psychological fitness-for-duty examination. CWA Local 1040, Thorpe's former collective negotiations representative, grieved the termination to arbitration under its collective negotiations agreement with the State. On February 12, 2010, the arbitrator issued an award denying the grievance and upholding Thorpe's termination.

Thorpe filed several unfair practice charges against CWA Local 1040 and JJC (Docket Nos. CI-2010-046, CI-2010-047 and CI-2010-049) contesting her termination and her majority representative's conduct. On December 15, 2011, I issued a decision dismissing the charges (D.U.P. No. 2012-8). On October 25, 2012, the Commission issued a decision (P.E.R.C. No. 2013-29), affirming the refusal to issue a complaint.

The gist of Thorpe's current charge is that on May 9, 2011, she was provided inventoried personal property held in storage by the JJC from which about ten boxes of documents (related to investigations Thorpe performed in the course of her employment) were missing. She alleges that Medical Director Harold Brown destroyed the documents which are necessary to the appeal of her termination. I infer that Thorpe demanded the return of the allegedly missing documents on May 11, 12 and 13, 2011 and on October 20 and November 7, 2011.

On February 3, 2012, the JJC filed a letter, together with documents, including a grievance arbitration award issued February 12, 2010, denying the grievance and upholding Thorpe's termination. The JJC contends that the charge fails to allege an unfair practice and is untimely.

The award provides that on December 12, 2007, Thorpe was " . . . removed from service and placed on administrative leave with pay." It also provides that Thorpe's Loudermill hearing was conducted on January 8, 2008. The JJC asserts that around that date, Thorpe refused to collect her property and that ten days later, JJC Director of Administration Roseanne Fairbanks directed Medical Director Harold Brown to oversee the packing and inventorying of Thorpe's personal property. Sergeant Anthony Ward assisted Brown. The property was transported to the Office of Investigations in the Tramburg building in Bordentown, New

Jersey for storage. On January 25, 2008, a final inventory list was submitted to Human Resources Manager, Lisa Bell.

On May 9, 2011, Thorpe received her personal property, according to the JJC. A chain of custody report was completed and Thorpe signed for each item. Thorpe purportedly advised that ten boxes of documents were missing, and that Brown had purposely destroyed them. Upon Director Fairbank's inquiry, the medical staff reported that no other files and/or boxes were stored. Fairbanks asked Thorpe to specifically identify the contents of the boxes and/or documents. The JJC asserts that Thorpe refused to identify them. An investigation report was completed by investigator Jeff Flora on May 12, 2011, concluding that all property provided to the Office of Investigations had been returned and the case was closed. JJC has provided documents reporting the inventory and chain of custody of Thorpe's personal property between January 15, 2008 and May 9, 2011.

Thorpe's October 18 reply provides that ". . . the gist of [the] charge is that [Thorpe] requested the JJC to preserve her file and other pertinent documents and they were not preserved." Thorpe also writes that she was never notified to ". . . return and pack my files and other documents" and did not refuse to identify the contents of the unreturned boxes. Thorpe also writes that her charge is timely filed because the statute of limitations commenced, ". . . when I was made aware of the fact that my evidence was not preserved." The attached documents are

a January 9, 2008 memorandum barring Thorpe's access to the JJC's Johnstone Campus; and portions of a June 4, 2010 unfair practice charge contesting the circumstances of that bar and of fitness-for-duty examinations [allegations that were dismissed by the Commission in P.E.R.C. No. 2013-29 on October 25, 2012].

I accept as true the facts set forth in Thorpe's charge and October 18 reply.

Our Act requires that an unfair practice charge be filed within six months of the date that the unfair practice occurred. Charges filed later than six months after the date of the unfair practice are untimely unless the charging party was prevented from filing within the statutory period. N.J.S.A. 34:13A-5.4c.

In determining whether a party was "prevented" from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978) (case transferred to Commission where employee filed court action within six months of alleged unfair practice). Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently

concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. Wayne Tp. (Shenekji), P.E.R.C. No. 2012-68, 38 NJPER __ (¶ __ 2012); Sussex Cty. Com. Col. (Stephenson), P.E.R.C. No. 2009-55, 35 NJPER 131 (¶46 2009); State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

N.J.S.A. 34:13A-3(d) defines a "public employee," in a relevant part, as ". . . any person holding a position, by appointment or contract, or employment in the service of a public employer." Unfair practice charges alleging violations of N.J.S.A. 34:13A-5.4 may be filed only by public employers, public employees, employee organizations, or their representatives. N.J.A.C. 19:14-1.1.

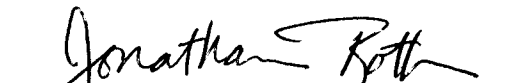
The charge was filed on November 9, 2011. A timely charge would have to allege unlawful conduct within six months of a date Thorpe could be considered a public employee - either within six months of Thorpe's August 15, 2008 termination (i.e., by February 15, 2009) or within six months of the February 12, 2010 arbitration award upholding that termination (i.e., by August 12, 2010). Thorpe contends that her charge was filed within six months of when she became "aware" that her materials were "not preserved."

I cannot apply a subjective standard to assess the timeliness of a charge. Thorpe has not alleged facts indicating that she was "prevented" from seeking return of her property or from seeking redress from any asserted failure to return all her property by August 12, 2010. Nor has she provided any facts showing why the statute should be tolled for about 15 additional months. I find that her charge is filed beyond the six month statutory period. N.J.S.A. 34:13A-5.4c. Also, and for purposes of this decision, I find that Thorpe was not a public employee after August 12, 2010 and has no standing to file this unfair practice charge. N.J.A.C. 19:14-1.1. Accordingly, I find that the complaint issuance standard has not been met and dismiss the charge.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Jonathan Roth
Deputy Director of Unfair
Practices

DATED: November 28, 2012
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by December 11, 2012.