

P.E.R.C. NO. 2009-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(OFFICE OF THE PUBLIC DEFENDER)

Respondent,

-and-

Docket Nos. CO-2006-155
CO-2007-152

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the motion for summary judgment filed by the State of New Jersey (Office of the Public Defender) in the consolidated unfair practice proceeding initiated by the Communications Workers of America. The charges allege the State violated the New Jersey Employer-Employee Relations Act when it refused to process grievances filed by a CWA shop steward; refused her request for union representation at a meeting; and disciplined her in retaliation for protected activity. The State argued that the first charge was untimely because the preliminary notice of disciplinary action for the suspension was served outside the six-month statute of limitations period and the charge failed to state a prima facie case for a Weingarten violation. The Commission finds that the date of the final notice of disciplinary action that was served within six months of the charge is the date of the discipline for statute of limitations purposes. The Commission declines to consider the summary judgment motion on the Weingarten allegations because it was really an appeal of the issuance of a Complaint that must be made by special permission to appeal within five days of service of the Complaint pursuant to N.J.A.C. 19:14-2.3(c).

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, Anne Milgram, Attorney General
(Geri Benedetto, Deputy Attorney General, on the brief)

For the Charging Party, Weissman & Mintz, attorneys
(Annmarie Pinarski, of counsel)

DECISION

On September 8, 2008, the State of New Jersey (Office of the Public Defender) moved for summary judgment in an unfair practice charge filed by the Communications Workers of America (CWA). (CO-2006-155). The CWA opposed summary judgment. We deny the State's motion.

The December 13, 2005 charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5)^{1/} when it refused to

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

process grievances filed by Denise Cole, a CWA shop steward; refused to grant Cole's request for representation during a January 20 disciplinary meeting; and suspended Cole in retaliation for protected activity.

On November 14, 2006, the CWA filed a second unfair practice charge, CO-2007-152, alleging that the State violated subsections 5.4a(1), (3) and (5) of the Act when Cole was suspended on October 3 for five days in retaliation for protected activity and when she was threatened with discipline on October 11 for attending a PERC exploratory conference.

On May 8, 2007, the Director of Unfair Practices issued an Order Consolidating the two charges for hearing. The Director refused to issue a Complaint on the 5.4a(5) allegations of the charges because insufficient facts were alleged to support those allegations. The hearing commenced on September 9 and 11, 2008 before Hearing Examiner Deirdre K. Hartman with additional hearing dates scheduled.

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act . . . (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. . .[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."

The State argues that the December 13, 2005 charge is untimely because the allegations relate to an alleged Weingarten violation^{2/} that occurred during a January 20, 2005 meeting and a February 8, 2005 suspension. Both of these allegations, it is argued, occurred outside the six-month limitations period to file a charge. See N.J.S.A. 34:13A-5.4(c). The State further argues that the CWA failed to plead a prima facie claim of a Weingarten violation in the December 13 charge.

The CWA responds that the December 13, 2005 charge is timely because the operative event for the statute of limitations calculation is the final notice of disciplinary action issued to Cole on June 30, 2005 and not the preliminary notice issued on February 8. The CWA also argues the charge sets forth facts sufficient to state a claim for a Weingarten violation.

Summary judgment will be granted if there exists no genuine issue as to any material fact and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

Timeliness of the December 13, 2005 Charge

^{2/} NLRB v. Weingarten, 420 U.S. 251 (1975) (Employee has a right to request a union representative's assistance during an investigation interview that the employee reasonably believes will result in discipline).

We first consider whether the December 13, 2005 charge is timely. N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge unless the charging party was prevented from filing a charge earlier. The event triggering the running of the limitations period is the implementation or effective date of an adverse personnel action as opposed to notice of the action. See Rutgers, the State University, H.E. No. 2003-2, 28 NJPER 466, 538-539 (¶33171 2002) (effective date of employee's reduction to a 10-month work year, as opposed to notice of reduction, was triggering event for determining timeliness of unfair practice charge).

We find that in this case the issuance of the preliminary notice was not the operative date of the discipline. When Cole received the February 8, 2005 preliminary notice of disciplinary action, she had not in fact been disciplined - she was put on notice that discipline may occur. The opportunity for a hearing or to settle the matter was still available to her. It was the final notice of disciplinary action issued on June 30 that was the operative event for our statute of limitations purposes. See State of New Jersey (Dept. of Transportation), P.E.R.C. No. 2009-16, 34 NJPER 291, 292 (¶104 2008) (statute of limitations began when employee learned purported temporary reassignment was made permanent). Upon receiving the June 30 final notice, the

discipline was imposed. Thus, we deny the employer's motion for summary judgment and find that the December 13 charge is timely.

The Weingarten Violation

The State asserts that the Weingarten count of the December 13, 2005 charge must be dismissed because the CWA did not plead that the January 20 meeting was an investigatory interview. Rather the charge asserts the meeting was "accusatory". The State further contends that the charge does not allege that the employee had a reasonable belief that discipline would result from the meeting. Thus, the required elements of a Weingarten case have not been plead.

The State is essentially appealing the Director's issuance of the Complaint on the December 13, 2005 charge. An appeal of the issuance of a Complaint must be made by special permission to appeal. N.J.A.C. 19:14-2.3(c) ("A decision by the Director of Unfair Practices to issue a complaint ... may not be appealed pre-hearing except by special permission to appeal"). Special permission to appeal must be filed within five days from the service of the Complaint. N.J.A.C. 19:14-4.7. It is now too late to appeal. The State may make a motion to dismiss, if appropriate, before the Hearing Examiner at the close of the charging party's case. Thus, we deny the motion as to the Weingarten count of the Complaint.

ORDER

The State's motion for summary judgment is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: December 18, 2008

Trenton, New Jersey