P.E.R.C. NO. 77-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

- and -

Docket No. CO-76-244-86

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT/AFT/ AFL-CIO,

Charging Party.

SYNOPSIS

The Commission grants a motion for summary judgment dismissing the complaint in an unfair practice proceeding on the ground that the charge was not filed within the six-month time period of N.J.S.A. 34:13A-5.4(c). The Commission holds that in the absence of any allegation of being prevented from filing an unfair practice charge, the running of the time period will not be tolled because the aggrieved party attempted to seek redress of the alleged discriminatory action through the grievance/arbitration process of the parties' collective agreement. The legislative prohibition on the issuance of a Complaint more than six months after the occurrence of an unfair practice precludes the assertion of jurisdiction by the Commission even when the aggrieved party is attempting to resolve the matter through other means.

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AFL-CIO,
Charging Party.

Appearances:
For the Respondent, Hon. William F. Hyland, Attorney General of New Jersey (Melvin E. Mounts, Deputy Attorney General, of Counsel).

For the Charging Party, Sauer, Boyle, Dwyer & Canellis, Esqs. (Mr. George W. Canellis, of Counsel).

ORDER ON MOTION

An Unfair Practice Charge was filed with the Public Employment Relations Commission on March 19, 1976 by the Council of New Jersey State College Locals, NJSFT/AFT/AFL-CIO (the "Charging Party") alleging that the State of New Jersey (the "Respondent") had engaged or is engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the charge alleges unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (3) in that the Respondent has refused to reappoint a faculty member because he filed a grievance.[1/] A Complaint and Notice of Hearing was issued

1/ The cited subsections prohibit employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them (Continued)

on June 25, 1976 by the Commission's Director of Unfair Practices and Representation.

This decision deals with a motion for summary judgment with supporting brief filed by the Respondent. The Charging Party has filed papers in opposition.[2/] The hearing previously noticed has been postponed pending disposition of the motion. Both parties have requested us to rule upon this motion rather than refer it to the Hearing Examiner. We are satisfied that this matter can be properly decided at this time.

The essential facts as set forth in the charge are not disputed. The Charging Party is the certified majority representative of employees including Professor Jack Barense employed by the Respondent in an appropriate unit. There existed a collective negotiations agreement between the Respondent and the Charging Party covering the term from February 22, 1974 through June 30, 1976.

Professor Barense, who was in his third year of employment at Stockton State College in the 1974-75 academic year, was recommended for reappointment on November 6, 1974 by the Faculty Review Committee. On November 11, 1974, the Vice President for Academic Affairs at the College directed Professor Barense to cease conducting classes in his "Workshop on Sexism" in the

1/ (Continued) 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."

2/ Subsequently, both parties submitted additional letters to the Commission. While we have examined those letters, our decision herein is unaffected by them. We reach the same result whether or not those letters are considered.

nude and further directed him to hold the remaining sessions of the course on campus. Upon receipt of this memorandum, Professor Barense filed on November 15, 1974, a grievance claiming, among other things, a violation of the article in the collective negotiations agreement concerning "Academic Freedom." Subsequently, his Dean, the Vice President for Academic Affairs, and the President recommended against the reappointment of Professor Barense for the 1975-76 academic year.

On December 3, 1974, the Faculty Review Board found certain procedural violations in the evaluation of Professor Barense and recommended that the review and evaluation process be repeated through the levels of the Dean and the Vice President. Professor Barense filed a new grievance on December 16, 1974 claiming that his pending non-retention constituted a reprisal for his filing of the grievance on November 15, 1974.

The review process was repeated with the Faculty Review Committee again recommending reappointment and the Dean, Vice President and President recommending against reappointment. This determination, in accordance with the provisions of the parties' agreement, was appealed to the Chancellor of Higher Education where the appeal was denied. This grievance was then appealed to arbitration and the arbitrator rendered his Opinion and Award, a copy of which is attached to the Charging Party's papers, on August 28, 1975.

The arbitrator, having found certain violations of the parties' agreement, recommended that the question of whether to

recommend to the President the reappointment of Professor Barense should be considered de novo. This recommendation was substantially accepted by the Respondent. An ad hoc committee consisting of another Vice President, a faculty member and a student "strongly recommended" to the President the reappointment of Professor Barense on November 17, 1975. By memorandum dated December 5, 1975, the President advised Professor Barense that he had not altered his recommendation not to reappoint Professor Barense. Thereafter, on March 19, 1976 the instant charge was filed.

In its motion for summary judgment, the Respondent moved for dismissal of the charge because it fails to state a claim upon which relief can be granted and because it was not timely filed.[3/]

The Respondent argues that this matter can be disposed of by motion for summary judgment in that there are no genuine issues of material fact in dispute and that the issues are solely legal.

The Respondent contends that the only factual allegations

3/ N.J.S.A. 34:13A-5.4(c) states, in pertinent part, that "... provided that no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the six months period shall be computed from the date he was no longer so prevented."

of the charge dealing with protected activity are the filing of the two grievances on November 15 and December 16, 1974, over fifteen months before the instant charge was filed. Professor Barense was notified of the decision not to reappoint him in December 1974 and he went off the payroll at the end of June 1975, also over six months before the charge was filed.

The Respondent urges that events arising out of the grievance not be permitted to circumvent the Act's timeliness provisions and that the President's December 5, 1975 decision, made in accordance with the arbitrator's award, not to reappoint Professor Barense is not a legally significant event regarding the timeliness of the charge.

The Respondent argues that even if the December 5, 1975 date were utilized, thus making the charge timely, the charge fails to state facts which, even if true, might constitute unfair practices.

The Charging Party urges that the timeliness of the charge should be measured from December 5, 1975 because, even though the protected activities engaged in by Professor Barense took place at the end of 1974, Professor Barense diligently pursued his legal rights under the collective negotiations agreement and these remedies had not been exhausted until December 5, 1975. To dismiss the charge as untimely, it is argued, would be inconsistent with the Act's policy of favoring voluntary mediation. Furthermore, it is stated that the Charging Party expected that the charge would have been returned as premature

had it been filed with the Commission prior to December 5, 1975.

Additionally, the Charging Party states that there are disputed factual issues relating to the President's reasons for failing to reappoint Professor Barense that can only be determined by a full hearing.

Putting the timeliness issue aside momentarily, we agree with the Charging Party that it would be violative of the Act if the Respondent failed to reappoint Professor Barense because he exercised his rights to file a grievance. That is precisely what the Charging Party alleges and, while the Act requires that the Charging Party prosecute charges and that the Commission has to determine, based upon all the evidence taken, that a party has engaged in an unfair practice, those are matters that normally require evidentiary hearings.

However, in the instant matter we conclude that we lack jurisdiction -- notwithstanding the arbitrator's disturbing conclusion which, of course, is not binding on us, that the Respondent took reprisals against Professor Barense by reason of his participation in the grievance procedure -- by virtue of the six months limitation in the statute.

Professor Barense filed a grievance November 15, 1974. In December 1974, the President notified him that the President would not recommend him for reappointment. No unfair practice charge was filed until March 19, 1976. Instead, Professor Barense filed a second grievance on December 16, 1974. The significant event for the purpose of determining the timeliness

of the instant charge was the notification to Professor Barense in December 1974, subsequent to the filing of his first grievance, that he would not be reappointed. He or the majority representative could then or within six months thereafter have filed an unfair practice charge alleging that he had been discriminated against in the exercise of rights guaranteed by the Act. No such charge was filed for well over a year and there is no claim that he was prevented from filing the charge.

Rather than filing a charge, Professor Barense chose to pursue the contractual grievance procedure. However, pursuit of that procedure does not toll the period for the filing of a charge with the Commission alleging a violation of the Act. While it is true that the Commission has a policy[4/] of deferring to voluntarily agreed upon procedures for resolving disputes in a fashion that is compatible with the policies and purposes of the Act, we do retain jurisdiction over those cases and the charge must be filed in a timely fashion. Where the Legislature has given us exclusive power to prevent unfair practices but has limited the issuance of complaints to events occurring within six months of the filing of charges, we cannot assert jurisdiction over an event which occurred more than six months before the charge was filed even when the charging party is attempting to resolve the matter through other means. Had the Legislature intended otherwise, it would have qualified the six months limitation.

4/ See, In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975) and In re East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975).

Based upon the above, it is concluded that the charge was not timely filed and we will grant the motion of the Respondent for summary judgment and dismiss the instant complaint.

ORDER

IT IS HEREBY ORDERED that the motion of the Respondent for summary judgment is granted and the complaint herein is dismissed.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Commissioner Hipp did not participate in this matter.
Chairman Tener and Commissioners Forst, Hartnett, Hurwitz and Parcells voted for this Decision.

DATED: Trenton, New Jersey
September 21, 1976

ISSUED: September 22, 1976