D.U.P. NO. 2003-3

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

In the Matter of

MONMOUTH COUNTY BOARD OF FREEHOLDERS
AND MONMOUTH COUNTY SHERIFF,

Respondents,

-and- Docket No. CO-2002-77

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 56, AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge as untimely. The charge was not filed until almost one year after Union representatives and unit members knew that the responsibilities of a vacant unit position had been transferred to non-unit employees. The Director finds that the Union had sufficient information of the alleged transfer well within the six-month limitation period for filing a charge and that settlement discussions between the parties concerning the dispute did not toll the six-month statute of limitation.

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Appearances:

For the Respondents
Robert J. Hrebek, attorney

For the Charging Party
Fred Sultan, Business Agent

REFUSAL TO ISSUE COMPLAINT

On September 19, 2001, United Food and Commercial Workers, Local 56, AFL-CIO (UFCW) filed an unfair practice charge alleging that Monmouth County and the Monmouth County Sheriff (collectively referred to as the County) violated 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

(Act) by unilaterally removing the work release administrator position from UFCW's negotiations unit and transferring the duties formerly performed by the work release administrator to other County employees outside the UFCW's unit.

The County asserts that the charge is untimely filed since the work release duties were assigned to corrections officers in September 2000, when the work release administrator title became vacant. It further maintains that it did not illegally transfer UFCW's clerical unit work but rather it determined that the work should more properly be performed by corrections officers who, because of their law enforcement status, have greater access to necessary records.

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 standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. In correspondence dated July 2, 2002, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. On July 25, 2002, UFCW filed a supplemental response in which it asserts that it acted in a prompt manner to resolve its transfer of work dispute with the County and that it believed the assignment of

the work to correction officers was temporary. The July 25, 2002 submission does not provide specific dates for UFCW's asserted attempt to settle its dispute with the County nor does the UFCW assert that it was prevented from filing an unfair practice charge while, simultaneously, discussing settlement possibilities with the County. The submission does not provide any new information to support the charge. Based upon the following, I find that the complaint issuance standard has not been met.

UFCW represents a unit of clerical employees assigned to the County sheriff's office. It has a current agreement with the County covering unit employees for the period January 1, 2001 through December 31, 2003. The negotiations unit includes the position of work release administrator.

Unit member Mike Capisano held the work release administrator title and performed its duties beginning in late 1999 or early 2000. Prior to Capisano holding the position, corrections officers performed the work release duties. Unit employee Morris, a program development specialist, worked alongside Capisano until August 29, 2000 when she went on leave of absence. Morris returned from leave of absence to her old position in March 2001 and was promoted to program development specialist II in October 2001. While working together, Capisano and Morris had their own areas of responsibility but occasionally performed each other's duties when the other was absent. Capisano resigned on September 11, 2000. His duties were then assigned to non-unit corrections officers who

worked with unit members who, as Morris had done, apparently overlapped on occasion with some of the duties being performed full-time by the corrections officers.

There is no dispute that local UFCW representatives and employee members of UFCW were aware in September 2000 that Capisano had resigned and that they were also aware that the work release administrator duties continued to be performed by corrections officers after Capisano left. The work release administrator position was not posted when Capisano left.

The UFCW was engaged in negotiations with the County for a successor agreement in late 2000 and early 2001, after Capisano had resigned. During negotiations, the work release administrator title remained in the negotiations agreement even though all parties were aware at the time that the work itself was being performed by non-unit employees. The parties settled their contract in or around early April 2001, retroactive to January 2001. UFCW alleges that its representatives did not learn until May 2001 that the County did not intend to post the disputed position. The work release administrator position has not been posted or filled by a unit member, and corrections officers continue to perform work release duties as their full-time assignment.

ANALYSIS

The Act requires that an unfair practice charge must be brought within six months of the alleged unfair practice. N.J.S.A.

34:13A-5.4c.[2/] See New Jersey Sports & Exposition Auth. and Sports Arena Employees Local 137, D.U.P. No. 99-11, 25 NJPER 145 (¶30066 1999); City of Hoboken, D.U.P. No. 96-11, 22 NJPER 2 (¶27002 1995)(charge alleging City breached collective agreement in the manner it paid retirement benefits seven months earlier was dismissed as untimely filed).

The standard for evaluating statute of limitations issues was set-forth in Kaczmarek vs. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on its rights. But the Court still expected charging parties to diligently pursue their claims.

In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date of an alleged unfair labor practice, provided the person(s) affected thereby has notice of the action. The date of the action

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2/ N.J.S.A. 34:13A-5.4c states, in relevant part, 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-month period shall be computed from the day he was no longer so prevented."

is known as the "operative date" and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must be filed within six months of the operative date - either the date of the occurrence of the alleged unfair practice or the date the aggrieved party had notice thereof. The concept of "notice" of the particular action complained of includes either actual or constructive notice of the existence of facts that would establish a violation. Constructive notice requires that a complaining party exercise reasonable due diligence in discovering the facts upon which the party bases its allegations. Michael Konig t/a Nursing Center, 151 LRRM 1090 (1995); Mueller Brothers Body Shop, 139 LRRM 1308 (1992). Charges and amendments filed past that date are generally untimely. Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the Charging Party that it was "prevented" from filing the charge prior to the expiration of the period.

The NLRB explicitly ruled in Michael Konig that the six-month statute of limitations for filing a charge begins to run when the charging party has constructive knowledge of the unfair practice. In Mueller Brothers, the Board found that had the union exercised due diligence, it would have easily discovered that for years the employer had a significant number of employees working in its shop who had not been referred to the union by the employer pursuant to the union-security clause. Thus, the Board found that the union could not argue, well beyond the statute of limitations,

that it had no notice of the employer's alleged violation. Id. at 1309.

Considering the circumstances of this case, there is no dispute that unit member Capisano vacated the work release administrator position on September 11, 2000, when he resigned. UFCW was aware of Capisano's resignation at the time it occurred. There is no dispute that the duties of the position were reassigned to full-time corrections officers in September 2000, shortly after Capisano's resignation. This fact was observed by UFCW unit members who worked alongside the corrections officers and may have assisted with the work release duties just as unit employee Morris had done while Capisano held the position. Thus, the unit members themselves were aware as early as September 2000 that corrections officers were doing the work formerly done by Capisano, and that the position had not been posted. Additionally, UFCW negotiators were engaged in negotiations in late Fall 2000, after Capisano resigned the position, and they knew or should have known during negotiations that the duties of the vacant unit position were being performed by non-unit employees.

While UFCW alleges that its representatives did not learn until May 15, 2001 that the position of work release administrator had not been posted and that the work had been transferred, it is undisputed that UFCW representatives knew in September 2000 that their unit member, Capisano, had retired and that the work was continuing to be performed. Further, by late Fall 2000, UFCW

negotiators and unit members themselves were aware that non-unit corrections officers were performing the work. There is also no allegation that the County attempted to conceal the fact that non-unit employees performed Capisano's duties shortly after his departure. Given these facts, I find that as of September 2000 UFCW had sufficient information that the unit work was being done by non-unit employees, regardless of whether or not the County had determined to post the position. Moreover, UFCW began settlement discussions with the County right after it learned that non-unit members had been assigned to the work in the fall 2000. Settlement talks ended close to the time UFCW filed its charge. UFCW does not assert that it was prevented from filing a charge during its settlement discussions with the County. The Commission has held that pursuing grievances and other forms of voluntary resolution of alleged unfair practices does not constitute a tolling of the six-month statute of limitations. New Jersey Dept. of Human Services, P.E.R.C. No. 85-48, 10 NJPER 638 (¶15306 1984); Camden Vocational Bd. of Ed., P.E.R.C. No. 83-28, 8 NJPER 558 (¶13256 1982); see also City of Margate, P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993) adopting H.E. No. 93-28, 19 NJPER 296 (¶24153 1993). Finally, even if UFCW was not officially aware until May 15, 2001 that the County had not posted or filled Capisano's position with a unit member, failure to post or fill the position is not the operative event in this case. The operative event occurred in September 2000, when non-unit corrections officers began openly

performing the work release duties. See Highland Park Board of Education, D.U.P. No. 91-17, 17 NJPER 83 (¶22037 1991). UFCW representatives and unit employees knew that the responsibilities of the work release administrator were assigned to non-unit employees beginning in September 2000, and have been so assigned since then. This charge was filed on September 19, 2001, well-beyond the six-month limitations period. Therefore, in the absence of timely allegations, I decline to issue a complaint in this charge. N.J.S.A. 34:13A-5.4(c). No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977); Kaczmarek.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: August 30, 2002
Trenton, New Jersey