P.E.R.C. NO. 2003-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-298

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses in part a Complaint based on an unfair practice charge filed by the Communications Workers of America against the State of New Jersey (Department of Human Services). The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally removed four doctors from CWA's negotiations unit of professional employees and reduced their compensation, hours, and benefits and when it did not provide requested information concerning the doctors' current employment status. The Hearing Examiner's decision to grant summary judgment dismissing as untimely the allegations concerning the removal from the negotiations unit was affirmed. Her recommendation to find that the employer violated the Act by refusing to provide CWA with relevant information concerning the employment status of the asserted employees was adopted.

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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-and- Docket No. CO-H-97-298

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Peter C. Harvey, Acting Attorney General (George N. Cohen, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION

On March 4, 1997, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State of New Jersey (Department of Human Services). The charge alleges that the State violated 5.4a(1) and (5)[1] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it

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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; 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."

unilaterally removed four doctors from CWA's negotiations unit of professional employees and reduced their compensation, hours, and benefits and when it did not provide requested information concerning the doctors' current employment status. The charge makes these specific assertions:

1. CWA represents all professional employees employed by the Department of Human Services, including physician specialists and clinical psychiatrists.

2. In or about March 1995 three physician specialists and one clinical psychiatrist were laid off from their unclassified positions with Trenton Psychiatric Hospital.

3. Prior to their layoff, the four doctors had been assigned to the Medical Officer on Duty (MOD) program and worked a 4:30 p.m. to 8:30 a.m. shift.

4. The four doctors covered the 16 hour shift, 7 days a week, on a rotating basis.

5. After the layoff of the four doctors in or about March 1995, the doctors continued to perform services at Trenton Psychiatric Hospital on the 4:30 p.m. to 8:30 a.m. shift.

6. When CWA questioned Department of Human Services representatives concerning the continued utilization of doctors who had been laid off from their unclassified positions, it was expressly stated to CWA that the doctors were being used on a consultant basis as independent contractors and were

therefore not included in CWA's negotiations unit and were not subject to the terms and conditions of the collective negotiations agreements in effect between CWA and the State.

7. In or about July 1996, CWA learned, for the first time, that [the] four doctors in question might not be independent contractors, but might be part-time employees of the Department of Human Services.

8. By letter dated July 17, 1996, from Steven P. Weissman to David Collins, CWA requested clarification as to the status of the four doctors.

9. By letter dated July 29, 1996, Collins stated that he would look into the matter.

10. Thereafter, in September 1996 Weissman inquired whether Collins had . . . determined whether the doctors in question were being utilized as independent contractors or whether they were employees of the Department of Human Services.

11. Collins was unable to provide a definitive answer to this inquiry.

12. By letter dated January 6, 1997 Weissman advised OER that unless the State could confirm that the doctors were independent contractors and not employees performing bargaining unit work, CWA would be compelled to file an unfair practice charge on their behalf.

13. As of February 25, 1997 the State of New Jersey has not confirmed whether the four doctors laid off

from their unclassified positions in March 1995 are performing services as independent contractors or are performing services as employees of the Department of Human Services.

14. Upon information and belief, the four doctors in question are employees of the Department of Human Services and are not independent contractors.

15. The sole basis for laying off the four doctors in question was to save money. After the layoff of the four doctors, the same services had to be rendered in connection with the Medical Officer on Duty program. The nature of the MOD program did not change after March 1995.

16. If the four doctors in question are employees, then the Department of Human Services unilaterally changed their terms and conditions of their employment by reducing their levels of compensation and benefits. The employer also refused to negotiate with CWA over these changes.

17. For the reasons set forth in the preceding paragraphs the instant charge is timely filed. Representatives of the Department of Human Services affirmatively represented to CWA that the doctors in question were providing services as independent contractors. CWA relied upon this representation.

18. The failure of the State to provide information concerning the employment status of the four doctors in question violates N.J.S.A. 34:13A- 5.4(a)(1) and (5).

> 19. If the four doctors are employees of the Department of Human Services, the State's unilateral reduction in their compensation, hours and benefits, and the State's unilateral removal of the doctors from CWA's negotiations unit violated N.J.S.A. 34:13A-5.4(a)(1) and (5).

On September 11, 1997, a Complaint and Notice of Hearing issued. The State's Answer admitted that it had terminated the four doctors in March 1995 that they had independently elected to perform medical services at the Department of Human Services ("DHS") and that CWA's attorney and OER's Deputy Director had exchanged letters; but it denied the charge's remaining allegations. The Answer also raised several defenses, including that the charge was untimely.

On April 14, 1998, the State filed a motion for summary judgment, asserting that the charge was untimely. The motion was referred to Hearing Examiner Elizabeth J. McGoldrick. The parties filed stipulations, exhibits and briefs.

On April 19, 2000, the Hearing Examiner granted summary judgment on some, but not all, paragraphs of the Complaint. H.E. 2000-8, 26 NJPER 251 (¶31099 2000). Concluding that the charge was untimely to the extent it contested the March 1995 layoff, she dismissed paragraphs 2-7, 15-17, and 19. Concluding that the charge was timely to the extent it sought information concerning the four doctors' current employment status, she scheduled a

hearing on the remaining paragraphs. Neither party sought special permission to appeal these interlocutory rulings. N.J.A.C. 19:14-4.8(e).

Trying to reach a settlement, the parties mutually requested and received several postponements of the hearing. Those efforts being unsuccessful, a hearing was held on January 31, 2002. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs by May 20, 2002.

On October 23, 2002, the Hearing Examiner issued her report. H.E. No. 2003-6, 28 NJPER 429 (¶33157 2002). She found that the State violated 5.4a(1) and (5) by not providing CWA with information about the doctors' current employment status. She rejected a contention that this claim had been mooted by the State's providing the information after the charge was filed and she recommended that the State be ordered to post a notice about its violation.

On November 1, 2002, the State filed exceptions. It asserts that the allegations concerning the request for information were untimely, unproven and moot.

On December 4, 2002, after receiving an extension of time, CWA filed exceptions. It asserts that partial summary judgment should not have been granted because there was a factual dispute over whether DHS representatives prevented CWA from filing an

earlier charge by falsely representing that the four doctors were consultants rather than employees.

On December 9, 2002, the State replied to the exceptions. It asserts that summary judgment was properly granted because CWA did not file its charge within six months of learning of the change in the doctors' employment status.

CWA received an extension of time until January 21, 2003 to respond to the State's exceptions. However, no response was filed.

We have reviewed the record, including the documents submitted in connection with the summary judgment motion, the exhibits submitted at the hearing, and the transcript of the hearing. The record supports the findings of fact in the Hearing Examiner's summary judgment report (H.E. No. 2000-8 at 3-10) and her post-hearing report (H.E. No. 2003-6 at 3-7). We adopt and incorporate them.

We add the full texts of the letters exchanged between CWA's attorney, Steven P. Weissman, and the State's Employee Relations Coordinator, David Collins.

On July 17, 1996, Weissman wrote this letter to Collins:

> On March 3, 1995, three Physician Specialists and one Clinical Psychiatrist I were laid off from Trenton Psychiatric Hospital. Prior to their layoff they had been assigned to the Medical Officer on Duty (MOD) program and worked a 4:30 p.m. to 8:30 a.m. shift. The four doctors covered the sixteen hour shift, seven days a week, on a rotating basis.

> It is my understanding that a grievance was filed and processed in this matter. After the four doctors were laid off they were offered the opportunity to continue covering the 4:30 p.m. to 8:30 a.m. shift. It was represented to CWA by management that the doctors were to be used on a consultant basis as independent contractors and were therefore not included in CWA's negotiations unit.
>
> I recently had occasion to meet with the four affected doctors. At that meeting CWA learned, for the first time, that the four doctors, who continue to staff 4:30 p.m. to 8:30 a.m. shifts, are not treated as independent contractors, but are being paid as employees of the Department of Human Services. Presumably, OER was not aware that this was the case.
>
> Based upon this recently acquired information, it is clear that the layoff of the four doctors was unlawful. Its only purpose was to circumvent the terms of the collective negotiations agreement and avoid paying the doctors contractually guaranteed salaries and benefits. Accordingly, CWA demands that the doctors be reinstated to their permanent full time positions and be made whole for all lost wages and benefits. In addition, CWA should be reimbursed for all dues monies that would have been paid to the Union had the doctors not been laid off.
>
> Please look into this matter and let me know how OER intends to proceed. If I do not hear from you within ten days from the date of this letter I will assume that the State has no intention of rectifying this problem and will initiate action in an appropriate forum.

On July 29, 1996, Collins wrote this response to Weissman:

> I am in receipt of your July 17, 1996 letter regarding the above captioned matter. As this office was not aware of the particular specifics cited in your letter as per the layoff of these unclassified employees, I

> have forwarded a copy of your letter to the Department of Human Services. However, let me state that if what you say in your letter is true, I find it incredible that these four professional individuals took 16 months to being it to your attention. As stated, while I will look into this matter, the 16-month gap between the layoff and your letter is problematic.

On January 6, 1997, Weissman wrote this letter to Collins:

> By letter dated July 29, 1996 you advised me that you would look into this matter and get back to me. CWA has held off filing any legal actions based on your letter. However, unless you can confirm that the doctors in question are in fact independent contractors and are not employed by the State performing bargaining unit work, CWA will be compelled to file an unfair practice charge on their behalf with PERC.

Receiving no response, CWA filed this charge on March 4, 1997.

N.J.S.A. 34:13A-5.4c states:

> [N]o complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 month period shall be computed from the day he was no longer so prevented.

We must determine whether this statute of limitations bars CWA from seeking relief on either or both of the claims asserted in its charge. Those claims are: (1) the change in the doctors' employment conditions and their removal from CWA's unit in March 1995; and (2) the failure to provide the information about the doctors' employment status requested by CWA in July 1996 and

January 1997. We will set forth the standards for assessing the timeliness of unfair practice charges generally and then apply those standards to each claim separately.

A. The Standards For Assessing Timelines

Section 5.3 does not rigidly bar relief on all causes of action arising more than six months before a charge was filed. A charge may still be filed if the charging party was "prevented" from filing a charge on time and the six month period will not begin to run until the charging party was "no longer so prevented." 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 as 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). 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. See, e.g.,

Kaczmarek; City of Margate, P.E.R.C No. 94-40, 19 NJPER 572 (¶24270 1993); Hoboken Teachers Ass'n, P.E.R.C No. 91-110, 17 NJPER 331(¶22145 1991); Barnard Engineering Co., 295 NLRB No. 30, 133 LRRM 1137 (1989); O'Neill Ltd., 288 NLRB No. 147, 129 LRRM 1315 (1988); Burgess Construction Corp., 227 NLRB No. 119, 95 LRRM 1135 (1977).

B. The First Claim

Summary judgment may be granted if "it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law." N.J.A.C. 19:14-4.8(d). In determining whether summary judgment was properly granted on CWA's first claim, we must view the evidence submitted in connection with the motion in the light most favorable to CWA as the responding party and we must grant CWA every reasonable inference. We must then determine whether, so viewed, the evidence and inferences suffice to permit us to resolve the timeliness issue in CWA's favor. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995); Margate.

CWA filed its charge on March 4, 1997, two years after the contested layoff of March 3, 1995. That charge is untimely unless CWA was prevented from filing a charge and continued to be prevented until at least September 4, 1996, six months before the

date it did file its charge. Applying the summary judgment standards in the preceding paragraph, we hold that CWA was not prevented from filing a charge before that date.

There is no genuine issue of fact material to our statute-of-limitations analysis. CWA's assertion that it was prevented from filing an earlier charge rests solely on statements written by the Manager of Human Resources at Trenton Psychiatric Hospital ("TPH") in a first step grievance denial. It is undisputed that those statements were made. It is also undisputed that no evidence was submitted to support the allegations in paragraphs 6 and 17 that CWA representatives asked DHS representatives about the doctors' employment status and were told that they were consultants or independent contractors. Absent any such evidence, the question is whether the statements in the first step grievance denial prevented CWA from filing a timely charge. The answer is no.

The claim that CWA asserted in its March 1997 charge repeated the claim it asserted in its March 1995 grievance and grievance-related appeals - - that the State had changed the four doctors' employment conditions and eroded CWA's negotiations unit. By the time the grievance was heard on May 1, 1995, CWA knew that the four doctors were continuing to work in the MOD program with essentially unchanged duties; that they continued to receive health insurance and to remain in the State retirement

system, and that they were covered by the Tort Claims Act since they were employees of TPH, a State facility. These assurances were contained in a February 15, 1995 letter from TPH's Manager of Human Resources. CWA thus had a factual basis for filing its grievance.

That same manager denied CWA's grievance at the first step. His decision stated that the doctors "were no longer employed by the State of New Jersey" when the grievance was filed; the termination of their unclassified appointments rendered the doctors "former employees"; and "these individuals are no longer employees as defined by the Agreement." However, these statements did not stop CWA from continuing to press its claim that the doctors were employees by appealing the denial to step 2 of the grievance procedure and then appealing the second step denial to the Department of Personnel. We agree with the Hearing Examiner that CWA was not "prevented" by the initial denial of the grievance from filing a timely unfair practice charge as well as its grievance and DOP appeals. Cf. State v. Council of New Jersey State College Locals, 153 N.J. Super. 91 (App. Div. 1977) (pending grievance proceedings do not toll statute of limitations). We also agree that CWA should have inquired at that time about the source of the doctors' compensation and their specific employment status, especially given the tensions between

the HR Manager's February 15 letter and his later grievance denial concerning the doctors' status.

Even if we assume that the initial denial of the grievance prevented CWA from filing a charge, it was no longer so prevented as of July 11, 1996. On that date, CWA's attorney met with the four doctors and learned that they were being paid as DHS employees. Based on that information, the attorney wrote a letter to the State's representative emphatically stating that the doctors' layoff was an unlawful attempt to circumvent the collective negotiations agreement; demanding that the State reinstate the doctors to their full-time positions and make them whole for all lost wages and benefits; and threatening to file an unfair practice charge if no response was received within 10 days. As of this date, if not before, CWA had the information it needed to file its charge. Yet it did not do so until almost eight months later. Compare Margate (October 1991 letter specifying unfair practice allegations and intent to pursue remedies required that charge be filed within six months).

CWA asserts that it reasonably elected to ask the State for more information about the doctors' employment status rather than file an immediate charge. Its July 17 letter, however, demanded relief rather than information. And the State's July 29 response, while offering to look into the matter, also stressed the 16 month gap between the layoff and the letter as a problem

and thus made clear that the statute of limitations would likely be raised as a defense to any charge. When the State's representative told CWA's attorney on August 8 that he thought the doctors were independent contractors and that he would seek confirming information from DHS, he did not indicate that the 16 month gap was no longer a problem. Under these circumstances, CWA was not "prevented" from filing its charge within six months of its July 11 meeting with the doctors. CWA was justified in seeking information about the doctors' employment status, but when that information was not promptly received, it should have filed the charge its July 17 letter had threatened to file if no response was received within 10 days.[2] The legislative purpose of encouraging the diligent pursuit of causes of action and preventing stale claims would be frustrated by not applying the statute of limitations to this claim.

2/ Unlike the union in Barnard Engineering Co., CWA did have clear notice of the alleged violations of law asserted in its July 17 letter and no fraudulent misrepresentations prevented CWA from knowing and asserting the basis of its charge at that time. In March 1995, it already knew of several indications that the doctors were employees and its July 1996 conversation with the doctors resulted in the additional knowledge that they were paid as employees. We similarly distinguish Burgess and O'Neill since these cases, unlike this one, involved fraudulent misrepresentations and complicated schemes preventing the unions from knowing the basis of the charge to be filed. This case would be more comparable to Burgess and O'Neill if evidence had been offered to support the allegations in paragraphs 6 and 17 of the Complaint.

For these reasons, we affirm the summary judgment on paragraphs 2-7, 15-17, and 19 of the Complaint.

C. The Second Claim

The Hearing Examiner upheld CWA's second claim as both timely and meritorious. We agree.

CWA's second claim is that the State violated its duty to provide information concerning the doctors' employment status. In August 1996, the State's representative promised to obtain that information and in January 1997 CWA demanded that the information be supplied promptly. CWA needed this information to ascertain whether these doctors were in its negotiations unit and whether special services employees were being used improperly. While CWA's first claim sought to litigate an event in the distant past, the second claim sought to clarify CWA's current representational interests. The State's initial failure to provide that information promptly turned into a refusal to provide that information at all within the six month period before March 4, 1997. Thus this charge was timely.

The State's exceptions do not specifically contest the Hearing Examiner's determinations that it was obligated to provide the information sought and that it did not do so before the charge was filed (H.E. No. 2003-6 at 12-13). Nor do its exceptions specifically contest her determination that the belated supplying of the information at an exploratory conference

did not make the charge moot (H.E. No. 2003-6 at 13). We adopt these determinations. We hold that the State violated 5.4 a(1) and (5) by not providing the requested information and we order the State to post a notice of its violation.

ORDER

The State of New Jersey (Department of Human Services) is ordered to:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to provide their majority representative, CWA, with relevant information concerning the employment status of asserted employees.

1. Refusing to negotiate in good faith with CWA concerning terms and conditions of employment, in particular by not providing CWA with relevant information concerning the employment status of asserted employees.

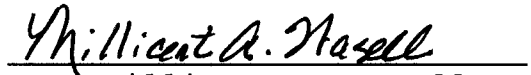
Take this action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Ricci and Sandman voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: February 27, 2003
Trenton, New Jersey
ISSUED: February 28, 2003

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide their majority representative, CWA, with relevant information concerning the employment status of asserted employees.

CO-H-97-298
Docket No.

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES)
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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H.E. NO. 2003-6

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-298

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the State of New Jersey, Department of Human Services violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (5) from September 4, 1996 to March 4, 1997, by failing to provide information concerning the employment status of four physicians who were laid off and rehired in 1995 to the Communications Workers of America. The Hearing Examiner finds that the information was potentially relevant to CWA's representation of professional unit employees. The Hearing Examiner finds that the State's defenses as to timeliness, relevance and mootness are not persuasive.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2003-6

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-H-97-298

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, David Samson, Attorney General
(George N. Cohen, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, Attorneys
(Judiann Chartier, Esq., of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 4, 1997, the Communications Workers of America, AFL-CIO (CWA) filed an unfair practice charge with the Public Employment Relations Commission against the State of New Jersey, Department of Human Services (State or DHS). CWA alleges that the State violated sections 5.4a(1) and (5)[1/] of the New Jersey

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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; 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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when sometime between July 1996 and June 1997, the State failed or refused to provide CWA with the employment status of four physicians employed at the DHS Trenton Psychiatric Hospital. CWA also alleges that in March 1995, the State unilaterally changed the terms and conditions of employment of the four physicians by laying them off and immediately rehiring them at lower rates of pay and benefits, also in violation of section 5.4a(1) and (5). On April 18, 2000, pursuant to the State's Motion for Summary Judgment, I dismissed those allegations because I found they were untimely. See, State of New Jersey (DHS), H.E. No. 2000-8, 26 NJPER 251 (¶31099 2000). Pursuant to that decision, on May 3, 2000, a hearing was scheduled on the remaining timely allegations.

On May 3, 2000, an Order Scheduling Hearing was issued on the remaining timely allegations.2/

On October 15, 1997 and January 8, 2001, the State filed an Answer and an Amended Answer denying that it violated the Act. The State asserts that CWA's request for the employment status is untimely; that the information is not relevant to CWA because regardless of the doctors' status -- independent contractors or special services employees -- CWA does not represent either status; and, finally, since the State has provided the information, the issue is moot.

2/ The parties requested and were granted several postponements of the hearing between April 2000 and November 2001, in order to pursue voluntary resolution of the issues. An order scheduling this hearing was sent on November 30, 2001.

On January 31, 2002, I conducted a hearing at which the parties examined witnesses and presented exhibits.3/ Post-hearing briefs were filed by May 20, 2002. Based upon the entire record, I make the following:

FINDINGS OF FACT

In addition to the findings from this hearing, I rely on the following facts found in State of New Jersey (DHS), H.E. No. 2000-8, 26 NJPER 251, 252, 253 (¶31099 2000):

> 1. The State and CWA (Professional Unit) are parties to a collective negotiations agreement which includes physician specialists and clinical psychiatrists.
>
> 2. By letter dated February 3, 1995, the State notified Physician Specialists Irfan Hug, Ghousia Hashmi, Sarla R. Chhabria and Clinical Psychiatrist Nirmala Yarra-Karnam that 'due to fiscal and budgetary constraints . . . [their] positions [at the Trenton Psychiatric Hospital] were being terminated, effective March 3, 1995.' CWA Representative John McCool was sent a copy of each letter.
>
> 3. All four doctors had been assigned to the Medical Officer on Duty Program (MOD) prior to their layoff. . . .
>
> 5. On about March 3, 1995, the four physicians agreed to perform medical services for DHS.
>
> 6. On March 17, 1995, [CWA Local 1040 Staff Representative Jenna Gledhill-Huff] submitted a group grievance alleging that: 'On 3/3/95, Trenton Psychiatric Hospital violated above stated Article XL by changing the terms and conditions of the Medical Doctors in the M.O.D. Program.'

3/ "T- " refers to the transcript of the hearing on January 31, 2002; "C- " refers to Commission exhibits; and "CP- " refers to Charging Party's exhibits.

7. On May 1, 1995, DHS Hearing officer Paul Gulli conducted a step 1 grievance meeting.

8. On May 2, 1995, Gulli denied the grievance (step 1 Answer) on three grounds.

9. On June 7, 1995, DHS' Employee Relations Coordinator Anita Avolio denied the grievance at step 2.

10. On October 30, 1995, CWA appealed the matter to the Department of Personnel's Division of Appellate Practices and Labor Relations. Gledhill-Huff's letter acknowledges her receipt of the step 1 and 2 decisions, together with 'all pertinent documents.' In the appeal, she revealed that she knew that after the layoffs, the doctors were offered '. . . the same appointment at an hourly rate of pay. . . . They would work 24 hours a week (part-time), and their benefits would be maintained through COBRA.' Gledhill-Huff stated that the State's action was '. . . a method of eroding the bargaining unit, and a violation of Article XL of the negotiated contract.'

These facts were developed on the record in this hearing:

Special services employees are hired on an hourly basis and do not have an official classification under the Civil Service Statute or Department of Personnel (DOP) regulations. Throughout the 1980s and into the 1990s, CWA had a dispute with the State regarding these employees. Litigation ensued; CWA eventually received written assurance from the Commissioner of the DOP that the State would not use special services employees. Relying on the assurance, CWA believed that the State was no longer hiring special services employees (T28-T29).

Steven Weissman is the attorney for CWA (T14). In the Spring of 1995, Gledhill-Huff advised Weissman about the layoff of

the four doctors and that they were continuing to work as either independent contractors or consultants (T14). Weissman advised Huff that if they were in either of these two employment classifications, there was very little CWA could do since subcontracting is a managerial prerogative in New Jersey (T14-T15).

About a year later, in the Spring of 1996, Gledhill-Huff called Weissman again at the doctors' request to set up a meeting with him (T15). At the meeting, Weissman learned enough to question the accuracy of the independent contractor/consultant label (T15-T16). He suspected that the doctors might be employees (T16).

On July 17, 1996, Weissman sent a letter to Deputy Director David Collins of the Governor's Office of Employee Relations (OER) advising him that CWA had recently learned that after the doctors had been laid off, they continued to perform the same duties and had been working the same hours, but received lower wages and benefits; that they were not being treated as independent contractors but were paid as employees of the DHS (CP-1; T17-T18). Weissman asserted that the February 1995 layoff was an unlawful attempt to circumvent the Union and the negotiated agreement, and requested reinstatement, back pay and back dues (CP-1; T17-T18).

In correspondence dated July 29, 1996, Collins advised Weissman that he would look into the matter (CP-2; T21).

In August 1996, Weissman learned in a conversation with Collins that ". . . it was [Collins'] understanding that the doctors were being used as consultants or independent contractors" (T22).

Weissman advised Collins that if they were not so employed then they had been unlawfully laid off and their employment conditions had been improperly changed (T22).

By the end of 1996, Weissman had not been informed of the State's determination or understanding of the doctors' employment status (T23). On January 6, 1997, Weissman renewed his request to Collins (T23-T24; CP-3). Weissman wrote:

> By letter dated July 29, 1996 you advised me that you would look into this matter and get back to me. CWA has held off filing any legal actions based upon your letter. However, unless you can confirm that the doctors in question are in fact independent contractors and are not employed by the State performing bargaining unit work, CWA will be compelled to file an unfair practice charge on their behalf with PERC. [CP-3]

Weissman heard nothing from Collins. On March 4, 1997, CWA filed this unfair practice charge (T25). During the period leading up to the charge, Collins was the deputy director of the OER. Collins predeceased the hearing and was unavailable as a witness. On January 8, 2001, Collins executed a certified statement to which he attached a copy of Weissman's January 6th letter, upon which was Collins' handwritten annotation: "1/9/97 Told Steve they are special services" (T5; C-2; attached Certification of David Collins). Weissman denies that the January 9, 1997 conversation occurred (T25, T27, T31, C-1). I credit Weissman on this fact. Weissman claimed he first learned from a State deputy attorney general that the State regarded the doctors as special services employees at a Commission exploratory conference in June 1997 (T27, T29-T30, T32). On March

4, 1997, Weissman asserted that the State had not yet responded to CWA about the doctors' status. I credit Weissman's testimony concerning the controversy surrounding the State's use of special services. Weissman testified: "If Mr. Collins had said to me that these doctors were being used as special services employees that would have been like waving a red flag in front of my face" (T31). On July 3, 1997, Weissman filed an appeal with the DOP protesting the use of special services for the doctors (CP-4; T28-T30). The timing of the unfair practice charge and the DOP appeal is consistent with Weissman's June 1997 discovery of the information that the doctors were employed under special services.

ANALYSIS

I recommend that the State violated the Act from September 4, 1996 to March 4, 1997, by failing to provide information concerning the employment status of the four doctors laid off and rehired in 1995. The State's arguments as to timeliness, relevance and mootness are not persuasive.

N.J.S.A. 34:13A-5.3 requires parties to "meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms of employment." Section 5.3 also empowers an employee organization selected by a majority of employees in a negotiations unit to be the exclusive representative of all the employees in that unit. The majority representative must represent all negotiations unit employees fairly, regardless of whether an employee is a union member. A public employer must

provide information requested by the majority representative so that it can carry out its representational duties. Hardin and Higgins, The Developing Labor Law, 856-858 (4th ed. 2001).

An employer's refusal to supply relevant information is an unfair practice and violates N.J.S.A. 34:13A-5.4a(5) and derivatively, 5.4a(1). The employer's duty to disclose "turns upon the circumstances of the particular case." See Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981); State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 87-149, 13 NJPER 504, 505 (¶18187 1987); Burlington Cty. Bd. of Chosen Freeholders and CWA, P.E.R.C. No. 88-101, 14 NJPER 327 (¶18121 1988), aff'd NJPER Supp.2d 208 (¶183 App. Div. 1989)("Burlington Cty."); Morris Cty., P.E.R.C. No. 2003-22, 28 NJPER __(¶_____ 2002); J.I. Case Co. v. NLRB, 253 F.2d 149, 41 LRRM 2679 (7th Cir. 1958); Kroger Co., 226 NLRB 512, 93 LRRM 1315 (1976).

In State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988) the Commission stated:

> As majority representative, CWA has the statutory right to information in the employer's possession which is relevant to a grievance. In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981), relying on federal precedent, we held that an employer must supply information if we find a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. Id. at 236. Relevance in this context is determined under a discovery-type standard, not a trial-type standard, see NLRB v. Acme

> Industrial Co., 385 U.S. 432, 437, 64 LRRM 2069 (1967), and therefore 'a broad range of potentially useful information should be allowed the union for the purpose of effectuating the bargaining process.' Proctor & Gamble Manufacturing Co. v. NLRB, 603 F.2d 1310, 1315, 102 LRRM 2128 (8th Cir. 1979). The rationale underlying this discovery policy is to enable the majority representative to have sufficient information to evaluate the merits of an employee's claim. We recognized, however, that the majority representative does not have an absolute right to obtain all requested information; rather, the duty to disclose 'turns upon the circumstances of the particular case.' [Id. at 754]

Applying these principles to this case, I find that in July 1996, CWA sought confirmation from the State about the doctors' employment status, having recently learned information which led it to question the assumption that the doctors were not employees but outside contractors. The information is relevant to CWA's concern over the use of special services since it affects CWA's negotiations unit. CWA's need for the information flows from its duty to represent unit employees, to protect their terms and conditions of employment and to protect the scope of its unit. The State did not respond until June 1997, three months after the charge was filed.

The State argues that the charge is untimely (T11-T12). N.J.S.A. 34:13A-5.4(c) provides, in relevant part:

> no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

Unless a charging party can demonstrate that it was prevented from filing within six months of the operative event, the claim is time-barred. Equitable considerations are relevant when determining if a person has been "prevented" from filing a timely charge under N.J.S.A. 34:13A-5.4(c) and should be weighed against the Legislature's objectives in imposing a limitations period. In Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329, 339 (1978), the charging party's diligent pursuit and timely filing of a charge, although in an inappropriate forum, justified the tolling of the statute of limitations as the plaintiff "at no time slept on his rights." Id. at 341.

The State argues: "Counsel for CWA has no independent status here. Counsel knows what the client knows-and the CWA knew . . . in February, 1995, of the proposed layoff and rehire of the doctors at an hourly rate. Belated inquiries to the employer will not toll the six month statute of limitations." (Post-hearing brief, page 6). The State cites City of Margate (Cattie), P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993)(Margate). There, in June 1991, David and Jules Cattie took a test to become lifeguards. Both received failing scores and were not hired. Beginning on June 19, their father wrote a series of letters to various Margate officials protesting his sons' scores and claiming that both were retaliated against for Jules' exercise of protected activity. Although the father learned by July 1991 that Jules' scores had been altered, it was not until April 1992 that he learned that David's scores had

also been altered. The Commission rejected Cattie's argument that since he did not know about the falsification of David's scores until ten months later, he was prevented from filing a charge; thus tolling the statute of limitations. The letters sent by the father to the City demonstrated sufficient knowledge of retaliation against both brothers in 1991 so that the statute of limitations should not be tolled. Id. at 573.

In Margate, the Commission found that the October 21, 1991 letter demonstrated that the charging party may not have been hired due to retaliation for his brother's protected activity. Although the alleged falsification of David's test scores may not have been known by him then, he believed that an unfair practice might have occurred. Unlike the charging party in Kaczmarek, Cattie did not attempt to file this claim. The Commission held that the Legislative purpose of encouraging the diligent pursuit of causes of action and preventing stale claims would be frustrated by ignoring the statute of limitations.

This case is distinguishable. Here, from March 1995 to July 1996, CWA operated under an impression that the doctors were laid off and rehired as independent contractors. A grievance was filed shortly after the layoff in an attempt to preserve the doctors' unit status, benefits and employment. In my Hearing Report on the Motion for Summary Judgment, I found that in 1995, CWA had sufficient information to file an unfair practice charge on the allegation that the State unilaterally changed terms and conditions

of employment or eroded the negotiations unit. Because those charges were not filed until 1997, they were untimely. I view CWA's request for information in July 1996 and the State's nonresponsiveness extending to March 1997 to be a separate unfair practice. As of March 4, 1997, the date the charge was filed, the State had not responded to the request for information and I found that allegation timely.

The State also argues that the information sought is not relevant to CWA's representational duties because CWA has no right to represent either special services employees or independent contractors. However, the Commission has stated that information must be provided if there is a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. The fact that CWA had represented these employees in its professional unit before their layoff makes the information potentially relevant to CWA's representational rights. It relied on the representation or belief that the State regarded these former CWA unit members as independent contractors, perhaps to its detriment, until learning in June 1997 that the doctors are special services employees. CWA has previously contested the State's use of special services as outside DOP regulations. Once in possession of the information, it reasserted a challenge to the State's use of that classification (CP-4). The information sought was potentially relevant to CWA's role as negotiations representative and the State had an obligation to provide it.

The information was not provided as of the filing of the charge. The fact that it was later provided does not make the State's earlier conduct moot. The State offered no reason for not providing the information and no reason for believing that its conduct would not recur. Cf. Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 120 S. Ct. 722 (2000)(party asserting mootness must persuade court that challenged conduct cannot reasonably be expected to recur). The collective negotiations process can function effectively only with the proper exchange of relevant information. Hardin and Higgins, The Developing Labor Law, 856 (4th ed. 2001); Burlington Cty.; Morris Cty.; State of NJ (OER). Accordingly, I find that the charge is not moot.

Therefore, based on all of the above, I conclude and recommend that the Commission find that between September 4, 1996 and March 4, 1997, the State violated section 5.4a(5) and derivatively 5.4a(1) by failing or refusing to provide CWA with information about the employment status of the four named doctors at the DHS hospital.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. Respondent State cease and desist from

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to provide CWA with the employment status of employees.

2. Refusing to negotiate in good faith with CWA concerning terms and conditions of employment, particularly by not disclosing relevant information.

B. That the State take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Elizabeth J. McGoldrick
Hearing Examiner

DATED: October 23, 2002
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to provide CWA with information about the employment status of employees.

WE WILL NOT refuse to negotiate in good faith with CWA concerning terms and conditions of employment, particularly by not disclosing relevant information about the employment status of employees.

Docket No. _____ _____
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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