P.E.R.C. NO. 81-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-79-1-28

FRATERNAL ORDER OF POLICE
LODGES 36A & 36B,

Charging Party.

SYNOPSIS

The Commission in an unfair practice proceeding agrees with the Hearing Examiner that the relevant complaint issued against the County of Hudson should be dismissed essentially for the reasons stated by the Hearing Examiner in his written ruling on a Motion for Summary Judgment. More specifically, the Commission concludes that the relevant unfair practice charges were not filed within six months of occurrence and that the FOP was not prevented from filing a timely unfair practice charge pursuant to N.J.S.A. 34:13A-5.4(c). The Hearing Examiner found that the Charging Party had filed a grievance on September 13, 1974 over non-payment of the 1974 salary increments and did nothing thereafter, either by way of processing the grievance under the agreement or by the filing of a timely unfair practice charge. The charge was not filed until July 5, 1978.

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Charging Party.

Appearances:

For the Hudson County Board of Chosen Freeholders
Murray, Granello & Kenney, Esqs.
(Malachi J. Kenney, Esq.)

For Fraternal Order of Police Lodges 36A and 36B
Schneider, Cohen & Solomon, Esqs.
(David S. Solomon, Of Counsel and On the Brief)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on July 5, 1978 by the Fraternal Order of Police, Lodges 36A and 36B ("FOP"), alleging that the Hudson County Board of Chosen Freeholders ("County") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., in that the County, notwithstanding repeated demands by the FOP from January 1, 1978, refused to pay to qualified members of the FOP certain salary increments that, it is alleged, were due under the collective negotiations agreement, which was in effect through December 31, 1977, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.

A Complaint and Notice of Hearing was issued on the FOP's charge, and the County filed an Answer thereto. On February 1, 1980 the County filed a Motion to Dismiss the Complaint in its entirety, together with supporting documentation and a brief, asserting that the alleged unfair practice occurred more than six months prior to the filing of the charge. A responsive brief, with two supporting affidavits, was filed by the FOP. After advising the parties that the motion would be treated as a motion for summary judgment, and receiving from the Chairman the authorization to consider the motion (See N.J.A.C. 19:14-4.8(a)), the Hearing Examiner granted the City's motion in a written ruling which recommended dismissal of the complaint in its entirety. H.E. No. 80-46, 6 NJPER ___ (¶_____ 1980).

The FOP has filed exceptions to the Hearing Examiner's Report and a brief in support thereof. After considering the FOP's exceptions and the entire record in this matter, we agree with the Hearing Examiner that the Complaint should be dismissed, essentially for the reasons stated by him in his written ruling.

Briefly, the Commission agrees that the FOP was not "prevented" from filing a timely unfair practice charge pursuant to N.J.S.A. 34:13A-5.4(c) and that even the most liberal reading of Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978) would not justify over three years (June 16, 1975 to July 5, 1978) of FOP inactivity with respect to the claimed unfair practice. The FOP's affidavits, which allege that County officials had assured the FOP that the increments would be paid, do not discuss any events beyond calendar year 1975. Thus, even assuming the FOP delayed processing its grievance or filing an unfair practice charge based on the

County's assurances, there is nothing in the record to indicate that such assurances were given any more recently than two and one-half years prior to the filing date of the instant unfair practice charge. The FOP's charge does not conform to the timeliness requirements of N.J.S.A. 34:13A-5.4(c) and accordingly we agree that it may not pursue its claim against the County through an unfair practice proceeding.

ORDER

The Complaint in this matter is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

BY _____
JEFFREY B. TENER
Chairman

Chairman Tener, Commissioners Hartnett, Hipp, Newbaker and Parcells voted in favor of this decision; Commissioner Graves voted against the decision.

DATED: Trenton, New Jersey
July 10, 1980
ISSUED: July 14, 1980

H. E. No. 80-46

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

In the Matter of

HUDSON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

- and -

Docket No. CO-79-1-28

FRATERNAL ORDER OF POLICE,
LODGES 36A & 36B,

Charging Party.

SYNOPSIS

A Hearing Examiner, upon referral by the Public Employment Relations Commission of a Motion For Summary Judgment by Hudson County, grants the Motion For Summary Judgment and dismisses the charges of unfair practices by the Fraternal Order of Police on the ground that the said unfair practice charges were not filed within six months of occurrence.

The Charging Party had alleged that the Respondent failed to pay annual salary increments to certain of its employees, as required by the provisions of several collective negotiations agreements, and that this constituted a violation of Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act. The Act requires in Section 5.4(c) that charges of unfair practices must be filed with six months of occurrence unless the person aggrieved was prevented from filing within the said six-month period. The Hearing Examiner found that the Charging Party had filed a grievance on September 13, 1974 over non-payment of the 1974 salary increments and did nothing thereafter, either by way of processing the grievance under the agreement or by the filing of a timely unfair practice charge. The charge was not filed until July 5, 1978.

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.

H. E. No. 80-46

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Hudson County Board of Chosen Freeholders
Murray, Granello & Kenney, Esqs.
(Malachi J. Kenney, Esq.)

For the Fraternal Order of Police, Lodges 36A & 36B
Bruce E. Fox, Esq.

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 5, 1978 by the Fraternal Order of Police, Lodges 36A & 36B (hereinafter the "Charging Party," the "FOP" or "Lodges 36A & 36B"), alleging that the Hudson County Board of Chosen Freeholders (hereinafter the "Respondent" or the "County") had engaged 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. (hereinafter the "Act"), in that the Respondent, notwithstanding repeated demands by the FOP from January 1, 1978, refused to pay to qualified members of the FOP certain salary increments that, it is alleged, were due under the collective negotiations agreement, which was in effect through December 31, 1977, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. 1/

1/ These Subsections prohibit public employers, their representatives or agents from:
"(1) Interfering with, restraining or coercing employees in the exercise
(continued next page)

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 26, 1979. Pursuant to the said Notice of Hearing, hearings were originally scheduled for December 27, 28 and 31, 1979, which were subsequently rescheduled to the mutually agreeable dates of January 22 and 23, 1980.

The hearing date of January 22, 1980 was, by agreement of the parties, converted to a pre-hearing, at which the Respondent raised, for the first time, the issue of the six-month time limit on the filing of the instant Unfair Practice Charge. The parties on that date reached an agreement that Respondent would by February 1, 1980 file a Motion to Dismiss, with supporting documentation and a Brief, and that the Charging Party would by February 22, 1980 respond with such additional documentation as it deemed necessary and Answering Brief.

Thereafter, on February 15, 1980, following receipt of the Respondent's Motion to Dismiss on February 1, 1980, as agreed, the Hearing Examiner advised the parties that the Motion to Dismiss would be treated as a Motion for Summary Judgment under N.J.A.C. 19:14-4.8, and the Charging Party was granted an extension of time to respond and did so on March 3, 1980 by filing two Answering Affidavits and a Brief in opposition to the Respondent's Motion for Summary Judgment.

On March 5, 1980 the Respondent filed a Revised and Supplemental Answer to the charge of unfair practices, for the purpose of completing the documentation to be considered on its Motion for Summary Judgment. Under date of March 27, 1980, the Hearing Examiner forwarded to the Chairman of the Commission the Motion for Summary Judgment, together with the documents previously filed, supra, for determination by the Chairman under N.J.A.C. 19:14-4.8(a) as to whether or not the Motion for Summary Judgment would be disposed of by the Commission or be referred to the Hearing Examiner. Under date of April 7, 1980 the Chairman referred the Respondent's Motion for Summary Judgment to the undersigned Hearing Examiner for disposition.

An Unfair Practice Charge having been filed with the Commission, and a Motion for Summary Judgment having been made by the Respondent, and, after con-

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1/ (continued)

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."

sideration of all documents heretofore filed, supra, the matter of the Respondent's Motion for Summary Judgment is appropriately before the Hearing Examiner for determination.

SUMMARY OF MATERIALS FILED IN SUPPORT OF AND IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The first collective negotiations agreement between the parties, executed October 26, 1973, was effective during the term January 1, 1972 through December 31, 1973. Article 1 of this agreement provided for annual starting salaries of $9200 as of January 1, 1972 with increases based on length of service every six months thereafter for the duration of the agreement. 2/ This agreement made no express reference to "increments."

The first successor collective negotiations agreement between the parties, executed on June 13, 1974, was effective during the term January 1, 1974 through December 31, 1975. Article I of this agreement provided that the covered employees would on January 1, 1974 receive an annual salary increase of $600 and on January 1, 1975 an annual salary increase of $750. The same Article I also provided, as follows:

> "C. Retroactive payment for the annual 1974 salary increment for the period January 1, 1974 through June 30, 1974, shall be made to each covered employee no later than the second pay day following July 1, 1974. Thereafter, the remainder of the annual increment shall be computed and equally apportioned in each bi-weekly pay check for each covered employee." (Emphasis supplied).

Article IX of the same agreement provided, in part, as follows: "...No employee shall be deprived of any salary increment granted herein or previously granted by the signing of this Agreement." (Emphasis supplied).

The second successor collective negotiations agreement, executed on December 14, 1976, was effective during the term January 1, 1976 through December 31, 1977. Unlike the prior agreements, which covered Lodges 36A & 36B in a single document, there was a separate identical agreement for each Lodge. The covering Memorandum to each of these agreements provided in Paragraph 1 for the extension of the first successor agreement, January 1, 1974 through December 31, 1975, "Except as this Memorandum of Agreement otherwise specifically applies..."

2/ Commencing July 1, 1972 the increases were in steps of $500.

Article I of each agreement provided that the "27th pay in 1976," amounting to a two-week payment, was granted for the year 1976 on a "one-time basis only, and shall not be considered part of the base pay." Article I also provided that effective January 1, 1977 all covered employees would receive an annual salary increase of $750. 3/

There is attached to the Respondent's Motion to Dismiss as Exhibit "A" a letter dated June 16, 1975 from Michael H. Hochman, then counsel for the FOP, to the County Sheriff, which stated that on September 13, 1974 a formal grievance was filed on behalf of four named employees 4/ regarding "the failure of the County to pay $500.00 wage increments...under the 1974...Agreement." In the same letter then counsel threatened to invoke the arbitration provisions of the agreement unless the matter was resolved within ten (10) days thereof. Exhibit "B" purports to show that the four named employees never received an annual salary increment but, rather, only received the negotiated annual increases.

The Charging Party's Answering Affidavits contain as Exhibit "A" a letter dated June 18, 1975 from the County Sheriff to Hochman, 5/ which indicated a conference on the matter might be held and that he would advise "...when arrangements have been made." Exhibit "B" is an Affidavit by Maurice V. Brady, who avers: that he was the County Register from 1966 to 1976; that he participated in collective negotiations for the County; that it was the policy of the County "to avoid going to arbitration or unfair practice proceedings" and to encourage unions, such as the FOP, not to file grievances or unfair practice proceedings in the interest of preserving harmonious labor relations; and that he was present when the County Supervisor, John Deegan, advised the four employees involved herein, during 1973, 1974 and 1975, to "Sit tight, you're getting the increments..." Exhibit "C" is an Affidavit by Cosmo Lancia, who served as President of Lodges 36A & 36B from 1972 through part of 1975 and who avers: that "during the contractual periods in dispute" he and others on the negotiating committee were continually promised by numerous County officials that the salary increments would be received "shortly;" that County Supervisor, John Deegan, personally informed him that the increments would be forthcoming; and that the County's Director of Personnel, Raymond Kierce, told him on numerous occasions not to file a grievance with respect to the salary

3/ It is noted that there is no provision in the second successor agreement which refers specifically to "salary increments."

4/ These are the same individuals referred to in the instant charge.

5/ A response to Hochman's letter of June 16, 1975, supra.

increments "since the matter was in the process of being resolved."

The Respondent's Answer and Motion to Dismiss raises as its principal affirmative defense the six-month limitation on the filing of charges of unfair practices. 6/

THE ISSUE

Must the instant charge of unfair practices be dismissed because of the six-month time limitation in Section 5.4(c) of the Act and under the doctrines of laches, estoppel and waiver?

DISCUSSION AND ANALYSIS

Positions of the Parties

1. The Respondent

The Respondent, without conceding that an unfair practice was ever committed by it, observes that if an unfair practice was committed it occurred under the 1974-75 agreement. 7/ The Respondent further observes that the Charging Party clearly knew of non-payment of the 1974 increment by its having filed a grievance on September 13, 1974, and its then counsel threatened to take the matter to arbitration in a letter dated June 16, 1975. However, nothing was ever done thereafter, either by way of proceeding to arbitration or the filing of an unfair practice charge, until the filing of the instant charge on July 5, 1978. Respondent notes further that the payroll records of the four affected employees confirms that salary increments have not been paid from 1974 through 1979.

Based on the foregoing facts, the Respondent contends that, in the absence of sufficient allegations that the Charging Party was "prevented" from filing a timely charge of unfair practices within the meaning of Section 5.4(c), supra, no "equitable considerations" 8/ are present in the instant case and there

6/ Section 5.4(c) of the Act provides, in part, that: "...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 date he was no longer so prevented." The Respondent also defends on the grounds of laches, estoppel and waiver.

7/ Article I, Section C provided for payment of the "annual 1974 salary increment" no later than the second pay day following July 1, 1974 with the remainder of the "annual increment" being paid bi-weekly thereafter. See also, Article IX of the same agreement. These articles are referred to in more detail at p. 3 hereof, supra.

8/ Referred to by the Court in Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329, 337, 338, 340 (1978).

is, thus, no reason to excuse the imposition of the six-month limitation.

The Respondent further cites Roosevelt Union Free School District, 12 PERB 3001 (1979) where the union filed an unfair practice charge on November 14, 1977, alleging that the District failed to pay salary increases pursuant to a November 8, 1976 agreement. PERB held that the charge was untimely under its four-month limitation period. The Respondent also contends that the instant unfair practice charge, on its face, does not indicate a continuing violation. 9/ Finally, the Respondent points out that the filing of the grievance in 1974 did not toll the limitation period for filing unfair practice charges, citing, inter alia, State of New Jersey v. Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd., 153 N.J. Super 91 (App. Div. 1977), certif. den., 78 N.J. 326 (1978). 10/

2. The Charging Party

The Charging Party, in response, urges that the provision for salary increments in the 1974-75 agreement was carried forward in the 1976-77 agreement by virtue of Paragraph 1 in the covering Memorandum, which extended the terms of the 1974-75 agreement. 11/ The Charging Party contends that "...it was effectively prevented from pursuing its remedy as a result of the actions" of various officials of the County, as set forth in its two Answering Affidavits. 12/ The Charging Party urges that this conduct by officials of the County operated to toll the six-month limitation period.

By way of legal argument, the Charging Party urges that the instant case falls within the ambit of the "equitable considerations," which should toll the statute of limitations under the holding of Kaczmarek v. New Jersey Turnpike Authority, supra. Further, the Charging Party urges that the equitable doctrine of laches is inapplicable since the Respondent does not have "clean hands," and that the doctrine of waiver is inapplicable on the facts.

Finally, the Charging Party contends that a reading of the Answering Affidavits indicates clearly that "...genuine issues of material fact exist..."

9/ See Essex County Board of Chosen Freeholders, E.D. No. 76-33, 2 NJPER 113 (1976).

10/ The Respondent also cites pertinent decisions of the New Jersey Courts with respect to laches and waiver.

11/ As noted in footnote 3, supra, there was no provision in the 1976-77 agreement referring specifically to "salary increments."

12/ Summarized at pp. 4, 5 hereof, supra.

and that, therefore, summary judgment should not be granted.

Respondent's Motion For Summary Judgment Is Granted Since No Genuine Issues Of Material Fact Exist And The Unfair Practice Charge Is Time-Barred

Initially, the Hearing Examiner finds and concludes that the Charging Party's two Answering Affidavits fail to raise any genuine issues of material fact. Mere averments that it was the policy of the County to avoid arbitration or unfair practice proceedings in the interest of preserving harmonious labor relations, that the four employees involved were told that they were getting their increments and that they would be received "shortly," and that the matter was in the process of being resolved, do not present genuine issues of material fact when considered against the fact that a grievance was filed on September 13, 1974, on behalf of the same individuals involved in the instant charge, and was not pursued to arbitration as late as June 16, 1975, nor was an unfair practice charge filed within six months of either of the foregoing dates. It appears clear beyond doubt that the salary increments due in 1974, pursuant to Article I, Section C of the 1974-75 agreement, were not paid as required by the due date in and around July 1, 1974 and, as a result thereof, a grievance was filed on September 13, 1974. The payroll records of the four employees involved confirm that no salary increments were paid from 1974 through 1979.

The Hearing Examiner is pursuaded that no "equitable considerations" of the type envisioned by the New Jersey Supreme Court in Kaczmarek v. New Jersey Turnpike Authority, supra, are present in the instant case. The Answering Affidavits do not, in the opinion of the Hearing Examiner, constitute a legal basis for applying the holding in Kaczmarek.

Thus, the Hearing Examiner grants the Respondent's Motion For Summary Judgment and dismisses the instant Unfair Practice Charge, based upon the absence of "equitable considerations" which would toll the six-month limitation period. 13/ Further, the Hearing Examiner agrees with the Respondent that the filing of the grievance in 1974 did not operate to toll the six-month limitation period. 14/

13/ The PERB decision in Roosevelt Union Free School District, supra, appears to be directly on point and supports the conclusion herein.

14/ See State of New Jersey v. Council of New Jersey State College Locals, etc., supra, and other cases cited in Respondent's Brief at p. 7. The Hearing Examiner need not and does not base his decision herein on the applicability of the doctrines of laches, estoppel or waiver.

* * * *

Based on the foregoing, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) since the Charging Party failed to file a timely Unfair Practice Charge pursuant to N.J.S.A. 34:13A-5.4(c).

RECOMMENDED ORDER

It is hereby ORDERED that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: May 13, 1980
Trenton, New Jersey