

P.E.R.C. NO. 84-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CI-81-79-13
CE-81-26-14

DOROTHY B. KODYTEK,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion of Mercer County Community College to stay further unfair practice proceedings before the Commission. The Commission rejects the College's argument that a related federal district court action justified a stay.

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Appearances:

For the Respondent:

Smith, Stratton, Wise, Heher & Brennan, Esqs.
(Garrett M. Heher, Esq.)

For the Charging Party

Hartman, Schlesinger, Schlosser, Faxon & Foy, Esqs.
(John F. Pilles, Jr., Esq.)

DECISION DENYING MOTION TO
STAY COMMISSION PROCEEDINGS

On April 27, 1981, Dorothy B. Kodytek, formerly president of AFT Local 2319 ("Local 2319") and then an employee of Mercer County Community College ("College"), filed an unfair practice charge against the College with the Public Employment Relations Commission. On May 14 and August 25, 1981, she amended the charge. The charge, as amended, alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act"), specifically subsections 5.4(a)(1), (2), and (3), ^{1/}

^{1/} These subsections 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"; "(2) Dominating or interfering with the formation, existence or administration of any employee organization"; and "(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."

when it allegedly retaliated for her activities as president of Local 2319 by evaluating her negatively and harassing her.

On June 3, 1981, the College filed an unfair practice charge against Local 2319. This charge alleges that Local 2319 violated the Act, specifically subsections 5.4(b)(1) and (2),^{2/} when it filed the charge described in the first paragraph. The College specifically alleged that this charge was filed to harass and intimidate the College during ongoing successor contract negotiations with Local 2319.

On July 23, 1981, the Director of Unfair Practices consolidated the charges and issued Complaints and a Notice of Hearing. The parties then filed Answers denying each other's allegations.

On October 22, 23, 26, 27, and 28, 1981, Hearing Examiner Charles A. Tadduni conducted hearings. The parties presented testimony and exhibits. After the October 28, 1981 hearing, the record closed. The parties filed post-hearing briefs by June 30, 1982.

On November 3, 1982, Kodytek filed a motion to amend the Complaint based on her charge to allege that since the conclusion of the hearing, the College had dismissed her, allegedly because of her protected activity on behalf of Local 2319. She also moved to reopen the record to take testimony concerning her dismissal. These motions were granted.

^{2/} These subsections prohibit employee organizations, 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 "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

On January 11, 1983, Kodytek filed a civil action in federal district court. She alleged that the College violated her federal constitutional rights of free speech and association, as protected by 42 U.S.C.A. §§1983 and 1985, by dismissing her, harassing her, and evaluating her negatively in retaliation for her activities on behalf of Local 2319. In addition to the same remedies she seeks before the Commission -- reinstatement with back pay and the expungement of discriminatory materials from her personnel records -- on her unfair practice charge, she has asked the federal court to award punitive damages.^{3/}

The Hearing Examiner scheduled hearings on the amended Complaint for March 21, 22, and 23, 1983. On March 17, 1983, the College filed a motion to stay Commission proceedings pending resolution of the federal action. On March 28, 1983, the Hearing Examiner conducted a pre-hearing conference and solicited the parties' position on this motion. At that time, the parties agreed to adjourn Commission proceedings until the holding of a pretrial settlement conference before the federal district court judge. That conference was held on July 13, 1983, but did not produce a settlement. Thus, Commission proceedings resumed.

On July 17, 1983, the Hearing Examiner heard oral argument on the motion to stay Commission proceedings. The parties filed briefs by September 1, 1983.

^{3/} In each proceeding, she has also asked for an award of the attorneys' fees spent in that litigation. In addition, she has asked the federal court to award her court costs; the Commission, of course, does not impose costs on litigants so no such request was necessary in this proceeding.

On October 21, 1983, the Hearing Examiner denied the College's motion, H.E. No. 84-25, 9 NJPER ____ (¶ ____ 1983) (copy attached), and issued an order scheduling hearings for December 20 and 21, 1983. He reasoned that the Commission had the predominant interest in the dispute since it essentially involved allegations of unfair labor practices within the Commission's special expertise to resolve.

On November 1, 1983, the College, pursuant to N.J.A.C. 19:14-4.6, requested special leave to appeal the denial of its motion. On November 7, 1983, the Chairman of the Commission granted such permission.^{4/}

We have considered the parties' submissions and all material in the record relevant to the College's motion to stay further Commission proceedings. We believe the Hearing Examiner's analysis of the motion and applicable case law is comprehensive and well-reasoned. Accordingly, we affirm the denial of the College's motion substantially for the reasons set forth in the Hearing Examiner's report.

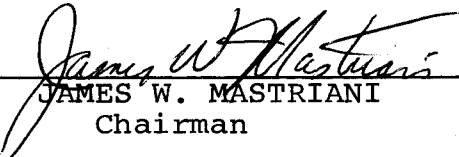
ORDER

The motion of Mercer County Community College to stay fur-

^{4/} The College also requested oral argument on its motion. This request is denied. The matter has been extensively litigated, and the Commission has reviewed the transcript of oral argument before the Hearing Examiner on July 17, 1983.

ther unfair practice proceedings before the Public Employment Relations Commission is denied.

BY ORDER OF THE COMMISSION



JAMES W. MASTRIANI
Chairman

Chairman Mastriani, Commissioners Newbaker, Suskin, Butch, Hipp, Graves and Hartnett voted for this decision. None opposed.

DATED: TRENTON, NEW JERSEY
December 9, 1983

ISSUED: December 12, 1983

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Charging Party.

SYNOPSIS

A Commission Hearing Examiner denies a Motion to Stay Commission Proceedings pending the outcome of a related cause of action under 42 USCA §1983 and 1985 in Federal District Court. The Hearing Examiner determined that the dispute was primarily an unfair practice, that approximately half of the unfair practice dispute had already been presented before a Commission Hearing Examiner, that the unfair practice raised important state interests for consideration, that such disputes should be resolved through the adjudicatory and regulatory machinery provided by the State, and that under all the circumstances of this case, the parties should continue with the administrative agency proceeding.

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HEARING EXAMINER'S DECISION ON MOTION
TO STAY COMMISSION PROCEEDINGS

A Motion to Stay Commission Proceedings in the instant matter was filed by the Respondent, Mercer County Community College, on March 17, 1983. Charging Party Dorothy Kodytek has filed an answer opposing said motion.

Charging Party Kodytek, formerly the president of AFT Local 2319, filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on April 27, 1981, alleging that the Respondent was engaged in conduct violative of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Said charge was amended on May 14, 1981 and on August 25, 1981. It is alleged in the charge that Respondent issued to Charging Party several negative evaluations and has

generally harassed Charging Party in retaliation for Charging Party's having engaged in protected activities. Such activity is alleged to be violative of N.J.S.A. 34:13A-5.4(a) (1), (2) and (3). 1/

On June 3, 1981, Mercer County Community College filed an Unfair Practice Charge (Docket No. CE-81-26-14) against the American Federation of Teachers, Local No. 2319 alleging that Local No. 2319 had filed charges against the College which were "spurious, inaccurate and misleading" and which were filed for the purpose of harassing and intimidating the College during the parties' then ongoing negotiations for a successor collective negotiations agreement. Said conduct is alleged to be violative of N.J.S.A. 34:13A-5.4(b) (1) and (3). 2/

On July 23, 1981, the Director of Unfair Practices issued Complaints and a Notice of Hearing and an Order Consolidating Cases in the above-referred matter.

Pursuant to the Complaints and Notice of Hearing, hearings were held in the above-consolidated cases on October 22, 23, 26, 27 and 28, 1981. Briefs and reply briefs were filed by the parties by June 30, 1982.

1/ These subsections 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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/ These subsections provide that employee organizations, their representatives or agents are prohibited from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

On November 3, 1982, Charging Party Kodytek filed a Motion to Amend the original complaint in this matter to include allegations of events which had occurred during and subsequent to the litigation of the original amended charge. Charging Party further moved to reopen the hearings in order to proffer evidence concerning the additional allegations set forth in its amendment. In Charging Party's amendment, it is alleged that Charging Party was harassed by Respondent and was dismissed from employment on April 23, 1982 due to Charging Party's having engaged in protected activities. Respondent filed a letter brief in opposition to said amendment. On January 27, 1982, the Hearing Examiner granted the Charging Party's motion to amend the Unfair Practice Charge and to reopen the record in this matter to receive evidence concerning the supplemental charge. Accordingly, a hearing was subsequently scheduled concerning the supplemental Unfair Practice Charge for March 21, 22 and 23, 1983.

On January 11, 1983, Charging Party Kodytek filed an action in Federal district court pursuant to 42 USCA §§1983 and 1985, wherein it is alleged that representatives of MCCC deprived plaintiff Kodytek of various and sundry rights secured by the United States Constitution and laws (the "federal action"). The federal action was based upon the same essential facts as the case before the undersigned; the relief sought, however, was different from that sought in the Commission proceeding. ^{3/}

^{3/} In the federal action, plaintiff Kodytek sought compensatory and punitive damages, attorney's fees and court costs in addition to some of the remedies which she sought before this Commission -- reinstatement with back pay to her date of termination and an expungement of her personnel records. (continued)

On March 17, 1983, Respondent MCCC filed a Motion to Stay Commission Proceedings, pending resolution of Charging Party's federal action. A prehearing conference and argument on Respondent's motion was held on March 28, 1983. At that proceeding, both parties voluntarily agreed to adjourn the Commission proceedings until a date after the pretrial settlement conference that was scheduled before the district court judge who was hearing the federal action. In the event that a settlement was reached at that pretrial conference which resulted in a withdrawal of the charges before the Commission, no further proceedings would have been necessary herein; in the event that the parties did not reach a settlement which resolved these charges, a date was set for oral argument on Respondent's motion.

On July 13, 1983, the parties attended the federal pretrial conference, at which time no settlement was reached concerning these disputes. Oral argument on Respondent's motion to stay Commission proceedings was held on July 19, 1983. At their request, the parties filed briefs on the motion to stay on September 1, 1983.

In deciding this motion, the primary considerations were as follows: (1) the single-controversy doctrine; (2) exhaustion of administrative remedies; (3) federal abstention/important state issues; and (4) concurrent jurisdiction.

In reviewing the case before the undersigned and the pleadings in the federal action, the undersigned concludes that the essence of the matter alleged to underlie both cases is an unfair

3/ (continued) In Charging Party's action before the Commission, the relief sought also included an order to the College to cease and desist from its unlawful actions, a declaration that the College had violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) and a Commission posting enunciating the foregoing.

labor practice. In the unfair practice complaint, Charging Party Kodytek alleges that the College has discriminated against her due to her (Kodytek's) exercise of rights protected under the New Jersey Employer-Employee Relations Act -- in violation of subsection 5.4 (a)(3) of the Act. In the federal action, plaintiff Kodytek complains that the College has deprived her of rights secured by the United States Constitution and laws. However, the federal rights allegedly deprived her -- for example, free speech and association -- are a reflection of her protected activities: her allegedly violated free speech rights were her complaints about working conditions; her grievances were the exercise of her free speech and free association rights. All of the allegations of discriminatory conduct and deprivation of rights derive from her employment relationship and her union involvement in relation thereto.

In City of Hackensack v. Winner, 82 N.J. 1 (1980), the Supreme Court said:

...PERC would have exclusive power over claims involving unfair practice allegations when these allegations do constitute the sole or major complaint of the aggrieved employees....wrongful conduct equated with unfair practice, though not the primary issue, may in the context of a particular controversy so dominate or color the entire case that its determination, as a practical matter, might substantially influence or render moot the resolution of other issues. In that situation it would be appropriate to consider PERC's jurisdiction to be "exclusive." Hackensack v. Winner, supra, at 25.

Accordingly, from the foregoing, it is clear that the Commission has jurisdiction over such controversies as that presented herein; further, inasmuch as the dispute in this matter appears to be primarily an unfair labor practice dispute, the Commission's jurisdiction may appropriately be considered "exclusive."

However, it would appear equally clear that the federal district court has jurisdiction over the §1983 claims. In considering these jurisdictional overlays, the undersigned reviewed several private sector cases wherein the NLRB and federal district courts reconciled their jurisdictional conflicts over the enforcement of provisions of the National Labor Relations Act, various federal claims under §§1981 & 1983 and the U. S. Constitution.

In De Malherbe v. Elevator Constructors, 438 F. Supp. 1121 (N.D. Calif. 1977), plaintiff filed an action under §1981 alleging that both his union and employer had engaged in certain employment discrimination practices to his detriment. The defendants moved to dismiss, contending, inter alia, that the court lacked subject matter jurisdiction over the dispute inasmuch as the NLRB had exclusive jurisdiction over such claims. The Court concluded that it had jurisdiction over the §1981 and Fifth Amendment claims, concurrent with the NLRB's jurisdiction over plaintiff's potential unfair labor practice charges. The Court stated:

Concurrent jurisdiction of the district courts and the NLRB does not substantially interfere with the purposes of...the NLRA. The NLRB generally has exclusive jurisdiction over claims arguably involving unfair labor practices because the NLRB has special expertise in accommodating the conflicting interests of labor and management....concurrent jurisdiction of the NLRB and district courts in civil rights cases is not only tolerable but even desirable.

DeMalherbe v. Elevator Constructors, supra, at pp. 1584-1585. Similarly, in Packinghouse Workers v. NLRB, 416 F.2d 1126, 70 LRRM 2489 (D.C. Cir. 1969), the court suggested that under facts which constitute both unfair labor practices and Title VII violations,

"...it is open to the employees to use either Title VII or the NLRA or both..." in the protection of their rights. Packinghouse Workers v. NLRB, supra, at p. 2493.

Accordingly, in circumstances giving rise to both unfair labor practices and federal civil rights claims, the cases would suggest that concurrent jurisdiction exists between the administrative agency and the federal district court concerning the subject controversy.

In considering whether application of the single controversy doctrine to these circumstances warrants holding this matter in abeyance pending the outcome of Charging Party's § 1981 action, the undersigned was guided by the following analysis from the Supreme Court in Hackensack, supra:

...since there are pronounced similarities in the exercise of judicial and quasi-judicial powers, it has been recognized that court-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings. But, in applying such court-based precepts to administrative agencies, their potential for achieving sound results must be tempered by a full appreciation of an administrative agency's statutory foundations, its executive nature, and its special jurisdictional and regulatory concerns....

The utilization of court-made procedural tools in administrative proceedings must depend in the final analysis upon the nature of the agency's regulatory responsibilities toward the subject matter of the controversy as well as toward the particular parties appearing before it. Moreover, because administrative agencies serve in part to effectuate the constitutional obligation of the executive branch to see that laws are faithfully executed, N.J. Const. (1947), Art. V, § I, par. 11, the public interest is an added dimension in every administrative proceeding. That interest is necessarily implicated in agency adjudications, and, in a sense, the public is an omnipresent party in all administrative actions....

Such considerations support the general principle that administrative agencies are entitled to and, indeed...may in fact be required to exercise their statutory powers over controversies properly before them regardless of whether other administrative or judicial avenues for relief are also open to the complainants. This may be so regardless of the fact that aggrieved parties thereby proverbially gain two strings to the bow or two bites of the apple. Hackensack, supra, at pp. 29-30.

The New Jersey Supreme Court has endorsed the utilization of the doctrines of exhaustion of administrative remedies. See Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1979) and City of Atlantic City v. Laezza, 80 N.J. 255 (1979). In these cases, the Court noted that usage of the doctrine served to promote certain goals: (1) it insures that claims will be heard, as a preliminary matter, by a body having expertise in the area; (2) the administrative agency decision may satisfy the parties and thus obviate the need for litigation before the courts; and (3) administrative exhaustion allows the parties to create a factual record necessary for meaningful court review.

The utilization of the doctrine of exhaustion of administrative remedies is herein given further compelling weight by the fact that approximately half of the unfair practice case has already been litigated before this agency. ^{4/} The federal proceeding would apparently require presentation to the court of much of the material already set forth in the five-day record compiled herein.

^{4/} Five days of litigation were conducted on the original amended charge. What now remains to be litigated before the Commission are the events which occurred between the last date of hearing and the termination of the Charging Party.

The Hearing Examiner is aware of the line of federal cases beginning with McNeese v. Bd/Education, 373 U.S. 668, 10 L.Ed 2d 622, 83 S.Ct. 1433 (1963), and most recently, Patsy v. Florida Bd. of Regents, ___ U.S. ___, 73 L.Ed. 2d 172, 102 S.Ct. ___ (1982), wherein the U.S. Supreme Court has rejected the argument that a §1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. However, in his dissent, Justice Powell suggested an alternative approach to such cases:

...The requirement that a §1983 plaintiff exhaust adequate state administrative remedies...does not defeat federal court jurisdiction, it merely defers it. It permits the States to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See Younger v. Harris, 401 U.S. 37, 27 L.Ed 2d 669, 91 S.Ct. 746 (1971). 5/

In Younger v. Harris, 401 U.S. 37, 27 L.Ed 2d 669, 91 S.Ct. 746 (1971) the Supreme Court formulated the doctrine of federal court abstention in favor of a pending state proceeding. Younger has been expanded to encompass civil proceedings in state courts and, in Williams v. Red Bank Bd. of Ed., 662 F.2d 1008 (3rd Cir. 1981), was expanded to encompass actions before state administrative agencies. In Red Bank, plaintiff Williams instituted a §1983 action wherein she asserted that tenure charges were brought against her as a result of her exercise of free speech rights. Williams thus sought to enjoin the state administrative proceeding (tenure charges) and further sought compensatory and punitive damages and attorney's fees. The district court determined that abstention was appropriate

5/ Patsy v. Florida Bd. of Regents, supra, at 73 L.Ed 2d 198.

and dismissed Williams' §1983 action, Williams v. Red Bank Bd. of Ed., 502 F.Supp. 1366 (D.N.J. 1980).

The Third Circuit affirmed the district court's abstention decision, noting that there was an important state interest at issue and that the state forum for the resolution of the teacher's tenure charges was adequate to resolve the teacher's federal claims. However, the Court reversed the district court's decision to dismiss the §1983 proceeding because through her §1983 action, plaintiff Williams had sought certain relief which the state administrative tribunal was not empowered to grant (compensatory and punitive damages). Accordingly, the Third Circuit remanded the matter to the district court for retention of jurisdiction over the case until the State proceedings were terminated.

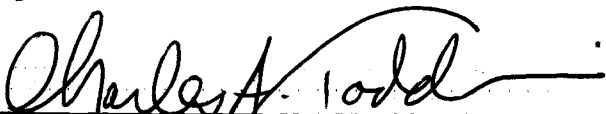
The Court's approach in Red Bank is consistent with an earlier abstention decision, Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In that case, the district court was affirmed in its decision to hold its proceedings in abeyance and retain jurisdiction of the case in order to await state court resolution of issues of state law which might render a decision on the federal claims unnecessary.

While the instant case arises with the parties in a somewhat different posture than were the parties in the Florida, Red Bank and Pullman cases, supra, certain broad considerations from these cases would appear to have an appropriate application herein. There are important State interests at issue herein and there is a specific state statute which addresses these issues (New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.). There is a

state agency (the Commission) charged with the administration of that statute and the adjudication of disputes arising thereunder. The adjudication of the unfair practice matter before the Commission may obviate the need to proceed with the §1983 action, and in fact, one half of the unfair practice dispute has already been litigated before the Commission.

Based upon consideration of the foregoing, the undersigned concludes that the Commission has jurisdiction over the subject controversy; that in light of the §1981 action before the federal district court, a circumstance of concurrent jurisdiction would appear to exist; that the underlying dispute in this matter is essentially an unfair labor practice; that one-half of the unfair practice matter has already been litigated before the Commission; that the instant unfair practice dispute concerns important state interests the resolution of which has been provided for by the State Legislature through an elaborate adjudicatory and regulatory scheme; and that application of the doctrine of exhaustion of administrative remedies would suggest that the parties first proceed with their administrative agency litigation, the resolution of which may obviate the need for all or part of their court action.

Accordingly, the Hearing Examiner hereby denies Respondent's Motion to Stay Commission Proceedings herein pending the outcome of the §1981 action before the federal district court. The hearing in this matter shall proceed in accordance with the Order Scheduling Hearing accompanying this decision.


Charles A. Tadduni
Hearing Examiner

Dated: October 21, 1983
Trenton, New Jersey