

E.D. NO. 76-33

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY BOARD OF CHOSEN FREE-  
HOLDERS and NICHOLAS CAPUTO, COUNTY  
CLERK,

Respondents,

Docket No. CO-7

-and-

ESSEX COUNTY COURT CLERKS ASSOCIATION,  
Charging Party.

SYNOPSIS

The Executive Director refuses to issue a complaint in an unfair practice proceeding, finding that the alleged refusal to negotiate occurred more than 6 months prior to the filing of the charge. The Executive Director states that a charge will not be found to allege a "continuing violation" of the duty to negotiate unless it alleges that, within the 6 month statutory period, the refusal to negotiate has been repeated or some other conduct has occurred indicative of a continuing violation.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY BOARD OF CHOSEN FREE-  
HOLDERS and NICHOLAS CAPUTO, COUNTY  
CLERK,

Respondents,

Docket No. CO-7

-and-

ESSEX COUNTY COURT CLERKS ASSOCIATION,  
Charging Party.

Appearances:

For the Respondents, Goldberger, Siegel & Finn, Esqs.  
(Howard A. Goldberger, Of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.  
(Sanford R. Oxfeld, Of Counsel)

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed by the Essex County Court Clerks Association ("Charging Party") on January 30, 1975 alleging that the Essex County Board of Chosen Freeholders and Nicholas Caputo, the Essex County Clerk ("Respondents") had engaged or are engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), and in particular N.J.S.A. 34:13A-5.4(a)(5).<sup>1/</sup> The gravamen of the charge is the allegation that the Respondents have refused to negotiate with the Charging Party as the duly designated collective negotiations representative

<sup>1/</sup> This subsection provides, in pertinent part, that employers, their representatives or agents are prohibited from "Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment...."

of the Essex County court clerks concerning certain events which originated in or about January, 1972.

The factual allegations are not complex. Prior to January 31, 1972, the normal work day for the Essex County court clerks was from 9:00 A.M. to 4:30 P.M. On December 31, 1971, the Chief Justice of the New Jersey Supreme Court ordered that, effective January 31, 1972, the office of the clerk of every court, except municipal courts, would be open for the transaction of court business from 8:30 A.M. to 4:30 P.M. Accordingly, the court clerks represented by the Charging Party were ordered by the appropriate authorities that, effective on the latter date, their work day would be extended one half hour to correspond to the 8:30 A.M. to 4:30 P.M. court day. The charge further alleges that on September 26, 1973 and again on October 25, 1973, the Charging Party wrote to the Respondents and to the Civil Service Commission demanding compensation for the additional half hour. Hearings were requested before the Civil Service Commission but were postponed pending a final determination on a similar case that had been appealed from the Civil Service Commission through the appellate courts. A petition for certification in this similar case was denied by the New Jersey Supreme Court on October 29, 1974.<sup>2/</sup>

<sup>2/</sup> These factual allegations are taken from the charge and various letters attached thereto and incorporated therein. The similar case referred to in the charge is Prosecutor's Detectives and Investigators Association of Essex County v. Hudson County Board of Chosen Freeholders, 130 N.J. Super 30 (App. Div.) cert. den. 66 N.J. 330 (1974).

In response to a letter from the undersigned pursuant to N.J.A.C. 19:14-1.6<sup>3/</sup> soliciting their statement of position with respect to the allegations of the charge, the Respondents raised four grounds which they contended warranted the dismissal of the charge. Two of these grounds are relevant to the determination herein:

"3. The charge should be dismissed in view of the fact that the basis for the same occurred more than six months prior to the filing of the charge in contravention of the statute involved.

"4. The Public Employment Relations Commission lacks jurisdiction of the subject matter of the charge in view of the fact that the charge refers to circumstances allegedly occurring at a time when the Public Employment Relations Commission lacked jurisdiction for the remedying of alleged unfair labor practices and the statute herein involved has no retroactive effect.<sup>4/</sup>"

By letter dated March 12, 1975, the parties were requested to submit briefs on the legal issues raised by the Respondents including the two quoted above.

The legal question raised by the second issue quoted above was addressed by the Commission in In re City of Newark, P.E.R.C. No. 87, 1 NJPER 21 (1975), at least with regard to events occurring within six months prior to January 20, 1975,

<sup>3/</sup> The letter was dated February 4, 1975 and initiated the Commission's investigation of the charge. Effective April 1, 1975, this rule was amended to provide for the "processing" of charges rather than their "investigation". The changes made in the rule do not affect those parts of the rule relevant to the instant determination.

<sup>4/</sup> The remaining two grounds go to the merits of the charge in that they allege that negotiations leading to an agreement did take place and therefore the Charging Party is estopped from bringing this charge.

the effective date of P.L. 1974, c. 123.<sup>5/</sup> In that case, the Commission held that its "exclusive power" to prevent unfair practices did apply to events occurring on December 31, 1974, in that "the unfair practice provisions of Chapter 123 are seen as essentially creating new procedures for the protection and enforcement of pre-existing statutory rights."<sup>6/</sup>

This case, however, presents a situation where the events arose in January, 1972 and the Respondents urge in the first of the two issues quoted that since this was more than six months prior to the filing of the charge, it should be dismissed. The Charging Party states in its brief that in recognition of the time limitation in Chapter 123 it seeks remedial relief only for the six month period prior to January 20, 1975 and that it seeks a cease and desist order with respect to future similar conduct.

Furthermore, the Charging Party attempts to extend the factual allegations to the six months period prior to the filing of the charge by arguing first that the Respondents have

<sup>5/</sup> P.L. 1974, c. 123 section 1(c) (N.J.S.A. 34:13A-5.4(c)) provides, inter alia, that the Commission shall have "exclusive power" to prevent anyone from engaging in any of the unfair practices listed in subsections (a) and (b) (N.J.S.A. 34:13A-5.4(a) and (b)) "provided 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 day he was no longer so prevented."

<sup>6/</sup> The only allegations in the charge relating to events subsequent to October 25, 1973 involve the correspondence between the Charging Party and the Civil Service Commission.

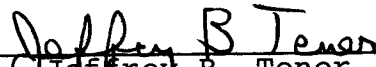
never responded to the Charging Party's letters of September 26th and October 25th, 1973 demanding compensation, and second that the extended work day is still in effect. In essence, the Charging Party argues that the alleged refusal to negotiate continues to the present time. However, as the earlier discussion demonstrates, no allegation in the charge relates to any demand for negotiation, compensation, or any alleged conduct on the part of the Respondent, later than October 25, 1973, obviously well before the six months period. The Charging Party thus alleges no recent conduct as evidence of a continued refusal to negotiate, but rather relies solely upon the alleged absence of any alteration in the situation as it existed in late 1973.

The concept of a continuing violation has long been recognized by the National Labor Relations Board in determining whether an alleged unfair labor practice is barred by a similar six month limitation period in the National Labor Relations Act. However, the Board and the federal reviewing courts will only find such a continuing violation where a refusal to bargain is repeated within the six month period, or where some other conduct takes place during that period to indicate that the violation is still continuing. Without passing upon the circumstances under which such a continuing violation will be found under the New Jersey Act, but accepting arguendo the validity of the concept, suffice it to say that in the absence of allegations of "continuing violation" facts within the six month period, the instant charge must fall. The undersigned certainly cannot

impute such facts on the basis of silence in the charge itself.

Therefore, in the absence of any allegation of conduct which falls within the six month period prior to the filing of the charge, it does not appear to the undersigned that the allegations of the charge, if true, constitute unfair practices within the meaning of the Act. The undersigned hereby refuses to issue a complaint and the case is hereby closed.

BY ORDER OF THE EXECUTIVE DIRECTOR

  
\_\_\_\_\_  
Jeffrey B. Tener  
Executive Director

DATED: Trenton, New Jersey  
May 10, 1976