P.E.R.C. NO. 89-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF VETERANS' AFFAIRS AND DEFENSE (MENLO PARK SOLDIERS HOME)
Respondent,

-and-

Docket No. CO-H-88-159

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL NO. 1

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the State of New Jersey, Department of Veterans' Affairs and Defense (Menlo Park Soldiers Home) against AFSCME, Council No. 1. The Commission determines that the binding effect of a 1981 agreement is a material fact in dispute. The Commission also rejects the employer's laches argument and its argument that once an employer notifies a majority representative of a proposed change in a negotiable term and condition of employment, it is the representative's burden to demand negotiations.

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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL NO. 1,

Charging Party.

Appearances:

For the Respondent, Cary Edwards, Attorney General (Richard D. Fornaro, Deputy Attorney General)

For the Charging Party, Szaferman, Lakind, Blumstein, Watter & Blader, Esqs. (Sidney H. Lehmann, of counsel; David B. Beckett, on the brief)

DECISION AND ORDER ON INTERLOCUTORY APPEAL

On December 16, 1987, the American Federation of State, County and Municipal Employees, Council No. 1 ("AFSCME") filed an unfair practice charge against the State of New Jersey, Department of Veterans' Affairs and Defense (Menlo Park Soldiers Home) ("employer").[1/] The charge alleged the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

1/ When the charge was filed, the Soldiers Home was within the jurisdiction of the Department of Human Services.

specifically subsections 5.4(a)(1) and (5),[2/] by violating the terms of a 1981 agreement that Human Services technicians, assistants and practical nurses will have every other weekend off.

On February 9, 1988, a Complaint and Notice of Hearing issued. On February 26, the employer filed an Answer asserting that the charge was untimely filed, the 1981 agreement is unenforceable and was voided by later collective negotiations agreements and a 1985 oral agreement, and AFSCME is estopped by laches and its "unclean hands."

On June 21, 1988, the employer moved for summary judgment and a stay. Relying on answers to interrogatories, the employer urged dismissal because the charge was untimely filed, due to laches, and because AFSCME failed to demand negotiations regarding weekend scheduling after receiving notice in 1985 of the State's weekend scheduling intentions.

On August 12, 1988, AFSCME filed an amendment and affidavit asserting that certain employees had been required to work a no-weekends off schedule during the six months preceding the original charge. It argued that the employer's alleged conduct

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2/ 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. (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."

constitutes a continuing violation and that therefore separate identifiable instances of the alleged offending conduct occurred within six months of the filing of the charge and amendment. It also argued that the statute of limitations, not laches, is applicable and that AFSCME was not required to demand negotiations since the employer unilaterally changed a term and condition of employment.

On August 19, 1988, the employer filed a reply emphasizing that employees in "existing positions" were covered by the 1981 "understanding" and that AFSCME had been notified of the unilateral change in 1985. On August 29, AFSCME filed a reply. On September 2, the employer responded.

On September 28, 1988, AFSCME filed a second amendment alleging that on September 19 the State announced weekend work schedule changes affecting about 118 employees who previously had every other weekend off. It further alleged that the changes made it appear that officers and supporters of AFSCME had benefited because they were among a group of senior employees given every weekend off.[3/]

On September 29, 1988, Hearing Examiner Jonathon Roth recommended that summary judgment be granted. H.E. No. 89-13, 14 NJPER ___ (¶ 1988).[4/] He found that the AFSCME was notified

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3/ On September 30, the employer filed an amended Answer to the first amended charge.

4/ The motion was filed with Hearing Examiner Mark Rosenbaum. When he left the Commission, the case was reassigned.

in 1985 that employees would be required to work consecutive weekends and that acts within the six months limitations period did not constitute a continuing violation. Accordingly, he found the allegations to be untimely. He also found that AFSCME waived the 1981 agreement by failing to include or refer to its terms in the parties' current collective negotiations agreement. He rejected the employers' other defenses.

On September 30 1988, Commission Designee Arnold H. Zudick denied AFSCME's application for a temporary restraining order concerning the second amendment. On October 6, he denied a request for interim relief. On October 12, he issued a written decision. I.R. 89-7, 14 NJPER ___ (¶_____ 1988).

On October 5, 1988, AFSCME requested special permission to appeal the summary judgment recommendation. On October 7, the Chairman granted special permission to appeal. The parties filed briefs and replies by December 5.

AFSCME argues that the Hearing Examiner misinterpreted and misapplied the case law on continuing violations; in a summary judgment proceeding all inferences of doubt should be resolved against the moving party, and the Hearing Examiner arbitrarily raised the waiver issue and his consideration and holding about this issue are wrong. The employer maintains that the operative event occurred in 1985 and that the charge is therefore untimely. It also maintains that laches and the duty to request negotiations are alternate grounds to grant summary judgment.

We have reviewed the Hearing Examiner's findings of fact (pp. 4-6). We incorporate them with these modifications. We delete findings one and two. These facts, while undoubtedly true, were not in the record. We delete finding three. The parties' collective negotiations agreements were not in the record and AFSCME disputes the dates of the contracts. We add to finding 4 this language from the 1981 memorandum: "It is the intention of the Home to revert to a weekend off schedule of every third weekend off if the subject every other weekend program does not meet the above conditions." We add to finding 5 this language from CEO Friedman's memorandum to AFSCME President Reese. "These positions will be assigned weekday RDO's [regular days off] when hired and within a six month period of time will be transferred to one of the existing every other weekend off positions." We add to finding 6 that Warren Davis was the Director of the Division of Veterans Programs and Special Services and that he stated that "[t]he new employees with fixed days off would remain in the group until regular weekend off vacancies occurred. We modify finding 8 to indicate that the new hire memoranda did not indicate that the employees would be working a no weekends off schedule. We modify finding 9 to show that the quotation is from the affidavit of Delores Reese. We add that management's minutes of an AFSCME/Management meeting of August 21, 1985 refer to AFSCME's contention that less than half of the 20 additional positions had been filled. Davis then stated that there were 20 vacant positions, not new positions, to be filled. AFSCME

Council 1 Executive Director Al Wurf indicated that there was a different interpretation of the word "new" and threatened to file an unfair practice charge. On September 9, 1985, Personnel Officer Curtis Shaffer wrote the Home's CEO and stated that no weekends off for four new hires had not yet been finalized with Wurf and they were informed that "we would have to give these employees every other weekend off." Three of the employees were still employed at that time: two had every other weekend off, one opted for a third shift position with no weekends off.

N.J.S.A. 34:13A-5.3 provides that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." This provision establishes a negotiations obligation before a change in an existing practice can be implemented. If the parties agree or if they negotiate to impasse, the employer can make the proposed change. If the change is made unilaterally before impasse, the union has six months to file an unfair practice charge. Salem Cty., P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987).

Here, however, AFSCME alleges that the 1981 agreement set the terms of weekend scheduling. Where a term and condition of employment is set by agreement, the employer, absent a prerogative or statutory command, may not lawfully make a unilateral change during that agreement's life. The employer has a continuing obligation to abide by the terms of the agreement and the union has

a continuing right to file an unfair practice charge if the agreement is repudiated. But cf. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (mere breach of contract not an unfair practice). We have previously held that a prior practice cannot control an agreement's language. Cf. State of New Jersey (Dept. of Education), P.E.R.C. No. 88-72, 14 NJPER 137 (¶19055 1988). For similar reasons, an abrogation does not rescind an otherwise enforceable contract provision. It is thus proper to have a hearing on the continuing significance, if any, of the 1981 agreement. Cf. Chamung Contracting Corp., 291 NLRB No. 123, 139 LRRM 1305 (1988); Abbey Medical, 264 NLRB No. 129, 11 LRRM 1683 (1982); Al Bryant, Inc., 260 NLRB No. 10, 109 LRRM 1284; Farmingdale Iron Works, 249 NLRB No. 3, 104 LRRM 1210 (1980); See also Superior Engraving v. NLRB, ___ F.2d ___, 26 LRRM 2351, 2356 (1950).[5/]

N.J.A.C. 19:14-4.8(d) provides that summary judgment may be granted:

> [i]f it appears from the pleadings, together with the briefs and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law.

The binding effect of the 1981 agreement is a material fact in dispute. In its charge, AFSCME alleges that the agreement has

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5/ Only the allegations of misconduct that occurred within six months of the filing of the charge are timely. Sevako v. Anchor Motor Freight, 797 F.2d 570, 122 LRRM 3316 (6th Cir. 1986).

continued in effect to the present time. In its Answer, the employer claims that the 1981 agreement is unenforceable because: the agreement was not entered into by the Office of Employee Relations; the employer had a managerial prerogative; there was no consideration; the agreement was executed under duress; the consideration given by AFSCME was a promise to stop unlawful activity, and the agreement was de facto rescinded by the 1985 repudiation and acquiescence and by operation of subsequent collective negotiations agreements.[6/] At this juncture, we cannot accept the Hearing Examiner's recommendation on the viability of the 1981 agreement. The relevant contracts and negotiations history are not in the limited record developed for this motion. This issue can best be decided after a full hearing and argument.

In addition, AFSCME's second amendment is still pending. It also has a new charge (CO-89-98) nearly identical to the second amendment.[7/] Resolution of the allegations in these matters will require a determination as to the viability and reach of the 1981

6/ AFSCME disputes the dates of those agreements.

7/ On November 9, 1988, the Chairman administratively held in abeyance further processing of these matters pending this decision.

agreement. Under all these circumstances, we are not convinced that summary judgment can be granted as a matter of law.[8/]

Accordingly, we deny the motion for summary judgment. We remand the matter to the Hearing Examiner to amend the Complaint to incorporate the second amendment and to conduct a hearing consistent with this decision. We ask the Director of Unfair Practices to continue processing CO-89-98 and to consider dismissal if the allegations are sufficiently identical to those raised in the second amendment so as not to warrant a separate proceeding.

ORDER

The motion for summary judgment is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
January 9, 1989
ISSUED: January 10, 1989

8/ We reject the laches argument. The timeliness of AFSCME's claim is governed by the statute of limitations. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 152 (1982). We also reject the employer's argument that once an employer notifies a majority representative of a proposed change in a negotiable term and condition of employment, it is the representative's burden to demand negotiations. East Brunswick Bd. of Ed., P.E.R.C. No. 86-109, 12 NJPER 352, 354 (¶17132 1986).

H.E. NO. 89-13

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF
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(MENLO PARK SOLDIERS HOME),

Respondent,

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AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL NO. 1,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that a motion for summary judgment be granted in favor of the State of New Jersey. In determining that the State has met the appropriate burden for the motion, he finds that the charge and first amended charge were untimely filed (it was not a continuing violation) and that AFSCME waived its right to an alleged term and condition of employment in a successor agreement.

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. 89-13

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COUNCIL NO. 1,

Charging Party.

Appearances:

For the Respondent
Attorney General's Office
(Richard D. Fornaro, DAG)

For the Charging Party
Szaferman, Lakind, Blumstein, Watter & Blader, Esqs.
(Sidney H. Lehmann, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION
ON MOTION FOR SUMMARY JUDGMENT

On December 16, 1987, the American Federation of State, County and Municipal Employees, Council No. 1 ("AFSCME") filed an unfair practice charge against the State of New Jersey, Department of Veterans Affairs and Defense (Menlo Park Soldiers Home) ("State"). The charge alleged that "within six months [before the charge was filed] and continuing at the present time" the State unilaterally ceased granting time off every other weekend to Human Services technicians, assistants and practical nurses, violating

§§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/] AFSCME asserted that in March 1981, it executed an agreement with the State providing the time off to the employees which had "continued in effect to the present time."

On February 9, 1988, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 26, 1988, the State filed an Answer. It denied the unfair practice allegations, asserting that the charge was untimely filed; that the 1981 agreement was unenforceable; that it was voided by each of those negotiations agreements it signed with AFSCME from July 1, 1980 to June 30, 1989 and by an oral agreement of the parties in 1985. The State also urged that laches and "unclean hands" require dismissal of the complaint.

On or about March 2, 1988, the State served interrogatories and a request for production of documents on AFSCME, pursuant to N.J.A.C. 1:1-11.1 et seq. and N.J.A.C. 19:14-4.1 et seq. On April 11, 1988, Hearing Examiner Mark Rosenbaum conducted a prehearing conference with the parties. The hearing was rescheduled to July 7

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. (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.

and 8, 1988. On or about May 31, 1988, AFSCME filed Answers to the interrogatories. On June 21, 1988, the State, pursuant to N.J.A.C. 19:14-4.8, filed a Motion for Summary Judgment and Stay of Proceedings and an accompanying brief. The State urged dismissal because the charge was untimely filed, and because AFSCME unduly delayed filing a charge and never sought to negotiate over changes in scheduling.

On August 12, 1988, AFSCME filed an amended charge and affidavits asserting that named unit employees have been required to work no-weekends off schedules during the six months preceding its filing of the original charge. It maintains that "each time an employee is hired and given a no-weekends off schedule, it constitutes a new breach of the terms and conditions of employment established by the agreement of the parties and a new instance of an unfair practice." In its accompanying brief, AFSCME asserts that the State never created any new positions; "since 1985 it has hired employees to fill vacancies...which existed before 1985 and were covered by the 'Understanding of the Parties' and then unilaterally changed these terms [and] conditions of employment associated with those positions by assigning those employees a no-weekends off schedule."

On August 19, 1988, the State filed a letter replying to AFSCME's brief in opposition to the motion. It emphasized that employees in "existing positions" were covered by the 1981 "understanding" and that AFSCME had been notified of the unilateral

change in 1985. On August 29, 1988, AFSCME filed a reply to the State's August 19 letter. The parties filed reply letters on August 29 and September 2, 1988.

Based upon the papers filed by the parties, including responses to interrogatories, I[2/] make the following:

UNDISPUTED FINDINGS OF FACT

1. The State of New Jersey, Department of Veterans Affairs and Defense is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq ("Act").

2. American Federation of State, County and Municipal Employees, Council No. 1 is an employee representative within the meaning of the Act. It represents health, care and rehabilitation services employees.

3. AFSCME and the Sate executed a series of collective negotiations agreement running from July 1, 1980 to June 30, 1983; July 1, 1983 to June 30, 1986; and July 1, 1986 to June 30, 1989.

4. On or about March 24, 1981, the parties executed an "understanding" providing Human Services technicians, Human Services assistants and practical nurses "to be scheduled off every other weekend." The scheduling was on condition that employees would work as scheduled except for valid reasons, those who could not work

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2/ On September 2, 1988, Mark Rosenbaum left the Commission and this case was assigned to me.

would arrange for substitutes, and no more than 5% of the employees in all three titles would not work even for valid reasons. The employer agreed to notify AFSCME if it deemed "necessary to change the weekends-off program." The document was signed by representatives of both parties.

5. On or about February 8, 1985, Melvin Friedman, Chief Executive Officer of the N.J. Veterans Memorial Home, issued a memorandum to Delores Reese, President of AFSCME, Local 979. It stated that the facility would recruit twenty new technicians, assistants and practical nurses to increase available staff on weekends. The memo also stated:

> It should be clearly understood that under no circumstances will any existing staff be required to give up their present every other weekend off, and that those individuals newly recruited will eventually receive the same benefits as the tenured staff. (Also see affidavit of Melvin Friedman).

6. On or about February 28, 1985, Warren Davis, Director of then employer Department of Human Services sent a memorandum to Sherryl Gordon, AFSCME staff representative stating in part, that the "twenty new hires" would be "assigned to work weekends with scheduled days off during mid-week high staff days." It also states that "none of the staff presently employed would be affected by this change."

7. In answers to interrogatories propounded by the State, Charging Party has asserted:

> (a)...Delores Reese, Jill Juhass, Lillian Young, Al Wurf, Susan Ragland, Sherryl Gordon, Harold

> Adams can all testify to the events of 1985 in which Respondent commenced violation of the March 1981 agreement... [Answer to interrogatory #6]
>
> (b) Since February 1985, the State has engaged in an ongoing practice of disregarding the terms and conditions of employment negotiated in March 1981;... [Answer to interrogatory #7]
>
> (c) Since 1985, the Respondent has engaged in an ongoing practice of hiring and scheduling employees within the affected titles on a no weekend off schedule... [Answer to interrogatory #12(c)]

8. In the six months before the December 16, 1987 charge was filed, about ten named employees were required to work no weekends off schedules. On October 15, 1987, a State memorandum to the local AFSCME president advised that on October 13, Ruth Fisher was hired as a Human Services assistant and worked a no weekends off schedule. A November 9, 1987 memorandum advised that on October 26, Marjorie Bradford was hired as an assistant with a no weekends off schedule.

9. Assistants and nurses hired on and after December 16, 1987, have been required to work no-weekends-off schedules. Officers and representatives of AFSCME "protested the State's actions repeatedly...when the State [imposed] a no-weekends-off schedule on new hires."

ANALYSIS

N.J.A.C. 19:14-4.8(d) provides the standard a Hearing Examiner must follow in evaluating a motion for summary judgment. The motion may be granted,

> ...if it appears from the pleadings, together with the briefs and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law.

In Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75, (1954), the New Jersey Supreme Court stated that the movant must remove any reasonable doubt of a genuine issue of material fact and that "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated..." See also New Jersey Civil Practice Rules, 4:46-2.

The State's principal argument is that the charge is untimely filed. It asserts that employees have been required to work no weekends off schedules since 1985 and that AFSCME cannot complain of the effects of any possible violation of the Act indefinitely.

Our Act requires that an unfair practice charge be filed within six months after the alleged unfair practice occurred unless the charging party was prevented from filing the charge. N.J.S.A. 34:13A-5.4(c). AFSCME acknowledges that the disputed acts began in February 1985. The original charge asserts that those acts also occurred "within six months prior to the filing of the charge and continues at the present time." The amended charge names employees required to work no weekends off schedules within the six month period and others hired within the period and required to work no-weekends-off schedules.

AFSCME has not been "prevented" from filing a timely charge. In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), the N.J. Supreme Court stated:

> ...the primary purpose behind statutes of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend...; another is to stimulate litigants to pursue their causes of action diligently and to prevent the ligation of sterile claims.... The prompt filing...preserves the immediacy of the record,...stabilizes existing bargaining relationships and inhibits the testing of aggravation of labor disputes. [Id. at 337, 338]

In Kaczmarek, the plaintiff's delay in filing the charge was excused by his previous filing of a timely action in an improper forum. In the Court's view, Kaczmarek did not "sleep on his rights." Other than protesting the change informally, AFSCME has not filed any action, including a grievance (which would not, in any event, toll the statute), seeking to reverse the State's February 1985 decision to require newly hired employees to work on weekends. Nor do the facts suggest any extentuating reasons why AFSCME delayed filing a charge.

AFSCME maintains that the weekend scheduling is a "continuing violation" not barred by the statute and seeks relief only for those violations occurring between June 16 and December 16, 1987. In urging that the complaint be dismissed, the State argues that AFSCME failed to act within the statutory period, that further processing is barred by laches and AFSCME failed to demand negotiations over the change.

In Local Lodge No. 1424, Int. Assn. of Machinists v. NLRB, 362 U.S. 411, 45 LRRM 3212 (1960) ("Bryan Manufacturing"), the NLRB General Counsel alleged that the execution of a collective bargaining agreement involved an unfair practice and that continued enforcement of the agreement was illegal. The execution occurred more than six months before the complaint was filed. The Board contended that the execution and enforcement of the agreement were separate unfair labor practices. Conceding that the statute of limitations barred a complaint on the execution of the contract, the Board maintained that evidence of the execution was admissible and relevant to determine whether conduct within the limitation period was unlawful. See Metz v. Tootsie Roll Industries, 715 F.2d 299, 114 LRRM 2340 (7th Cir. 1983), cert. den. 464 U.S. 1070 (1984).

The Court rejected the Board's argument and delineated two situations involving the statutory limitations period and the continuing violation doctrine.

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period: and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events.3/

3/ In illustrating the first situation, the Court cited Axelson Mfg. Co., 88 NLRB 761, 25 LRRM 1388 (1950); Potlatch Forests, Inc., 87 NLRB 1193, 25 LRRM 1192 (1949); Local 1418, Int'l Longshoremen's Assn., 102 NLRB 720, 31 LRRM 1365 (1953); NLRB v. General Shoe Corp., 192 F.2d 504, 29 LRRM 2112 (6th Cir.

Footnote Continued on Next Page

> The second situation is that where conduct occurring within the limitations period can be charged to be unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.4/ [Id. at 416]

3/ Footnote Continued From Previous Page

1951); NLRB v. Clausen, 188 F.2d 439, 27 LRRM 2537 (3rd Cir. 1951) and Superior Engraving Co. v. NLRB, 183 F.2d 783, 26 LRRM 2351 (7th Cir. 1950). In the Court's view, these cases show that "occurrences within the six months limitations period in and of themselves constitute, as a substantive matter, unfair labor practices." (my emphasis). For example, in Potlatch, the employer unilaterally implemented a "seniority strike" policy outside the six month period and used it to layoff certain employees within the six month period. Notwithstanding the unilateral implementation of the policy, the Board found that the policy itself was illegal when used to layoff reinstated employees who participated in a strike. (An employer cannot discriminate against employees who strike; it may only permanently replace them.) Evidence of the policy's beginnings merely "shed light" on the substantive violation.

4/ In illustrating the second situation, "where the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period," the Court cited Bowen Products Corp., 113 NLRB 731, 36 LRRM 1355 (1955) and American Federation of Grain Millers v. NLRB, 197 F.2d 451, 30 LRRM 2290 (1952). In American Federation of Grain Millers, strikers who had been permanently replaced demanded reinstatement, alleging that the strike was caused by an employer unfair practice before the replacements were hired. The acts alleged to be the unfair practice occurred more than six months before the charge was filed. The NLRB found that §10(b) barred reinstatement. The Court stated that the challenged acts within the limitations period were "inescapably grounded" on events predating the limitations period.

The Court found that the General Counsel's complaint fell in the second category. It stated:

> ...the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement unvalid on it face or with one validly executed but unlawfully administered.... In any real sense, then, the complaints in this case are "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation soley by reason of circumstances existing only at the date of execution. [Id. at 422]

The Commission dismissed a "continuing violation" argument in Salem Cty. Bd. of Freeholders, P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987). There, the employer unilaterally eliminated the paid half-hour lunch period of two unit employees in March 1985. CWA filed its charge in May 1986. CWA argued that each pay period in which the two employees were not paid was a separate violation of the Act. In agreeing with the hearing examiner's decision to grant partial summary judgment in favor of the Board, the Commission stated:

> There is nothing in the record to show that CWA was prevented from filing the charge earlier. (citation omitted). Nor are we persuaded by CWA's "continuing violation" theory under this case's circumstances. The charge's allegations solely allege a unilateral change which occurred well outside the six month period. There have been no allegations concerning any unilateral changes within that period nor does the record reveal any. Therefore, this charge was properly dismissed. See Local Lodge 1424. (other citations omitted)

In other words, the Commission agreed that the facts in Salem Cty. fell in the second category of cases described in Local Lodge 1424, which are time-barred under §10(b) of the LMRA.

AFSCME has not alleged a "continuing violation" under Local No. 1424. The unilateral change in terms and conditions arguably contained in the 1981 memorandum occurred in February 1985, when the State advised AFSCME that "new hires" would be required to work consecutive weekends. (Another unilateral change occurred when the State required the first new employee to work consecutive weekends in early 1985). Assuming that the State never created "new" positions and merely filled vacancies with employees who worked consecutive weekends, I find no allegation that the State's allegedly unlawful acts during the six month limitation period (June 16 to December 16, 1987) differed from those taken in 1985, 1986 and the first six months of 1987. Even if the State's unilateral change is a continuing unfair practice, it is only a continuing violation by reason of circumstances existing in February 1985.

Although AFSCME maintains that the 1985 unfair practice merely "sheds light" on the substantive violations that occurred within the limitations period, it really implicates the union's failure to attempt to redress the allegedly unlawful change. In other words, this case more closely concerns a "passive refusal to respond to a single action by the employer" than active and repeated violations each year by an employer and union which is challenged by individual employees. Sevaco v. Anchor Motor Freight, 797 F.2d 570, 122 LRRM 3316 (6th Cir. 1986).

In Sevaco, a group of employees filed charges against their union and employer protesting their unlawful execution of a

supplemental agreement to the master contract. The agreement, signed in 1973, provided that drivers could bid for favored "yard jobs" in accord with their seniority. The procedures prohibited employees hired in yard jobs after March 1969 from bidding to keep their positions. Each succeeding year the employer and union conducted an "annual bid", resulting in a reduction of positions available to those "yard" employees hired after March 1969. Although employees whose grievances were denied between 1974 and 1983 joined in the June 1983 lawsuit, the court determined that only improper acts occurring six months prior to the filing were actionable. The Court cited the federal rule that in hybrid §301 actions a claim accrues "when a claimant discovers or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violation." Id. at 3319. The court permitted employees whose grievances were denied after December 1983 to proceed because the case concerned:

> ...alleged repeated violations each year by the union and company that repeatedly injured appellants each time drivers bid a received yard jobs. The nature of the misconduct in this case involves an active annual bid procedure and course of conduct not a mere passive refusal to respond to a single action by the employer. [Id. at 3319]

This case does not concern "repeated violations each year." AFSCME was notified in 1985 that employees would be required to work consecutive weekends and the acts "constituting the alleged violation" within the six month period were not the result of an employer and union acting "in concert" annually. In Sevaco, the

employees (whose charges were actionable) sought to vindicate their rights within the six month period following the denial of their grievances. AFSCME, on the other hand, has not sought to vindicate its exclusive contractual right to "every other weekend off" scheduling within the statutory period. To the extent that AFSCME contends that the 1981 memorandum was repudiated, it had extensive notice of the State's intentions and acts in 1985. To the extent AFSCME contends that unilateral changes occurred within the six month period, it may seek to enforce contractual rights in binding arbitration or in the courts Englewood Bd. of Ed. v. Englewood Teachers Assn., 64 N.J. 1 (1973); So. Orange-Maplewood Ed. Assn. v. So. Orange-Maplewood Bd. of Ed., 146 N.J. Super 457 (1977). The State's acts within the limitations period, like the absence of lunch hour pay in employee paychecks in Salem Cty., are not separate violations. The unilateral change occurred well outside our statute of limitations.

Finally, the purposes of the statute of limitations described in Kaczmarek would not be served by the continued processing of this case. Like its federal counterpart, §10(b) of the LMRA, N.J.S.A. 34:13A-5.4(c) is designed to give alleged violators the opportunity to prepare defenses and to protect them against stale claims. Kaczmarek; NLRB v. Waterfront Employees, 211 F.2d 946, 955, 34 LRRM 2049 (9th Cir. 1954). In defending the charge, the State may have to present evidence of the 1985 "change." AFSCME's assertion that it seeks a remedy for only the

six month period before the charge was filed and those violations after the charge was filed does not relieve the State of that burden.

The undisputed facts also reveal that AFSCME waived the 1981 "understanding" by failing to include or refer to its terms in the current collective negotiations agreement executed on July 21, 1986. The "hours of work" (Article XVI) and "maintenance of benefits and effect of contract" (Article XLIII) clauses do not refer to weekend scheduling rights in the 1981 memorandum. Section B of the "hours of work" article provides: "All employees shall be scheduled to work a regular shift as determined by the appointing authority which work shift shall have stated starting and quitting times." The "complete contract" clause (Article XLVI) states in relevant part: "the State and the Union acknowledge this to be their complete contract, except as may be added hereto by particular reference in memorandum [sic] of understanding predating the signing of this contract ..." Included in the current contract are two memoranda which do not refer to the 1981 understanding. Under these circumstances, I conclude that the parties did not intend the 1981 memorandum to last indefinitely and AFSCME cannot now acquire a better contract than it negotiated in 1986. Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293 (1953); Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 81-77, 7 NJPER 34 (¶12014 1980). Finding no

material facts in dispute and agreeing that the State is entitled to its requested relief as a matter of law, I dismiss the Complaint.5/

Jonathon Roth
Hearing Examiner

DATED: September 29, 1988
Trenton, New Jersey

5/ The State has also argued that the charge is time-barred by laches. I disagree because the expiration of an appropriate statute of limitations prohibits equitable relief. See Lilliendahl v. Stegmari, 18 A. 216, 45 N.J. Eq. 648 (1890). More recently, the Supreme Court in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 152 (1982), stated in a footnote: "Where a legal and an equitable remedy exist for the same cause of action, equity will generally follow the limitations statute" (citation omitted). I have found that N.J.S.A. 34:13A-5.4(c) bars further processing of this case. If the Commission, on appeal, determines that the charge is timely filed or that this case was inappropriate for summary judgment, then for purposes of conducting an evidentiary hearing, the charge shall be timely filed under the statute.

I also dismiss the State's other defense that AFSCME never demanded negotiations over the alleged change in weekend scheduling. The charge alleges that scheduling under the 1981 agreement was a term and condition of employment. The union has no burden to demand negotiations over such a change. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978); New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den., P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79).