P.E.R.C. NO. 87-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAWTHORNE,

Respondent,

-and- Docket No. CO-86-68-99

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 389, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Service Employees International Union, Local 389, AFL-CIO against the Borough of Hawthorne. The charge alleged the Borough violated the New Jersey Employer-Employee Relations Act when it refused to agree to a separate contract for its foremen or agree to the execution of a stipulation which would cover them.

The Commission, in agreement with the Hearing Examiner and in the absence of exceptions, holds that the complaint should be dismissed because the charge was not timely filed.

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Charging Party.

Appearances:
For the Respondent, Gerald L. Dorf, Esq.
(Lawrence Henderson, of Counsel)

For the Charging Party, Max Wolf, Secretary-Treasurer, SEIU

DECISION AND ORDER

On September 10, 1985, Service Employees International Union, Local 389, AFL-CIO ("SEIU") filed an unfair practice charge against the Borough of Hawthorne ("Borough"). The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (5) and (6),[1/] when it refused to agree to a separate contract for its foreman or agree to the execution of a stipulation which would cover them.

On January 22, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 6, 1986, the

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 (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Borough filed its Answer. It admitted that the SEIU had sought to negotiate a collective negotiations agreement, but denied that the parties had reached agreement.

On March 5, 1986, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and argued orally. The Borough filed a post-hearing brief.

On April 9, 1986, the Hearing Examiner issued his report and decision recommending dismissal of the Complaint. H.E. No. 86-49, 12 NJPER 271 (¶17110 1986). He found that the charge was not filed within the six month statute of limitations set forth in N.J.S.A. 34:13A-5.4(c). The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on April 22, 1986. The SEIU was granted an extension until May 3, 1986 to file exceptions, but did not do so.

We have reviewed the record. The Hearing Examiner's findings of fact are accurate. We adopt and incorporate them. Under all of the circumstances of this case and in the absence of exceptions, we agree with the Hearing Examiner that the Complaint should be dismissed because the charge was not timely filed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioners Hipp and Reid were not present.

DATED: Trenton, New Jersey
July 24, 1986
ISSUED: July 25, 1986

H.E. NO. 86-49

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

In the Matter of

BOROUGH OF HAWTHORNE,

Respondent,

-and- Docket No. CO-86-68-99

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 389, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough did not violate §§5.4(a)(1), (5) or (6) of the New Jersey Employer-Employee Relations Act for the reason that the Charging Party failed to file a timely Unfair Practice Charge, it having been determined at the hearing, that the operative events having occurred more than six months prior to the date of filing. Actually, there was a 12-month lapse between the last event with which the Borough could have been charged and the date of filing of the Unfair Practice Charge by the Charging Party. The Hearing Examiner concluded that the provisions of §5.4(c) of the Act must be applied, the Respondent having raised the six-month limitations defense in its brief and the Hearing Examiner having the authority to raise the issue sua sponte: Twp. of Teaneck, P.E.R.C. No. 81-142, 7 NJPER 351, 353 (¶12158 1981) aff'd App. Div. Docket No. A-4891-80T2 (1982) and Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985).

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. 86-49

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

In the Matter of

BOROUGH OF HAWTHORNE,

Respondent,

-and- Docket No. CO-86-68-99

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 389, AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Gerald L. Dorf, Esq.
(Lawrence Henderson, Esq.)

For the Charging Party
Max Wolf, Sec.-Treas.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 10, 1985, by the Service Employees International Union, Local 389, AFL-CIO (hereinafter the "Charging Party" or "SEIU") alleging that the Borough of Hawthorne (hereinafter the "Respondent" or the "Borough") 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

Borough has refused to negotiate with the Charging Party in good faith by having failed either to agree to a separate contract for its foremen in the Department of Public Works or to agree to the execution of a stipulation which would cover the foremem and apply to them the same benefits as negotiated for the blue collar unit in the Department of Public Works in accordance with a past practice dating back to 1976 or 1977; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6) of the Act.[1/]

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 January 22, 1986. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 5, 1986 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the Respondent only filed a post-hearing brief by March 14, 1986.

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 (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

An Unfair Practice Charging having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing brief of the Respondent, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Borough of Hawthorne is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Service Employees International Union, Local 389, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. In 1976 the Borough recognized the SEIU as the collective negotiations representative for a unit of blue collar employees in the Borough's Department of Public Works and a contract was duly negotiated and executed. (Tr 8).

4. Thereafter, in 1976 or 1977, the Borough recognized the SEIU as the collective negotiations representative for a two-man unit, consisting of the foreman of the Department of Water Supply and the foreman of the Road and Sewer Department and a separate contract was duly negotiated and executed covering these employees (Tr 8, 9, 14). The basis for the terms and conditions of employment for the two foremen was that they would receive the same negotiated benefits as those given by the Borough to the DPW blue collar unit,

supra (Tr 9, 11, 12). The only differentiation was that unlike the blue collar unit employees, who were covered by a union security clause, the foremen were exempted and paid an agency fee (Tr 9, 11, 12).

5. This pattern of negotiations wherein the foremen received the same benefits as the employees in the DPW blue collar unit continued in all collective negotiations agreements through 1983 (Tr 12).

6. The two foremen, who were in the foreman unit at its inception in 1976 and 1977, were Ralph Snyder and William Cole, both of whom paid the agency fee from the inception of the collective negotiations unit (Tr 24). However, in October 1977, Cole died and was replaced by James Peterson, who never paid the agency fee thereafter (Tr 10, 11). It was stipulated that the two-man foreman unit consisted of Snyder paying the agency shop fee and Peterson refusing to do so (Tr 25, 46, 47).

7. In December 1983 or January 1984, as negotiations for the 1984-85 agreement were about to commence, Max Wolf, the Secretary-Treasurer of the SEIU, was contacted by Douglas Borchard, the attorney for the Borough, who told Wolf that the Borough wished to abolish the separate contract for its foremen (Tr 12). Borchard offered to combine the two collective negotiations units under one agreement (Tr 13). Wolf's response was a proposal that there be a stipulation executed for the two foremen, which would have the same effect as the prior practice (Tr 13).

8. In February or March 1984, Wolf prepared and sent a proposed form of stipulation to Arthur A. Brokaw, who was at that time a Commissioner for the Borough, who was designated as the Director of the DPW (Tr 14, 15). There is no dispute between Wolf and Brokaw that Brokaw refused to execute the stipulation (Tr 15, 48). Brokaw testified credibly that he did not receive the stipulation until September or October 1984 (Tr 48, 49), contrary to the testimony of Wolf that he sent the stipulation to Brokaw in February or March 1984. Brokaw testified that his reason for not executing the stipulation proposed by Wolf for the two-man foreman unit was based on a discussion with Borchard that a one-man unit was not appropriate (Tr 45, 46, 48). By this, Brokaw explained that since Peterson had never paid the agency shop fee or dues to the SEIU, leaving Snyder as the sole payer, there existed a one-man unit among the two foremen.

9. Based on the above advice from Borchard, Brokaw never recommended the signing of the stipulation, which would have to have been executed by the Mayor (Tr 49, 50).

10. Wolf testified on direct examination that when he received no response through the mail, obviously referring to Brokaw, supra, he sent a letter to the Mayor, Louis Bay, threatening to file an unfair practice charge (Tr 15). The date on which this letter was sent was established as in or around September 1984 since it occurred four or six months after Wolf had sent the stipulation to Brokaw in February or March 1984, and was shortly after the

execution of the 1984-85 collective negotiations agreement for the blue collar DPW unit on August 7, 1984 (Tr 16, 30). Wolf testified further on direct examination that between the date of his writing to the Mayor in September 1984 and the day of his filing of the instant Unfair Practice Charge on September 10, 1985, he had telephone conversations "...with various representatives of the Borough..." and was "...assured that the matter would be cleared up..." (Tr 17). Wolf could not recall the names of any representatives of the Borough with whom he had had conversations regarding the clearing up of the matter in the 12-month period from September 1984 to September 1985, but he did testify clearly that he had had no conversations with the Mayor, Brokaw, Borchard or Commissioner Anthony Ross, who will be referred to hereinafter (Tr 20, 32, 34, 35). Wolf also testified on cross-examination that he had "no discussions" during the 12-month period until his discussion with Ross, infra (Tr 26). Further, when, on cross-examination, Wolf was asked who had "assured" him he replied, "I have no other names to add..." (Tr 27). Also, Wolf testified, again on cross-examination, that the "next event" after his letter to the Mayor was the filing of the Unfair Practice Charge in September 1985 (Tr 30).

11. Wolf testified without contradiction that he first met with Ross in November 1985 regarding the stipulation for the foremen unit and that Ross said that the "...matter would be taken care of..." (Tr 18-21). When asked about this meeting with Ross on

cross-examination, Wolf testified that Ross had agreed to oversee the negotiations and the settlement of this problem (Tr 38).

DISCUSSION AND ANALYSIS

The Respondent in its post-hearing brief contends that the instant Unfair Practice Charge should be dismissed as untimely under §5.4(c) of the Act. This provision states, in part, that "...no complaint shall issue, based upon any unfair practice occurring more than 6 months prior to the filing of the charge[2/] unless the person aggrieved thereby was prevented from filing such charge...."

The Respondent having raised the six-month limitation defense, the Hearing Examiner must examine the testimony of Wolf to determine whether or not there was any conduct of the Respondent which occurred in the 12-month period between September 1984 and September 1985 other than the failure of the Mayor to respond to Wolf's letter. Wolf's own testimony makes clear that there is no evidence upon which a conclusion could be based that there were any "assurances" given by representatives or agents of the Borough between September 1984 and September 1985. As Finding of Fact No. 10, supra, makes clear Wolf testified flatly that he never spoke during this period with the Mayor, Brokaw, Borchard or Ross, the first conversation with Ross having occurred in November 1985, after

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2/ Here the charge did not indicate on its face that it was untimely.

the instant Unfair Practice Charge was filed. Wolf could provide no names of persons who gave him assurances, merely testifying in a general way that he had had telephone conversations "with various representatives of the Borough." Such imprecise testimony cannot afford a basis upon which to find that the Borough violated the Act as alleged within six months of the filing of the instant Unfair Practice Charge.[3/]

Further, there is plainly no evidence that the SEIU or Wolf was in any way prevented from filing this Unfair Practice Charge prior to the date of its filing on September 10, 1985. Although a copy of Wolf's letter to the Mayor, written in September 1984, was not offered in evidence, the Hearing Examiner assumes arguendo that it must have complained of Brokaw's failure to respond to Wolf's proposed stipulation, mailed some six months earlier, and that the Mayor was on notice that he should respond. Such a response by the Mayor should have been made within a reasonable time.

However, unless the failure of the Mayor to have responded is deemed to be a continuing violation of §5.4(a)(5) of the Act,[4/]

3/ Even if the Respondent had not raised the issue of timelinesss in its post-hearing brief, the Hearing Examiner, based on the record, could have raised the issue sua sponte: Twp. of Teaneck, P.E.R.C. No. 81-142, 7 NJPER 351, 353 (¶12158 1981) aff'd App. Div. Docket No. A-4891-80T2 (1982) and Spotswood Bd. of Ed., H.E. No. 85-43, 11 NJPER 382 (fn. 24)[¶16139 1985], aff'd P.E.R.C. No. 86-34, 11 NJPER 591 (fn. 4)[¶16208 1985].

4/ See, for example, McCready & Sons, Inc., 195 NLRB 28, 79 LRRM 1212 (1972); Clothing Workers, Local 187 (Shutzer Mfg. Co., Inc.), 210 NLRB No. 135, 86 LRRM 1461 (1971); and NLRB v. Strong Roofing & Insulating Co., 386 F.2d 924, 65 LRRM 3012 (9th Cir. 1967).

which it is not, the SEIU must have filed its unfair practice charge at least within six months of the expiration of a reasonable period of time from the date that Wolf wrote to the Mayor. September 10, 1985 clearly does not qualify for timeliness under the foregoing test of "6 months plus."

The Hearing Examiner, having concluded that there is merit to the Respondent's assertion of the six-month limitation defense, must recommend dismissal of the Complaint and, thus, will not consider the merits of the unfair charge allegations as to whether or not the Respondent violated §§5.4(a)(1), (5) or (6) of the Act.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following"

CONCLUSION OF LAW

The Complaint that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1), (5) and/or (6) must be dismissed because a timely Unfair Practice Charge was not filed by the SEIU within the meaning of N.J.S.A. 34:13A-5.4(c).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: April 9, 1986
Trenton, New Jersey