H.E. NO. 2014-6

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

In the Matter of

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION,
Respondent,

-and- Docket No. CI-2007-065

JANE LYONS,
Charging Party.

SYNOPSIS

A Hearing Examiner grants the State/NJDOT's Motion to Dismiss a Complaint on the basis of timeliness and failure to prosecute. The charging party, Jane Lyons, alleged that the State of New Jersey, Department of Transportation (State/NJDOT) violated N.J.S.A. 34:13A-5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act (Act) when it reassigned her from the field to an office position. At the conclusion of charging party's case, the Hearing Examiner considered the State/NJDOT's Motion to Dismiss the Complaint as untimely filed, for failure to state a violation of the Act, and for lack of prosecution because Lyons did not appear on a scheduled hearing date. The Hearing Examiner finds that the unfair practice charge was not filed within six months of any operative date or any date alleged in the charge. Additionally, the Hearing Examiner finds that the charging party deliberately failed to appear on a scheduled hearing date without good cause, and recommends the Complaint be dismissed in its entirety.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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JANE LYONS,

Charging Party.

Appearances:

For the Respondent
John Jay Hoffman, Acting Attorney General
(Brady Montalbano Connaughton, Deputy Attorney General)

For the Charging Party
(Jane Lyons, pro se)

HEARING EXAMINER'S RECOMMENDED DECISION ON MOTION TO DISMISS

On May 25, 2007, and by amendment on June 11, 2007 and October 28, 2008, Jane Lyons (Lyons or Charging Party), an employee of the State of New Jersey, Department of Transportation (NJDOT), filed an unfair practice charge with the Public Employment Relations Commission (Commission).

Lyons alleged, in sum, that NJDOT violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it reassigned Lyons from a resident engineer position in the field to an administrative assignment in the regional field

office, in retaliation for issues that occurred when she was on a field job. She further alleged that she continued to file grievances about the reassignment and management refused to accept some of her grievances, and that on May 7, 2007, she received a letter from NJDOT addressing her August 28, 2007 grievance. Finally, she alleged that her reassignment was now permanent, which she perceives as an unfair practice, retaliation, and discrimination because she is a female engineer.[1/] Lyons alleged that NJDOT's actions violate 5.4a(1), (2), (3), (4), (5), (6) and (7) of the Act.[2/]

1/ An expanded summary of charging party's original narrative and the procedural history leading up to the issuance of the Complaint can be found in New Jersey Department of Transportation and Jane Lyons, P.E.R.C. 2009-16, 34 NJPER 291 (¶104 2008) and P.E.R.C. 2009-69, 35 NJPER 210 (¶74 2009) (C-3).

2/ These provisions 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established

(continued...)

On June 19, 2008, the Director of Unfair Practices dismissed Lyons' charge as untimely. D.U.P. 2008-7, 34 NJPER 135 (¶57 2008).

Lyons appealed the dismissal. On appeal, Lyons argued that her charge was timely filed because she did not become aware that her reassignment was permanent until January 2007 and that she filed her charge within six months of that date.

On September 25, 2008, the Commission issued a decision remanding the charge to the Director of Unfair Practices (P.E.R.C. No. 2009-16) (C-3). The Commission found:

> Lyons alleges that in 2007, a new permanent position was created which in effect changed her temporary reassignment to a permanent one. Since she filed her charge within six months of that date, an allegation that the position change was in retaliation for activity protected by the Act is timely and would ordinarily warrant a complaint. Should a complaint issue, the parties may still litigate the issue of when Lyons knew or should have known that she was permanently reassigned.
>
> However, although Lyons states that the permanent reassignment was in retaliation for her complaints, it is not clear what complaints she is referring to so we are unable to determine whether such complaints constitute protected activity under the Act. Nor has Lyons alleged specific facts or dates about her allegation that [NJDOT] refused to accept her grievances. Such a refusal might violate 5.4a(1) of the Act by interfering with an employees statutory right to present

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2/ (...continued)
by the commission."

> a grievance. See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). Accordingly, we will remand this matter to the Director to afford Lyons one last opportunity to amend her charge to clarify those two allegations and for the Director to then reassess whether those allegations, if true, might constitute a violation of the Act.

On October 28, 2008, Lyons filed a second amendment to the charge with numerous attachments, dating from December 2004 through June 2008. On April 1, 2009, the Director of Unfair Practices again dismissed Lyons' charge, finding that the charge did not set forth a clear and concise statement of facts as required by N.J.A.C. 19:14-1.3(a). D.U.P. 2009-9, 35 NJPER 219 (¶77 2009).

Lyons appealed the dismissal. In her appeal, Lyons asked: "Does [m]anagement have the right to reassign me permanently after an involuntary temporary reassignment is grieved?" On June 25, 2009, the Commission remanded the charge to the Director for complaint issuance on the 5.4a(1) and a(3) allegations of Lyons' charge. P.E.R.C. 2009-69 (C-3). In its decision, the Commission wrote: "We view Lyons' statement and question as an allegation that, if true, might constitute an unfair practice. Accordingly, a complaint must issue." The Commission further found that the employer's defense that it had already responded to Lyons' grievances could be raised at hearing or through a motion for summary judgment.

On August 3, 2009, the Director issued a Complaint on the 5.4a(1) and a(3) allegations of the charge.

On August 12, 2009, NJDOT filed an Answer generally denying the allegations of the Complaint and asserting separate defenses.

Hearings were conducted on May 4, 6, and September 28 and 29, 2010 and August 5, 2011. Lyons presented the testimony of Darnell Hardwick, Aloston Purnell, and Paul Pologruto, and also testified on her own behalf.[3/]

On June 14, 2011, a scheduled hearing date, Lyons did not appear without prior explanation. I convened the hearing and NJDOT made a Motion to Dismiss Charging Party's case for lack of prosecution. I reserved decision on the Motion in order to give Lyons the opportunity to explain her failure to appear. I wrote to Lyons stating that if she did not provide a written explanation for her failure to appear by June 29, I would grant NJDOT's Motion. On June 24, Lyons responded, via email that she

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3/ At the commencement of the September 28, 2010 hearing date, Lyons asserted that she wished to call Jeffrey Palmer as a witness, but could not locate him. I indicated that if Mr. Palmer became available before the record closed, Lyons could request to recall him or file a motion to reopen the closed record to include his testimony. On October 7, 2010, via email, Lyons requested that I reconsider my decision "because the State wants to file a motion for dismissal and I believe Mr. Palmer's testimony can be relevant." By letter of October 12, 2010 to all parties, I reiterated my prior decision denying Lyons' request.

did not appear because she had taken a sick day. The June 14 hearing date was rescheduled to August 5, 2011.

On August 5, 2011, the Charging Party rested her direct case. NJDOT then made a Motion to Dismiss Charging Party's case as untimely and for failure to establish a violation of the Act.

Each party filed briefs by December 9, 2011 and the record on the Motion closed on that date.[4/]

On June 8, 2012, I received an email from Charging Party copied to the previous Deputy Attorney General handling this matter. Attached to the e-mail were several documents which Charging Party requested to be considered as part of the record on the pending Motion to Dismiss. By email on the same date, NJDOT opposed the request. That same day, I responded by letter to all parties advising that the record on the Motion closed with the filing of Charging Party's post-hearing brief on December 9, 2011, and that no evidence submitted after that date would be considered. N.J.A.C. 19:14-6.3; N.J.A.C. 19:14 4.4(b).

Based upon the entire record, and granting every favorable inference to the Charging Party, I make the following:

4/ The Transcripts in this matter are referred to as 1T (May 4, 2010), 2T (May 6, 2010), 3T (September 28, 2010), 4T (September 29, 2010), 5T (June 14, 2011), and 6T (August 5, 2011). "C" refers to the Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits, respectively.

Findings of Fact[5/]

Background

1. Communications Workers of America (CWA) Local 1032 represents a unit of supervisory employees at DOT, known as the Professional Level Bargaining Unit (R-11). The collectively negotiated agreement or "contract" between CWA and the State of New Jersey is "owned" by the CWA national union which delegates representational duties to the locals to administer the contract (4T23). The most recent collective agreement negotiated between the parties is effective from 2007 to 2011 (CP-9).

2. The collective agreement contains a grievance procedure, at Article 4. A contractual grievance is a claim by CWA that NJDOT has violated part of the negotiated agreement (3T15, 4T24, 4T27). The grievance procedure requires contractual grievances to be filed by CWA, not individual employees (4T23, 6T91, 6T113). If an individual unit member files a contractual grievance, CWA determines whether it will be processed (6T39, 6T94). Since at least the early 2000's, CWA has requested that

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5/ This decision considers facts relating back to more than six months before the date of Lyons' original charge filed May 25, 2007 and through the date Lyons filed her final amendment as permitted by P.E.R.C. No 2009-69 (October 29, 2008) (C-3). Except as indicated, facts relating to events occurring more than six months prior to the date the charge was filed are included as background, for the sake of clarity and a full and complete record, and to provide the Charging Party full and fair consideration of all evidence presented in support of the unfair practice charge.

NJDOT forward all contractual grievances filed by individual employees by NJDOT employee relations for its review before they are processed (4T23, 6T101 - 6T102, C-1, CP-22). CWA may decline to pursue a grievance because the issue is not grievable or CWA has determined not to pursue a grievable issue (4T22, 4T25). CWA has the absolute right to process grievances, not individual employees (6T90). Individual unit employees do "not get to interpret the contract" (4T29).

3. A non-contractual grievance concerns rules and regulations related to work conditions at NJDOT (3T15). Employees have the right to file non-contractual grievances and represent themselves (2T146, 4T71). If an employee files a non-contractual grievance, NJDOT may decline to process it and the employee may appeal that denial to the Department of Personnel, Merit Systems Board (DOP/MSB, now known as the Civil Service Commission) for discretionary review pursuant to N.J.A.C. 4A:2-3.7 (6T22, 6T94).[6/] CWA is not obligated to process non-contractual grievances, but often does if the employee asks (4T8, 6T97).

6/ N.J.A.C. 4A:2-3.7, "Appeals from appointing authority decisions: State service" provides that grievances may be appealed to the Commissioner within 20 days of the conclusion of Step Two procedures under a negotiated agreement. Such appeals must present issues of general applicability in the interpretation of law, rule, or policy. The employee bears the burden of proof. N.J.A.C. 4A:2-3.7(b), (c).

4. Step 1 of the grievance procedure is before an employee's first level supervisor, Step 2 is a departmental level hearing, and Step 3, the terminal step, is binding arbitration (4T28, 4T75).

5. Paul Pologruto is the treasurer of CWA Local 1032 and is also employed by CWA as a staff representative (4T4). He has worked for CWA for almost 22 years (4T5). As a staff representative, his duties include representing workers, administering contracts, and sometimes representing unit members in disciplinary hearings or arbitrations before various appointing authorities (4T6).

6. To ensure consistency in the interpretation of the contract, Pologruto makes the initial decision on what contractual grievances will be processed, in conference with the local president, and informs the employer (4T26, 6T39, 6T90). If a unit member is dissatisfied with Pologruto's decision, they may approach the president of the local, and if still dissatisfied thereafter, the national union (4T26, 4T35). If CWA determines not to pursue an employee's contractual grievance, the employee may choose to pursue informal resolution or other legal recourse at their option (4T29).

7. It is the national CWA's decision, after review of the merits and hearing reports, whether to pursue a contractual grievance to arbitration (4T10).

8. Employees may be reassigned for various reasons within management's right and prerogative to direct the workforce (4T47, 4T51). Reassignments are considered non-contractual grievances by the terms of the collective negotiations agreement. As non-contractual, reassignments are not arbitrable, so while the employer may grant a grievant a department level hearing, but thereafter the grievant's only appeal right is to the Civil Service Commission (4T11, 4T22-4T23)[7/].

September 2004 through December 2007

9. Jane Lyons began employment with NJDOP in 1981 and is employed by NJDOT as a senior engineer (1T75). Lyons is a member

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7/ The parties' collective negotiations agreement addresses transfers and reassignment at Article 38 prior to 2007 and at Article 37 in the 2007-2011 agreement (CP-8, CP-9)

N.J.A.C. 4A-7.2, Reassignment, provides:

> A reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organization unit."

N.J.A.C. 4A:4-7.7, Appeals, provides:

> Transfers, reassignments of lateral title changes shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. When an employee challenges the good faith of a transfer, reassignment or lateral title change, the burden of proof shall be on the employee.

I assume, as the Commission did in P.E.R.C. No. 2009-16, that there is a difference between a temporary and a permanent reassignment pursuant to civil service rules.

of the CWA Professional Level collective negotiations unit (C-1). Lyons most recent supervisor was Regional Construction Engineer Jeff Palmer in NJDOT's Southern Regional office, also known as Region South (1T76, 2T73, R-13).

10. Lyons' job title is Senior Engineer. The job description for Senior Engineer - Transportation provides in pertinent part:

> Under direction of a Principal Engineer, Transportation, or other supervisor in the (A) Construction Maintenance Service, (B) Design Service, or (C) Traffic and Local Road Design, Department of Transportation, takes the lead in or performs independent work in the complex engineering phases of surveys, studies, designs, investigations, construction, or inspections of transportation systems and appurtenances; does related work as required. (R-14).

11. NJDOT engineers may function in several capacities - in the office as a senior engineer, or out in the field as a resident engineer or construction inspector (1T77, 4T37). The duties of a field resident engineer include interpreting and enforcing the contract between NJDOT and its contractors, and making sure that a contractor is performing to the specifications of the project (2T112, 2T116, 1T134). If a resident engineer sees a safety issue with a contractor, the resident engineer has the authority to stop the contractor's work (2T134). Resident engineers are on duty at all times, and receive an on-call bonus of 5% of salary every six months (2T150).

PAR/Assignment Grievance - September 2004

12. Prior to 2005, Lyons had been assigned to office duties "a few times" (1T79). In July 2002, Lyons was assigned to office duties (1T153, R-2). On September 15, 2004, Lyons filed a contractual grievance (G#2004-039) alleging that Palmer failed to properly administer and grade her July 2003-June 2004 Performance Assessment Review (PAR), on which she received a final rating of unsatisfactory. Lyons also alleged that her "assignment to an undesirable job (took) away my promotional opportunities, opportunity to make overtime, [and] receive bonuses" (R-2).

13. Pologruto represented Lyons in the grievance. In attempting to resolve the grievance, Pologruto asked Palmer several times to give Lyons another chance to go out into the field to be a resident engineer; Palmer "finally" agreed (4T37). On October 28, 2004, Lyons' grievance was settled at a Step 2 hearing. On March 15, 2005, Lyons, Pologruto, NJDOT management representative David Sichik and NJDOT hearing officer Aloston Purnell executed a settlement agreement (4T14, 4T16, 6T105-6T106). The settlement specified that as a final resolution of the grievance, Lyons would receive a performance rating of "commendable" and would be assigned to the Route 73 Median Closure Project (4T16, 6T110, CP-31, R-3).

14. On March 23, 2005, Lyons sent an email memorandum to Purnell, expressing concerns about the grievance settlement

(CP-20). Lyons stated that she had not signed the final agreement, but that her signature was cut and pasted from the handwritten form to the typewritten agreement produced by NJDOT Manager of Employee Relations Peggie Keith, that Lyons did not agree with the settlement terms, and that the correct grievance date was 2004, not 2001 (6T115, 1T156, 1T158, CP-24, CP-20, CP-31, CP-32).[8/]

Reassignment/Settlement Grievance - November 2005

15. In June 2005, Lyons started work on the Route 73 project (1T158). The project involved some curb replacement and resurfacing (4T37).

16. On October 21, 2005, Palmer sent Lyons a memorandum outlining several issues concerning Lyons' September and October

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8/ Lyons questioned the authenticity of R-3, which she claims she did not sign, because it included language waiving actions in judicial or administrative forums. Lyons asserted that her signature was cut and pasted from CP-31 (6T115, 1T156, 1T158). Pologruto testified that CP-31 and R-3 were the same document and that his and Lyons' signatures were authentic (6T109-6T110). R-3 appears to be a transcribed copy of CP-31, the agreement that all parties signed, albeit incorrectly dated 2001.

In her testimony, Lyons also denied that she was assigned to the Route 73 project as a result of the settlement, but rather because she was "the right person for the job". (1T158). Based upon the weight of the credible evidence, it is reasonable to conclude that Lyons was assigned to the Route 73 project as a result of the settlement terms; however, it is undisputed that Lyons accepted and served in the assignment consistent with the terms of R-3. As such, I further find that any issue of the authenticity of the agreement is moot, and not material to the disposition of this Motion.

work on the project with a particular contractor, Green Construction. Palmer stated that if Lyons' performance did not improve, he would remove her from the project (R-4).

17. On October 31, 2005, Lyons wrote a memorandum to Enrico Paternosto of Green Construction, as follows, in pertinent part:

> Today, I tried to expedite the review of your TCP for Franklin Ave. That was returned for corrections by hand delivering it to Cherry Hill but instead you started harassing Mr. Williams and me because we would not accept your TCP changes verbally. This behavior creates a hostile environment. Mr. Williams can make decisions in the field and he does not need you to try [to] pressure him to circumvent me.
>
> Today, your office called Mr. Palmer about the TCP for Franklin Ave and the conflict with the existing work zone for C-10, 11 although I informed you that the TCP submitted by your office needs to be resubmitted for acceptance and that the designer's sketch for [the] day's work was not approved, you chose to circumvent me and get Mr. Palmer to accept your change of plan verbally for re-striping although we do not have design immunity.
>
> While working at this work zone refrain from creating this continuous environment of harassment by refusing to cooperate and comply, remember that you were not paid for any work that did not comply with the Specifications such as placing asphalt at locations with curb less than 24 hours, material that was not compacted properly, pipe, and inlet installation.
>
> Many Contractors bid for the work and were not given the opportunity to work because you won the bid. Maybe if they had bid with the intent not to follow the Specifications they would be on this project instead of you.

> Following the Specifications, allow[s] fairness to all whom did not win. (R-6) (emphasis in original)[9/].

18. On November 1, 2005, apparently without knowledge of Lyons' October 31 memo, Palmer wrote Lyons another memorandum recapping a meeting between them concerning her work on the Route 73 project (1T165, R-5). Palmer referenced a September 2005 incident in which Lyons wanted Palmer to support her decision to suspend a subcontractor's work for the remainder of the day, although the subcontractor had addressed Lyons' safety concerns. In the memo, Palmer indicated that he felt Lyons' decision to be "purely punitive" under the circumstances and not in the best interest of completing the work, concluding by saying:

> Please be advised that this information is again being provided in an effort to develop your decision-making skills in the Resident Engineer position. I must remind you again that future decisions that serve to unnecessarily interrupt the construction activities will be cause for your removal from the project. (R-5).

19. At some point after the November 1 memo, Palmer apparently reviewed Lyons' October 31 memo to the contractor. On November 4, 2005, after having conferred with a deputy attorney general, Palmer sent Lyons a memorandum removing her from the

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9/ R-6 is captioned "Fax Memorandum"; in her testimony, Lyons stated that she composed the cover page denoting the document as such, but consistently referred to the document as an email throughout her testimony (1T175). I will refer to R-6 as a memorandum for purposes of this decision.

project. Referring to Lyons' statement concerning the contractor's "intent not to follow the specifications" on the project, Palmer wrote:

> Such a statement is totally inappropriate, unsupported by any evidence and does not represent the official position of the Department in this matter.
>
> As resident engineer on this project, your communications with the contractor can be construed to represent the official position of the Department on any matter concerning the project. Thus, such communications must be based on probable facts which are known by you to be accurate. Neither you nor the Department are in possession of any of the contractor's bid preparation documents, or any other documentary proof which would support your statement that the contractor's successful low bid was premised on the contractor's intention to save money by not complying with the requirements of the contract. Absent such proof, such a statement of contractor intent is both improper and reckless, and could be used by the contractor as the basis for a claim for damages against both you and the Department.
>
> As Resident Engineer on this project, it is your responsibility not only to interpret and enforce the contract, but to work cooperatively with the contractor to obtain a timely and within budget completion of this important construction project. None of these goals can be attained when the State's Resident Engineer makes unsupported statements regarding the contractor's motives in bidding the job which destroy project teamwork and which may expose the Department to significant damage claim. Your statement demonstrates your lack of the appropriate judgment needed to serve as a Resident Engineer. Therefore, I have no choice but to relieve you of the duties of Resident Engineer on the Route 73 Median Closures

> project. You are to report to the Cherry Hill Regional Office on November 14, 2005. (CP-13, R-8)

20. Lyons testified that Palmer told her that he did not think her memorandum was "bad" but was being directed by his supervisor to bring Lyons into the office (1T76).

21. On November 5, 2005, Lyons began working in the Region South office (1T77, R-11).

22. On November 18, 2005, Lyons filed a grievance. In the grievance, Lyons alleged:

> I filed a grievance dated 12/21/04 about my reassignment to the Regional Office. I have been taken off the Route 73 Median Closure project and brought back into the Regional Office. Therefore, management has not kept to the terms of the agreement and I am requesting my grievance to be reinstated and a Step II grievance hearing be scheduled immediately.

23. The grievance did not specify whether it was contractual or non-contractual in nature, and stated that Darnell Hardwick, a CWA shop steward, would represent Lyons (CP-6, R-7). Lyons also alleged violation of her freedom of speech rights, that Palmer had treated her differently than similarly situated minorities, retaliation, and undermining of her whistleblower rights (CP-6, R-7).

24. Palmer denied Lyons' grievance at the first step in an undated decision (CP-11, R-10). On June 26, 2006, Purnell held a Step 2 hearing. Palmer testified on behalf of NJDOT and CWA

presented Lyons' testimony (R-11). Palmer testified that management was directed to remove Lyons from Route 73 project in the best interest of the Department, in response to her performance on the project and upon legal advice that the statements in her memorandum to the contractor could expose the agency to significant damages (R-11).

25. At the June 26, 2006 hearing, while listening to Palmer's testimony, Lyons learned for the first time that her reassignment was due to having sent the contractor the email (1T75). She then asked Palmer, during the hearing, whether her office assignment was permanent, and whether she could go back out into the field. Purnell asked Palmer whether he wanted to answer that question. Palmer stated 'not in the near future' (2T105).

26. Palmer never told Lyons she would not be going back into the field "in the near future" until the grievance hearing (2T90). After hearing Palmer's statement, Lyons understood that her position was no longer temporary, but "was going to be permanent" (1T76, 1T81, 1T101, 1T102). However, Lyons felt Palmer's description of the reasons for her reassignment was different than what she had been told before (1T79, 1T81). She had been told that she was coming into the office to finish up paperwork - change orders and claims related to the Route 73

project, but felt "[n]ow it's management necessity" (1T77, 1T78) 1T79).

27. Lyons testified that she didn't believe Palmer's statement at the hearing that her assignment was not temporary because at each PES (i.e., performance evaluation system) meeting she and Palmer would discuss when she could go back out into the field. Lyons testified:

> And he would give me a deadline as to when I could go back out but those deadlines kept changing. But he never said, never said, I could never go out . . . (not) in the near future until the hearing. And then I still didn't know if that was going to follow. And that's why I waited for the report *(on the first grievance decision)* because it kept changing . . . I waited for it to be in writing so then I'd have something to use, something concrete to use, in my complaint. And that's why I filed [the unfair practice charge] when I filed. (2T90).

28. On July 12, 2006, Lyons emailed Palmer with the subject line, "Reassignment":

> I have been informed once again that my assignment will be in the Regional Office. I have informed you many times that I have seniority over others in this Region and that this assignment causes a hardship for me. I was told that this assignment is a permanent assignment and not temporary at the grievance hearing.
> (C-1).

29. Lyons later testified that she did not find out that the assignment was permanent until Purnell's second grievance decision was issued in March 2007 (1T104, CP-10). She also

testified that the date in her charge, May 7, 2007, was an error and that the correct date was August 28, 2006 (2T70-2T71).

30. On July 27, 2006, Purnell issued a decision on the grievance. Purnell found management's decision to reassign Lyons appropriate and within management's rights under the collective agreement, and noted Palmer's testimony that Lyons' reassignment was not temporary (R-11, CP-12).

31. Lyons' testimony concerning when she learned her assignment was permanent was inconsistent. Granting every favorable inference to the Charging Party, I find that Lyons knew or should have known that her assignment was permanent no later than June 26, 2006, when she was present for Palmer's testimony to that fact, which was subsequently memorialized in the grievance decision. Lyons acknowledged her understanding of Palmer's testimony in a July 12 email to Palmer before the July 27 decision was issued.

32. The record is not clear when Lyons and Palmer met to discuss her PES prior to the June 2006 grievance hearing. Documents in the record relating to a later rating period, July 1, 2006 - June 30, 2007, include an undated interim PES document and a final PES document dated July 11, 2007 (CP-28, CP-29). From these documents I infer that Lyons and Palmer typically met to discuss her performance review at least twice a year. Therefore, the record supports an inference that Lyons and Palmer

met to discuss her PES no more than once between the time Lyons filed her November 2005 grievance and the June 2006 grievance hearing. The record does not support a conclusion that Lyons and Palmer had any other PES meetings between her November 2005 grievance and the June 2006 hearing. The weight of the evidence in the record does not reasonably support a conclusion that Palmer gave Lyons a time frame for returning to a field assignment based upon discussions they had at numerous PES meetings.

33. Lyons felt that Purnell's decision did not correctly analyze her grievance. She explained: "My grievance was whether the state should have disciplined me and whether the state had the right to use reassignment as a form of discipline. That's what my grievance was about, but that's not what was addressed" (2T65).

34. CWA did not appeal the grievance decision to arbitration (4T49, 6T113). On August 24, 2006, Lyons appealed the grievance to the Department of Personnel, Merit Systems Board (DOP/MSB) (R-7). On November 29, 2006, DOP/MSB issued a letter decision declining to hear Lyons' appeal, finding no evidence that the reassignment decision was based on retaliation or discrimination (R-12).

Reassignment/PES Grievance - August 2006

35. Lyons believed that Palmer was annoyed by her complaints about the assignment and raised minor issues about the quality of her office work as a form of retaliation (1T123). Without specifying a time frame, Lyons testified:

> Mr. Palmer informed me that I was going to be working in the office as an office engineer. And the way he talked to me, and he scrutinized the work in the office, he would come to my desk and [say], I don't like the way this is, do it again. And I'd say I don't understand. [Palmer would say] I want you to do it over. I said, well, you can say that. What's wrong with it? You're not giving enough details. I gave you the best answer I can give you. Those kinds of back and forth, he would come back in the afternoon, it was just constant harassment, because [the work] was okay. (1T23, 1T95)[10/]

36. Between May 2 and 4, 2006, Palmer and Lyons exchanged emails initiated by Lyons, in which Lyons questioned whether her work assignments were within the scope of the Senior Engineer job

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10/ On March 21, 2006, Lyons filed a discrimination complaint with NJDOT Division of Civil Rights and Affirmative Action against Palmer and NJDOT, on basis of race, gender, and age discrimination, reprisal and hostile work environment (CP-14). On May 6, 2006 Lyons filed a discrimination complaint with NJDOT Division of Civil Rights and Affirmative Action alleging a racial slur was written on her desk (CP-14). On August 17, 2006 NJDOT found the complaint unsubstantiated; Lyons appealed (CP-15). On February 1, 2007, the Merit Systems Board issued a decision denying Lyons' appeal of both complaints finding Lyons had not established that Palmer or the appointing authority (NJDOT) had engaged in conduct against her in retaliation for her workplace violence complaint (CP-14, R-11).

description. Lyons claimed "isolation" in the office work assignment; Palmer responded that the duties were appropriate for a senior engineer as discussed at Lyons' most recent PES meeting, and were her responsibilities in her current assignment, based on need (2T86, R-20).

37. On August 28, 2006, Lyons filed another contractual grievance (G#2006-035) against Palmer contesting an unsatisfactory interim PAR rating, and alleging that her reassignment was a form of discipline (R-13). She was represented by Paul Pologruto (2T57, 6T114, R-14).

38. On January 16, 2007, Purnell heard Lyons' August 2006 grievance. On March 29, 2007, he issued a decision denying the grievance (CP-10, R-14). Purnell wrote,

> Ms. Lyons' primary contention in this matter is that she has been unjustly judged by management with its decision to remove her from field assignments . . . Ms. Lyons continued to indicate that the manner of reassignment was discipline without due process, and she related "I demand to be disciplined."
>
> * * *
>
> The Hearing Officer notes that the grievant has utilized the grievance process to address the same issue of reassignment previously argued in another grievance case. Refer to Grievance Appeal #G2005/048, hearing date June 26, 2006.

(2T59, R-7, R-14). However, Purnell ordered Lyons' requested remedy of a meeting to discuss her final PES rating and standards to improve the asserted performance deficiencies (R-14).

39. CWA did not appeal the grievance decision (6T115). Lyons appealed to the Department of Personnel. On July 26, 2007, DOP denied the appeal, holding that Lyons had not met her burden of proof nor established abuse by the appointing authority in the grievance case; noting that Lyons had "previously filed a grievance and two discrimination complaints concerning her reassignment from the field to an office position; that Lyons' reassignment did not violate Merit Systems Board rules; and that if Lyons claimed a contractual violation, the appropriate venue was arbitration" (2T62, R-15). Finally, the decision advised Lyons that any allegations of disparate treatment were properly before NJDOT's internal office of DCR/AA (R-15).

PES/Assignment and Assignment/Hardship Grievances - March and May 2007

40. Between September and December 2006, Lyons emailed various NJDOT representatives including Keith, Palmer, and Division of Human Resources Director Gregory Vida, numerous times regarding the denial of Step 1 hearings on three unspecified grievances, all apparently related to her assignment.

41. Keith referred some of Lyons' questions to Vida. On October 23, 2006, Vida replied to Lyons:

> Peggie Keith has referred your latest email to me concerning your desire to have a Step 1 hearing on your grievances. You indicated that you believe that she is misunderstanding your request. I also read through this and I am unsure why Peggie and you are having trouble communicating in this matter. Peggie has previously sent you letters outlining specifically what grievances of yours are still active. I know that you have received that correspondence and yet seem to have difficulty either accepting it or understanding it.
>
> In order to avoid prolonging the non-productive exchange of emails, I have discussed this situation with Paul Pologruto of your union, the CWA. I am asking you to reach out to Paul and explain to him what your issues are. Paul has agreed to act as intermediary and explain your concerns and issues to Peggie and myself.
>
> I do understand that you desire to perform field work. <u>This matter has been the subject of at least one previous grievance and has been resolved and will not be reopened</u>. If however, you have other outstanding issues, I urge you to reach out to Paul for assistance. (C-1) (emphasis added).

42. On October 26, Lyons responded to Vida, in pertinent part:

> In your memo you said that my issue to be placed in the field has been resolved. Please explain [h]ow it has been resolved. I am still in the Region South Office. I am not in the field and no one in Management will tell me why? This issue has not been resolved. The hearing officer gave me a hearing about my "2003-2004" reassignment to the Regional Office.

On October 27, Vida responded:

> It is my recollection that during the earlier grievance a determination was made to give you one more chance to show that you could successfully work in the field. Based on the correspondence you sent arising from the Route 73 project, you have exhibited behavior that is inappropriate and DOT cannot permit you to function in this manner. As a result, you were returned to office duties.

43. On March 2, 2007, Lyons filed a contractual and noncontractual grievance, indicating Hardwick would represent her (CP-1, CP-19). The grievance alleged:

> Mr. Palmer has continued to use my PES to inform me about unsatisfactory work at the time of my PES which is not according to the contract nor procedure. He has also informed me that I will continue to work in the Regional Office because of what the State perceived as unprofessional conduct without disciplinary hearing and the issue happened 15 months ago. I am suffering a hardship with this assignment. The Senior Engineer title in the Construction unit is a field position and at this time I have the most seniority in this title in Region South. Reassignment is not to [be] used as discipline.

As relief, Lyons requested, "[s]top retaliating against me and place me in the field to continue my duties as a field engineer. I do not want to be the Regional South slave" (CP-18).

44. Between March 20 and May 7, 2007, Lyons and Vida engaged in a stream of email communication, initiated by Lyons, concerning her past and current grievances.

45. On March 20, Vida mailed a letter to Lyons' home requesting that she clarify her March 2 grievance concerning her

PES, and advising her that she had already had a grievance on her reassignment.

46. On April 13, Lyons emailed Vida that she had received a letter from him stating he would not give her due process on her last grievance because it is a grievance about reassignment (CP-22). In her email, Lyons also asked Vida, "Are you also telling me that I can not leave the Cherry Hill Regional Office and return to the field? [T]hat is what my grievance is about" (CP-22).

47. In reply on April 16, Vida responded that he assumed Lyons referred to his March 20 letter, that he believed that Purnell would soon issue a decision on another grievance arising from Lyons' reassignment (which grievance is not clear in the record) and that "(s)imply refiling the same grievance over and over is counterproductive." Vida asked Lyons to indicate any new information that she believed would be relevant to her current grievance, so that it might be considered (CP-22).

48. Via email on April 23, Lyons alleged that her grievances on her reassignment had not been heard in a timely fashion and some had never been heard "even though there were adverse affects from treatment." Lyons requested a hearing for the March 2, 2007 grievance and a determination for two other, unspecified grievance hearings (CP-22).

49. In reply on April 23, Vida advised Lyons to contact the manager of the hearing officers with any questions about grievance processing, the conduct of grievance hearings or the timeliness of hearing reports (CP-22).

50. On May 2, 2007, Lyons filed a contractual and non-contractual grievance, alleging:

> This assignment to the Regional Office has caused adverse affects to my career development and I am being denied opportunities; such as denial for training; Senior Engineers in the field supervise. This assignment to the Regional Office [is] a hardship and is unhealthy. I have continuously complained about improper and unjust discipline because I filed a Workplace violence complaint, complained about the actions of the contractor, Green Inc. and their bidding methods that could affect the way the public view, [how] the Specifications are interpreted for bidding (conscientious employee); [and] the unfair practices of this Department and Management [have] continued to violate my rights per Contract and rights under the Merit System.
> (CP-2).

51. On May 7, 2007, Vida responded to an unspecified email from Lyons, again referencing his March 20 letter, and advising Lyons that she "may not keep refiling the same grievance in order to get a different answer" (CP-25).

52. On May 8, Lyons responded to Vida, asking "(w)here in the Contract, Policy and Procedures or DOP rules does it state that you can deny my grievances?" (CP-25). In reply, Vida cited

Lyons' appeal rights pursuant to the arbitration clause of the collective agreement (CP-25).

53. In reply, Lyons again requested "the Policy and Procedure" underlying Vida's decision (CP-25).

54. The same day, Vida responded:

> I will again attempt to explain this. The N.J.A.C., Contract or DOP rules do not say you cannot file grievances. You, in fact, did file a Grievance, had a hearing and the decision was that management acted appropriately in assigning you duties consistent with your title, but not those of a resident engineer. It appears you do not like this determination. If so, the contract gives you the right to appeal, as I indicated. You do not get to start over at step one of the grievance process.
>
> Jane, with all due respect, I have told you this over and over again. I'm sorry if my explanations have not been clear, I will suggest for the final time, that if you do not like the decision of DOT you have the ability to appeal.
> (CP-25).

55. Lyons responded:

> I understand my appeal options but the issues in my previous grievances were different and the new issues all have different issues. Therefore, you are taking away my rights. Each new PES allows me a new time frame. It appears that you do not like that issue. If so, you're in the position to rewrite the Policy and Procedures, and negotiate the Contract but until they are rewritten, you do not get the right to retaliate. The State has made the issues continuous; as long as I am in the Region South Office and not working in the field.

> My seniority has not changed; my duties are unfair and lack opportunities. (CP-25).

56. On May 25, 2007, Lyons filed her initial unfair practice charge. The charge alleged, in pertinent part:

> On May 7, 2007, I received a letter from the New Jersey Department of Transportation's Office of Ethics and Appeals that addressed my Grievance dated August 28, 2007.
>
> The State of New Jersey Region South Construction Office reassigned me from a position in the field to their Regional office and on July 1, 2007, my supervisor, Mr. Palmer was supposed to establish a new PES for me and also review the State's need for the new fiscal year to determine where I would be assigned. I have filed many grievances challenging their claim that they need me because I am the best qualified employee for this assignment and the fact that I have been improperly disciplined. This assignment is also a violation of CWA 1032 Contract for Seniority, Reassignment, Performance Review and Anti-Discrimination provision because they have used unfair labor practices.
>
> * * *
>
> This reassignment is now a permanent assignment and I perceive is an unfair labor practice because I am a female Resident Engineer and it also gives the State an out for issues that Contractors have with me supervising them in the field; by placing me in the office.

57. For purposes of the Motion, I infer that the May 7, 2007 letter referred to in Lyons' charge is the May 8 email from Vida, referencing a pending decision on an unspecified grievance related to Lyons' assignment, and stating that she may not

continue to re-file the same grievances. I also infer, as a fact in support of charging party's case, that Vida's email communication with Lyons constituted an official response to her March and May grievances, declining to accept those grievances for processing to the extent they challenged Lyons' assignment.

58. On May 31, Vida wrote to Lyons, in pertinent part:

> In your email of May 14 you indicated that you have already "supplied all information that is necessary to process my grievance, misapplication of rule, violation of my rights, misinterpretation of the Contract . . . my statement of the grievance is clear."
>
> I asked for clarification to insure that I have not overlooked any issues that have not already been addressed through the grievance process. In effect, you have said that I have all of the information. Therefore, based on this, I see no new issues that have not already been addressed through the grievance process. . . .
>
> As I have indicated to you, it is not appropriate to keep refiling the same grievances. You have had your grievance hearings and the results have been issued. If you disagree please follow the appeal procedures as contained in the contract.[11/]

59. On June 4, Vida further responded in pertinent part:

> Please understand that my decision to not permit you to refile these grievances again and again is not made in a vacuum. . . . You have filed grievances and if you are not satisfied with the results you should follow the appeal process outlined in the contract.

11/ Lyons' May 14, 2007 email is not in the record.

> Continuing to refile these will not change the outcome unless new facts are presented. (C-1)

60. Lyons believes that "(p)rotected activity is just me working on the site, being a black female, trying to get due process through grievances. That's all I've been wanting. I don't want to file a discrimination complaint, I want due process through grievances. And that's not happening" (1T87-88). Lyons believed that she was "constantly reassigned" under the terms of the collective agreement every six months to a year; and that each time she was given a new assignment while in the office constituted a "new incident": Lyons testified:

> Because with construction we are constantly reassigned to different jobs, different things to do. So my definition of reassignment might be different than yours, but I'm going by what the contract says. The contract states that if you are changing what you are doing, the type of work you are doing, therefore it's reassignment. I came in to do claims. Then they reassigned me to do other duties, phase review. And the last duty that I had was I was environmental . . . it's been changing (2T73).

Therefore, each time she was given a new type of work to do, or received a new PES while assigned to the office; she filed a new grievance (1T104, 1T106, 2T72-2T74, 2T75).

61. Lyons believed that each of her grievances, though referencing duplicate grievance articles, were different because each referred to different circumstances or situations. Lyons felt that NJDOT's refusal to process her grievances was

equivalent to denying the merits of the grievance, and a denial of her right to due process (1T124).

62. Lyons believes that she was informally disciplined and punished for having sent the October 2005 "email" to the contractor and that management should have formally disciplined her rather than taking the position all of her grievances were related to her reassignment and treating her differently for the next five years (1T93, 1104, 1T98).

63. Lyons believed that the "old" 2004 - 2007 contract (CP-8) permitted her to file contractual grievances as an individual unit member, but after the "new" 2007-2011 contract (CP-9), none of her grievances were accepted (2T78). She does not believe that contractual grievances could be processed only through CWA prior to the 2007 contract (2T79). She believed the issues in all her grievances were different, and that feels she should have the right to grieve or question her assignment (1T108).

64. Pologruto was told repeatedly by Palmer and other management representatives from employee relations, including Keith and Vida, that Lyons was reassigned to the office because of incidents that occurred out in the field, including the October 2005 memorandum to Green Construction, and management felt that they did not want to send Lyons back into the field because of these incidents (4T39, 4T61, 4T68). Pologruto testified that in his view, each of Lyons' grievances related in

some way to her assignment to office duties rather than as a field engineer, and that he explained to Lyons several times that CWA would not process contractual grievances related to her assignment (6T99, 6T135).

65. On July 11, 2007, Pologruto wrote to CWA National Representative Ruth Barrett requesting a legal opinion on "DOT's refusal to process grievances filed by Jane Lyons relative to her assignment to office duties," on the ground those issues had been addressed in prior grievances (CP-30). On August 20, 2007, Barrett wrote to Lyons, informing her that CWA would not arbitrate her grievances because her reassignment was not based on retaliation, but resulted from her memorandum to a contractor, and her grievances did not contain proofs establishing contractual violations (R-16).

66. Lyons did not understand Barrett's letter, because she understood the contract to require due process for all grievances (2T80).

67. On October 28, 2008, Lyons filed her final amendment to the charge pursuant to P.E.R.C. No. 2009-69 (C-3). Between filing her initial charge and the October 2008 amendment, Lyons personally filed several other contractual and non-contractual grievances based upon her interim and final PES, her assignment, and other issues (CP-3, CP-4, CP-5). In each instance, after

NJDOT inquired, CWA advised Lyons and NJDOT it would not process the aspects of the grievances relating to Lyons' assignment (R-18).

Motion to Dismiss for Lack of Prosecution

68. On January 25, 2011, the Deputy Attorney General representing the NJDOT sent me several emails, copied to Ms. Lyons, expressing concern over an impending snowstorm and requesting to adjourn the January 26 hearing. I responded that I did not believe the weather would affect the morning commute, but that I would be accessible via email and would reconsider if Ms. Lyons joined the request. I asked Ms. Lyons to respond by the end of the business day, but did not hear from her.

69. At approximately 10:30 P.M., the Deputy Attorney General emailed me an updated weather report indicating that ice and snow were expected for the morning commute. I replied that in view of the updated report and in the interest of safety, the hearing was adjourned, and I would provide alternate dates.

70. At 8:30 A.M. on the scheduled hearing date, with the snowstorm in progress, I received three successive emails from Ms. Lyons in response to several previous emails. Ms. Lyons stated she disagreed with the Deputy Attorney General's procedural summary, that she opposed the adjournment request, and in response to my email adjourning the hearing date, Ms. Lyons

wrote that she would be late for the hearing date, but would appear. I immediately wrote back to Ms. Lyons:

> Ms. Lyons,
>
> The hearing and court reporter have been cancelled in the interest of safety due to the weather. I will not be going in to the office. Please do not go to the Trenton office. Thank you.

71. At approximately 10:00 A.M. on Wednesday, I received a call from my office that Ms. Lyons had arrived for the hearing. Ms. Lyons explained that she had not understood from my email that the hearing had been adjourned, and expressed frustration that the matter had been adjourned because State offices were open.

72. No other party, witness, or the court reporter appeared.

73. I apologized to Ms. Lyons for any misunderstanding (6T5-6T6).

74. The hearing was rescheduled for June 14, 2011, at 9:30 A.M. Prior to the scheduled hearing start time, I received a voice mail from Ms. Lyons time-stamped 8:15 A.M., as follows: "Hello, this is Jane Lyons. I am not going to make it today. Thank you." No explanation was given. Before the appointed time for the hearing, I left voice messages at Ms. Lyons's office and residence and received no response (5T2).

75. I convened the hearing at approximately 10:00 A.M. and placed the information about the voice mail I received on the record (5T2-5T3). The Deputy Attorney General representing the NJDOT appeared on behalf of the State, and Paul Pologruto was also present. The State then made a Motion to Dismiss Charging Party's case for lack of prosecution. I reserved decision on the Motion to give Lyons an opportunity to respond (5T4, 6T6-6T7).

76. On June 21, 2011, I wrote to Ms. Lyons, enclosing the transcript of the proceedings, and requesting a response to the State's Motion by June 28, 2011. I indicated that if Lyons did not respond, I would grant the State's Motion.

77. On June 24, I received an email from Ms. Lyons, copied to the Deputy Attorney General, as follows:

> In response to the Motion, I was sick, I took a sick day. I called your office, I called the Union's office but I did not have [the Deputy Attorney General's] number.
>
> [In] regards to the case I am asking that another date be scheduled. I came out on a snowy day for the last scheduled hearing but no one showed up, I do not understand why I am not allowed to be sick.
> (6T7).

78. The hearing was rescheduled to August 5, 2011. On that date, I summarized the developments on the previously scheduled hearing date on the record (6T5 - 6T10). Ms. Lyons appeared and concluded her direct case. The State then made the within Motion to Dismiss.

ANALYSIS

Motion to Dismiss Standards

Motions to dismiss are properly made at the conclusion of charging party's case. N.J.A.C. 19:14-4.7. Union City, P.E.R.C. No. 2006-77, 32 NJPER 116 (¶55 2006). When such a motion is made before a hearing examiner, the hearing examiner has the authority to decide it. N.J.A.C. 19:14-4.7 and 6.3. Ibid.

In deciding a motion to dismiss after the charging party presents its case, the hearer of fact must accept as true all of the evidence supporting the charging party's allegations and afford the charging party the benefit of all inferences that can reasonably be deduced from that evidence. Dolson v. Anastasia, 55 N.J. 2 (1969); New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979). Dismissal of a claim is appropriate when a rational fact-finder could not conclude from the evidence that each essential element of that claim is present. Pitts v. Newark Bd. of Ed., 337 N.J. Super. 331, 340 (App. Div. 2001). See also Communications Workers of America (Badini), H.E. No. 2013-8, 39 NJPER 284 (¶95 2012).

Applying these standards to the evidence introduced during the hearing, and viewing the evidence most favorably to the Charging Party, I recommend that the Commission grant NJDOT's motion to dismiss the Complaint in its entirety.

The issues before me, as narrowed by the Commission's decisions in P.E.R.C. 2009-16 and P.E.R.C. 2009-69, are as follows:

> 1) whether Lyons' charge is timely filed, as having been filed within 6 months of the time when Lyons knew or should have known that she was permanently reassigned, and, if so
>
> 2) whether the State/Department of Transportation reassigned Lyons permanently in retaliation for her grievance concerning her temporary reassignment, in alleged violation of N.J.S.A. 34:13A-5.4a(3), and
>
> 3) whether the State/Department of Transportation refused to accept Lyons' grievances, tending to interfere with her protected rights, in alleged violation of N.J.S.A. 5.4a(1); and
>
> 4) Whether the Complaint should be dismissed for lack of prosecution.

Timeliness

The Act requires that an unfair practice charge be filed within six months of the date that the unfair practice occurred (the "operative date"). Charges filed later than six months after the date of the unfair practice are untimely unless the charging party was prevented from filing within the statutory period. N.J.S.A. 34:13A-5.4(c).

In determining whether a party was "prevented" from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits to a particular claim.

The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978) (case transferred to Commission where employee filed court action within six months of alleged unfair practice). Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. Wayne Tp. (Shenekji), P.E.R.C. No. 2012-68, 39 NJPER 37 (¶12 2012) (Commission found that Shenekji was not prevented from filing a timely unfair practice charge where he became aware in July 2010 that he had a claim for unpaid compensation, and certainly should have known when he received the check that was allegedly less than he was owed). See also Sussex County Com. Col. (Stephenson), P.E.R.C. No. 2009-55, 35 NJPER 131 (¶46 2009); State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

In P.E.R.C. 2009-16, the Commission found, in remanding to the Director, that on its face Lyons' charge had been filed within 6 months of the date she claimed the unfair practices took

place. Lyons alleged she did not know her position was permanent until January 2007; thus the Commission found Lyons' charge timely filed as filed within 6 months of that date. In so doing, the Commission found only that Lyons had alleged sufficient facts that, if true, might constitute unfair practices. N.J.A.C. 19:14-2.1(a). Having found the dates alleged in Lyons' charge unclear, the Commission gave her one final chance to amend the charge to allege specific facts and dates to conform with the timeliness standard.

In P.E.R.C. 2009-69, the Commission remanded the charge for complaint issuance on the a(1) and a(3) allegations, finding that Lyons' amendment raised an additional allegation, effectively amending Lyons' charge to allege that her reassignment was made permanent in retaliation for her grievances.

By assuming Lyons' charge to be timely based on the dates alleged in the charge, the Commission did not make any credibility determinations of the truth of that date or any of the other allegations in the charge. The Commission stated that should a complaint issue, the merits of the operative date and the permanence of Lyons assignment could still be litigated, therefore leaving the findings of fact to the Hearing Examiner.

I must therfore determine the accuracy of all dates in the record, beginning with the operative date of the alleged unfair practice. Specifically, I must first determine whether Lyons'

charge is timely, as having been filed within 6 months of an operative date of an alleged unfair practice.

A timely charge would have to allege unlawful conduct within six months of the operative date. This standard cannot be subjectively applied. See State of New Jersey (Juvenile Justice) and Judy Thorpe, D.U.P. No. 2013-2, 40 NJPER 8 (¶4 2012)(Director held that a timely charge would have to have been filed within six months of employees' termination or within six months of the arbitration award upholding that termination; charging party alleged no facts indicating that she was prevented from seeking redress of the issues raised in the charge for 15 months after the expiration of the limitations period). N.J.S.A. 34:13A-5.4(c).

Lyons asserts numerous dates on which the alleged unfair practice(s) occurred. In her initial charge, filed May 25, 2007, Lyons alleged that Palmer failed to establish a new PES for her effective July 1, 2007; her June 2007 amendment alleged that on May 7, 2007, she received a letter from the NJDOT addressing her August 28, 2007 grievance. In Lyons' first Commission appeal, she argued that she learned her assignment was permanent in January 2007; in Lyons' testimony at hearing, she testified that the May 7 date in the charge was in error, and that she learned her assignment was permanent on August 28, 2006. Lyons also testified that she tried to get a written answer about her

reassignment status after her hearing in 2006 and never questioned whether her assignment was permanent until she "finally" saw a document that stated why she was reassigned permanently in the form of an email from Vida in 2007, after she asked Vida whether she had been "death sentenced" to permanent reassignment. Lyons also asserts that she was not aware of the reasons for her reassignment until she read a 2008 certification by Vida, "in which he acknowledged that the reassignment was a "remedial" action to ensure [Lyons] did not engage in any further inappropriate conduct on the work site".[12/] Finally, Lyons argues that the charge is timely because the Commission held that Lyons charge was timely filed in P.E.R.C. No. 2009-16. Lyons also asserts that, on an unspecified date, NJDOT made a new decision to make her reassignment permanent and created a new position with a description different than her previous duties, in effect changing her temporary reassignment to a permanent position, "as a form of retaliation and intimidation", and the charge is timely as to this new decision.

NJDOT argues that the May 25, 2007 charge is untimely as filed well beyond the Act's six-month limitations period, as the entire basis of the charge and amendments stem from Palmer's November 4, 2005 action reassigning Lyons from resident

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12/ This fact was raised for the first time in Charging Party's post-hearing brief.

engineering duties in the field to the Southern Regional Office; that it is undisputed that at the June 26, 2006 hearing, Palmer testified that Lyons' reassignment was permanent, and Lyons presented no evidence that she was prevented from filing the unfair practice charge.

Having found as a fact that Lyons knew her reassignment was permanent on June 26, 2006, I further find that date to be the operative date on which the limitations period began to run. Lyons testified multiple times that she knew at the June 26, 2006 grievance hearing that her assignment was considered permanent, and also stated to Palmer in a July 12, 2007 email, prior to the June 26 issuance of the grievance report, that she understood her assignment to be permanent. Therefore, to be timely, Lyons' charge would have to have been filed no later than six months after that date, or by January 26, 2006.

Moreover, Lyons' allegations that NJDOT refused to accept her grievances is also untimely. Lyons' charge alleges that she received a communication from NJDOT in May 2007 indicating that further grievances concerning her reassignment would not be processed. I have inferred that Lyons referred to the May 8 portion of her email exchange with Vida during that time frame. However, the full email exchange between Lyons and Vida in the record shows that Vida told Lyons on October 23, 2006, that further grievances on her reassignment would not be processed

because they were repetitive of issues regarding her reassignment which had already been decided. Therefore, I find that October 23, 2006 is the date on which Lyons knew, or should have known, that NJDOT did not intend to accept any more grievances relating back to her November 2005 assignment - the operative date for any unfair practice charge on that allegation. Vida confirmed NJDOT's position several times - in March, April and May 2007. The May 2007 "letter" referred to in Lyons' only repeated Vida's October 2006 determination a final time. Thus, Lyons' May 2007 communication with Vida was not material to the limitations period on any of the allegations of her charge. This communication, which Lyons received and replied to, took place well over six months before Lyons filed her unfair practice charge. Therefore, I find that Lyons' claim alleging that NJDOT refused to accept her grievances, is also untimely.

Viewing the facts in the light most favorable to the charging party, none of the other dates Lyons put forth on her direct case support a conclusion other than Lyons knew or should have known that her reassignment was permanent no later than June 26, 2006, which I find is the operative date of the alleged unfair practice for purposes of determining whether the charge was filed within the six month limitations period. Neither the May 2007 charge nor the October 2008 amendment alleged any dates within the six months of what I have determined is the operative

date. Even if, as Lyons testified, the limitations period did not begin to run until she received Purnell's July 27, 2006 hearing report, or the date in the charge is corrected to August 28, 2006, as Charging Party testified it should be, the charge is still untimely. There is no support in the record to conclude that Lyons became aware that her assignment was permanent on any subsequent date. No testimony or evidence produced on Charging Party's case support a conclusion that a new permanent position was created each time she was assigned a new work project. Finally, the record contains no reasons supporting an inference that Lyons was prevented from filing the charge within six months of either operative date. Kaczmarek.

Therefore, I find that the unfair practice charge was not filed within six months of any operative date or any date alleged in the unfair practice charge. Therefore, the charge is untimely and I recommend that the charge be dismissed.

Motion to Dismiss for Lack of Prosecution

N.J.A.C. 1:1-14.4 (c), a rule of the Office of Administrative Law ("OAL"), provides that if a party fails to appear at a proceeding scheduled by an administrative law judge, the judge shall hold the matter for one day before taking any action. Upon receiving an explanation, in writing and served on all other parties, the judge may reschedule the matter for

hearing, and, at the judge's discretion, order any of the following:

> i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
>
> ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
>
> iii. Such other case- related action as the judge deems appropriate.
> (Emphasis added).

This OAL rule is authorized by N.J.S.A. 52:14F-5(t), a portion of the Administrative Procedures Act, which permits:

> reasonable sanctions, including assessments of costs and attorneys' fees against parties, attorneys and other representatives who, without just excuse, fail to comply with any procedural order or with any standard or rule applying to a contested case and including the imposition of a fine not to exceed $1000 for misconduct which obstructs or tends to obstruct the conduct of contested cases.

See County of Hudson (Desmond and Lopez) ,P.E.R.C. No. 2009-8, 34 NJPER 244 (¶83 2008) (in dismissing complaint for failure to appear, Commission found the proper authority for dismissal of case for failure to appear is OAL rule N.J.A.C. 1:1-14.4(c) rather than Commission rule N.J.A.C. 19:14-6.12); see also New Jersey Transit Bus Operations, Inc. and United Transportation Union and Edgar Ramos, P.E.R.C. No. 87-158, 13 NJPER 583 (¶18215 1987) (Commission found Hearing Examiner's

dismissal of Complaint for Charging Party's failure to appear was appropriate where charging party did not adequately explain his failure to appear at the hearing; appeal was not timely filed, and Commission's request for supporting papers was not answered, citing R. 1:2-4, Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582 (App. Div. 1977); Elmora S. & L. Ass'n v. D'Augustino, 103 N.J. Super. 301, 304 (App. Div. 1968)).

NJDOT argues that Lyons' case should be dismissed because on the date she failed to appear, "the matter had been scheduled for many months, [Lyons] had ample notice of the hearing date, significant State resources were expended inasmuch as several State representatives and the Hearing Examiner appeared for the scheduled hearing, as well as the court reporter, and that Lyons never gave any valid or credible reason for her failure to appear."

Lyons argues that the issue is moot because she called her office and Commission offices to report that she would not appear; contacted her witness Paul Pologruto while he was at the hearing to inform him that she could not attend, and the Hearing Examiner was given a written reason and accepted her explanation.

On the rescheduled hearing date, Lyons concluded her direct case, having been afforded a full and fair opportunity to litigate her claim over five full days of hearing. Although I am

recommending dismissal of the complaint on the merits, Lyons' conduct warrants admonishment and consequence.

I believe and find that Lyons deliberately disregarded my email indicating the January 26 hearing was adjourned due to the inclement weather. She received, read and responded to each of the emails concerning the adjournment, well in advance of the scheduled hearing time, yet proceeded to appear at the hearing which she knew or should have known was canceled for the day due to the weather. Lyons then failed to appear for the June 14 hearing date, leaving a brief voice mail with no details of why she would not appear, and then responding with a terse, argumentative explanation referencing the adjournment of the January hearing date due to snow. Under these circumstances, Lyons' claim of illness strains credulity, and I now find that it was not credible. Lyons' conduct on January 26, in which she disregarded clear information that the hearing was adjourned due to the weather, strongly supports the inference that her failure to appear on June 14 was a deliberate form of protest against the adjournment of the earlier hearing date due to inclement weather.

I permitted the rescheduling and continuation of the hearing and the completion of Lyons' case in chief because significant State resources had been expended by the fifth day of hearing. I continued to reserve decision on the State's Motion to Dismiss

for lack of prosecution, thus my consideration of the motion is not moot.

Therefore, I find that Lyons' failure to appear on June 14 and her unsubstantiated claim of illness, constitutes misconduct within the meaning of the rule and justifies the dismissal of the complaint within the meaning of N.J.A.C. 1:1-14.4 c(2)(iii). Thus, the charge is dismissed for lack of prosecution.

Conclusions of Law

The unfair practice charge is untimely. Charging Party failed to establish a prima facie case of a violation under the Act. Moreover, Charging Party deliberately failed to appear for the June 14, 2011 hearing date. Therefore, I recommend that the Complaint be dismissed for lack of timeliness and lack of prosecution.

Recommended Order

The State's Motions to Dismiss are granted. The Complaint is dismissed.

Patricia T. Todd

Patricia Taylor Todd
Hearing Examiner

DATED: February 18, 2014
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed,

this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 27, 2014.