P.E.R.C. NO. 89-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HEALTH),

Respondent,

-and- Docket No. CO-H-87-33

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants permission to withdraw an unfair practice charge filed by the Communication Workers of America, AFL-CIO against the State of New Jersey (Department of Health). The State opposes the request and urges adoption of the recommendations in H.E. No. 89-7 about the interrelationship between a withdrawal of charges, a party's request to reopen proceedings, and the six month statute of limitations. In a companion case, State of New Jersey (Department of Human Services), P.E.R.C. No. 89-52, the Commission addresses the proper procedures for entertaining a motion to reopen a charge deemed withdrawn. Given that decision, the Commission grants CWA's request to withdraw its charge in this case.

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Charging Party.

Appearances:

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

For the Charging Party, Michelle M. Dunham, Esq.

DECISION AND ORDER

On September 13, 1988, the Communications Workers of America, AFL-CIO ("CWA") requested permission to withdraw an unfair practice charge it had filed against the State of New Jersey (Department of Health) ("State"). The State has opposed that request, asserting that the Commission should adopt the recommendations in H.E. No. 89-7, 14 NJPER ___ (¶_____ 1988) about the interrelationship between a withdrawal of charges under N.J.A.C. 19:14-1.5(d), a party's request to reopen proceedings, and the six month statute limitations under N.J.S.A. 34:13A-5.4(c).

We have issued today a companion case, State of New Jersey (Department of Human Services), P.E.R.C. No. 89-52, 14 NJPER ___ (¶_____ 1988), addressing the proper procedures for entertaining a

motion to reopen a charge deemed withdrawn. These procedures provide for notice to the respondent and an opportunity to contest the motion. Given that decision, we grant CWA's request to withdraw its charge. We will not speculate now about what circumstances would justify granting or denying a motion to reinstate a charge. We will instead make such determinations in cases asking us to review the exercise of the Director's discretion in a particular instance.

ORDER

The request for withdrawal is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Bertolino voted in favor of this decision. Commissioner Wenzler was not present. None opposed.

DATED: Trenton, New Jersey
October 20, 1988
ISSUED: October 21, 1988

H.E. NO. 89-7

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF HEALTH,

Respondent,

-and- Docket No. CO-H-87-33

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission grant a motion to dismiss a Complaint where it was issued upon an Unfair Practice Charge that was deemed withdrawn, followed by an amendment which was time-barred under N.J.S.A. 34:13A-5.4(c). There were no mitigating "equitable considerations" within the meaning of Kaczmarek v. N. J. Turnpike Auth., 77 N.J. 329 (1978).

A Hearing Examiner's decision to dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

H.E. NO. 89-7

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF HEALTH,

Respondent,

-and- Docket No. CO-H-87-33

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Hon. Cary Edwards, Attorney General
(Richard D. Fornaro, D.A.G.)

For the Charging Party, Michelle M. Dunham, Esq.

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION ON RESPONDENT'S MOTION
TO DISMISS PRIOR TO HEARING

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 31, 1986, by the Communications Workers of America, AFL-CIO ("Charging Party" or "CWA") alleging that the State of New Jersey, Department of Health ("Respondent" or the "State") has 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. ("Act"), in that on April 29, 1986, Mario D'Agostino, a Senior Vault Clerk, was reprimanded for allegedly failing to perform a personal favor for his supervisor and on April 30, 1986, D'Agostino posted a warning to his co-workers and

on May 2nd, D'Agostino was threatened with disciplinary action for posting the foregoing warning; on April 29, 1986, D'Agostino filed a grievance and on May 23rd, D'Agostino was suspended for one day; further, Verona Parkes, a Senior Clerk Typist, was suspended on April 28, 1986, for three days for chronic and excessive absenteeism; thereafter, the State allegedly failed to comply with certain provisions of the grievance procedure, following the filing of a grievance by Parkes; and, finally, on May 15, 1986, CWA became aware of a unilateral change in the terms and conditions of employment of certain employees in the Department of Health, regarding time and leave procedures and the requirements for the production of medical certificates; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1)-(3) and (5) of the Act.[1/]

When the Charging Party failed to pursue its Unfair Practice Charge, the Director of Unfair Practices on December 9, 1986, advised CWA that its failure was "...deemed a withdrawal of the charges pursuant to N.J.A.C. 19:14-1.5(d). Accordingly, the

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

charges are deemed withdrawn and these cases are closed..."[2/] This action was confirmed by an Assistant to the Director on February 4, 1988, in a letter to Respondent's Deputy Attorney General.

On February 13, 1987, CWA filed an "Amendment to CO-86-33," (sic) in which CWA alleged, additionally, that Parkes, supra, was suspended on January 8, 1987, in violation of the contractual hearing procedures and, also, because of anti-union animus, and that the State refused to supply CWA with certain requested information dealing with Parkes in order to process her case through the contractual grievance procedure; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1)-(5) of the Act.[3/]

On March 7, 1988, counsel for CWA sent a letter to the Director of Unfair Practices, complaining that on February 23rd she was informed by an Assistant to the Director that the Commission considered the matter closed. She stated that this "simply not correct..." CWA counsel asserted further in her March 7th letter

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2/ The plural reference to "charges" was to an earlier unfair practice charge like situated: CO-86-336. Further, the Director's letter of December 9th had been preceded by two letters of September 17, 1986 and November 10, 1986, requesting a withdrawal of the charge, followed by a third letter on November 25, 1986, which set a deadline of December 9, 1986, for receipt of a response, the absence of which "...shall be deemed a withdrawal..."

3/ This additional subsection prohibits public employers, their representatives or agents from: "(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."

that an agreement had been reached between CWA and the Director of Unfair Practices on December 16, 1986, "...that the case would remain open..." and that "...PERC further verified that the case was open by accepting an amendment to the charge which was filed in January of 1987..."

On March 21, 1988, the Director of Unfair Practices sent a letter to CWA counsel with a copy to the Respondent which stated, in part, that "...In light of the timely amendment filed in the case docketed CO-87-33, I will grant your request to reopen that case..." Thereafter, it appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 22, 1988. The original hearing dates of June 20, 21, 29, 30 and July 1, 1988, were adjourned several times and the matter was rescheduled for hearing on August 22, 1988.[4/]

On May 3, 1988, the Respondent filed its Answer to the Complaint, in which it raised a series of affirmative defenses, among which was that it had not been afforded due process by the Commission's Director of Unfair Practices when he reopened the matter following dismissal, and that the Charging Party's charge was untimely and barred by N.J.S.A. 34:13A-5.4(c).

4/ However, the Hearing Examiner by letter of July 27, 1988, advised the parties that this date was cancelled, pending the disposition of the Respondent's Motion to Dismiss.

By letter dated June 8, 1988 (received June 14, 1988), CWA counsel filed a second amended Unfair Practice Charge, the letter stating that CWA "...is withdrawing all allegations made in the original charge except as they relate to the discipline of Mario D'Agostino..." The second amended Unfair Practice Charge pertains only to D'Agostino and the events of April and May 1986, supra.

On July 15, 1988, the Respondent filed with the Hearing Examiner a Motion to Dismiss with supporting legal argument, affidavits and other documentation together with a Motion for Stay of Proceedings. Service was made upon the Charging Party on July 19, 1988, and, after a request for an extension of time to reply was granted, CWA filed its response on August 3, 1988.

The decision which follows is in accordance with N.J.A.C. 19:14-4.7 and is based upon the following:

UNDISPUTED PROCEDURAL FACTS

1. The State of New Jersey, Department of Health is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. On July 31, 1986, CWA filed its original Unfair Practice Charge, the contents of which have been previously summarized, which related to D'Agostino, Parkes and alleged unilateral changes in terms and conditions of employment with

respect to time and leave procedures and the production of medical certificates.

4. Following the usual formality of requesting a statement of position on August 4, 1986, and the holding of a conference on August 21st, nothing further transpired of record until two letters were sent by the Director of Unfair Practices to CWA on September 17 and November 10, 1986, wherein a withdrawal of the charge was solicited in order to "...close out our file..." These letters were followed by a letter of November 25th, which stated that failing a response "...it will be assumed that the Charging Party has no further interest in pursuing this matter, and such failure to respond shall be deemed a withdrawal of the charge pursuant to N.J.A.C. 19:14-1.5(d)." Finally, on December 9, 1986, the Director sent his final letter to CWA, in which he stated that its failure to respond was "...deemed a withdrawal of the charges..." and "Accordingly, the charges are deemed withdrawn and these cases are closed..." (emphasis supplied).[5/]

5. On December 17, 1986, a CWA representative sent a letter to the Director, in which he confirmed his meeting with the Director on December 16th and, after reciting the history of settlement efforts to resolve the factual dispute underlying the unfair practice charge, he concluded: "We would appreciate your

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5/ As noted previously, the reference to plural charges arises from the fact that CWA had filed an earlier charge in Docket No. CO-86-336 (sic), which was not consolidated with the instant matter and is not a part of this proceeding.

intervention...in reopening the cases so we may continue to pursue resolution of the issues contained in the charges..."

6. On February 10, 1987, the same CWA representative sent a letter to the Respondent's Deputy Attorney General, enclosing a copy of the first amended Unfair Practice Charge, which was thereafter docketed on February 13, 1987.

7. On February 13, 1987, the first amended Unfair Practice Charge, supra, was docketed, which alleged that Parkes was suspended on January 8, 1987, in violation of the contractual procedures and, also, because of anti-union animus, and, further, that the State refused to supply CWA with certain requested information in order to process Parkes' case through the grievance procedure.

8. On February 4, 1988, an Assistant to the Director sent a letter to the Respondent, stating that CO-87-33 was deemed withdrawn on December 9, 1986, and enclosed a copy of the Director's letter.

9. On March 7, 1988, CWA counsel sent a letter to the Director, asserting that she had been incorrectly informed by an Assistant to the Director on February 23rd that the matter had been closed. In this letter, CWA counsel insisted that an agreement had been reached between a CWA representative and the Director on December 16, 1986, "...that the case would remain open..." and that "...PERC further verified that the case was open by accepting an amendment to the charge which was filed in January of 1987..." The

amendment referred to was the first amendment to the original charge, which was docketed on February 13, 1987, and alleged additional facts as to Parkes as previously summarized.

10. On March 21, 1988, the Director sent a letter to CWA counsel with a copy to the Respondent, in which he stated that "...In light of the timely amendment filed in the case docketed CO-87-33, I will grant your request to reopen that case..." (emphasis supplied).

11. Thereafter on April 22, 1988, a Complaint and Notice of Hearing was issued with the hearing schedule set forth above, as modified, to which was attached the original Unfair Practice Charge, docketed July 31, 1986, and the first Amended Unfair Practice Charge, docketed February 13, 1987. The Respondent filed its Answer on May 3, 1988, alleging a series of affirmative defenses, inter alia, its not having been afforded due process by the Commission's Director of Unfair Practices when he reopened the matter following dismissal, and the fact that the charge was untimely and barred by N.J.S.A. 34:13A-5.4(c).

12. Thereafter, CWA filed a second Amended Unfair Practice Charge, which was docketed on June 14, 1988, in which all of the prior allegations of unfair practices were withdrawn except those pertaining to the "...discipline of Mario D'Agostino...," which occurred on May 23, 1986. The second Amended Unfair Practice Charge reflects that it only pertains to D'Agostino.

13. On July 15, 1988, the Respondent filed the within Motion to Dismiss together with a Motion to Stay the Proceedings. CWA responded on August 3, 1988.

DISCUSSION AND ANALYSIS

A motion to dismiss is governed by N.J.A.C. 19:14-4.7, which provides only that if the motion is granted by the Hearing Examiner before the filing of his Recommended Report and Decision, then the Charging Party may obtain review by the Commission, provided the request for such review is filed within ten days of the order of dismissal. This rule does not, however, provide guidance as to the standard to be applied by the Hearing Examiner in determining whether to grant or deny the motion to dismiss.

However, the Hearing Examiner is unable to perceive any significant difference between the standard for disposing of a motion to dismiss and that of a motion for summary judgment, which is provided for N.J.A.C. 19:14-4.8. This rule provides in Section (a) that "...Any motion in the nature of a motion for summary judgment may only be made subsequent to the issuance of the complaint and shall be filed with the chairman of the commission, who shall refer the motion to either the commission or the hearing examiner..." Thus, it appears to the Hearing Examiner that he may treat the Respondent's Motion to Dismiss as a motion for summary judgment even though not filed with the Chairman and referred to the undersigned.

N.J.A.C. 19:14-4.8(b) establishes the standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment, namely, that "...there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...," in which case summary judgment may be granted and the requested relief ordered.

The Commission has, in many cases, followed the New Jersey Civil Practice Rules (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

The Hearing Examiner is fully satisfied that the above requisites for granting the Respondent's Motion to Dismiss have been met since there are no genuine issues as to any material procedural facts appearing in the moving and responding papers filed in this matter.

Based upon the record papers and the legal memoranda submitted by counsel in support of their respective positions, the Hearing Examiner hereby grants the Respondent's Motion to Dismiss for the following reasons:

* * * *

The Respondent claims that there has been a denial of its right to procedural due process by the action of the Director of Unfair Practices in reinstating/reopening this proceeding on

March 21, 1988, without prior notice to or affording the Respondent an opportunity to be heard. Additionally, the Respondent argues that the Director's action was arbitrary and unreasonable and that the Complaint is time-barred.

The Charging Party contends that the dismissal by the Director of December 9, 1986, was without prejudice to reinstatement, which would appear at first blush to be supported by the last sentence in N.J.A.C. 19:14-1.5(d), which states that "...Unless otherwise stated, a withdrawal and dismissal under this subsection is without prejudice..." Since the Director's letter of December 9, 1986, did not indicate that the deemed withdrawal was with or without prejudice, it was without prejudice. The Charging Party then points out that an in person request was made to reopen the case by a CWA representative on December 16, 1986, and this was confirmed in a letter by him to the Director of December 17, 1986, supra. The Charging Party then argues that the Respondent was given notice of the filing of an "...amended charge" when CWA's representative sent a letter to the Respondent's Deputy Attorney General, which discussed in detail the efforts to settle the matters contained in the original Unfair Practice Charge. Finally, the CWA, in its responding papers, states that "...Considering the timely amendment realleging the original allegations, the charge was reinstated for good cause..." (emphasis supplied) and that the Commission's rules on "time requirements" should be liberally construed.

* * * *

The Hearing Examiner has analyzed the above procedural facts and the legal arguments of counsel and has concluded as follows:

[1] The original Unfair Practice Charge alleges events which occurred essentially between May 23, 1986 and June 16, 1986. Following the filing of the original Unfair Practice Charge on July 31, 1986, there was, except the request for a statement of position and the holding of a conference on August 21, 1986, a hiatus until September 17, 1986, when the Director of Unfair Practices sent his first letter to the CWA representative, requesting a withdrawal so that the file might be closed. This was followed by like letters from the Director on November 10, 1986 and November 25, 1986, except that the November 25th letter stated that failing a response by December 9, 1986, it would be assumed that the Charging Party had no further interest in pursuing the matter and that such failure would be "...deemed a withdrawal of the charge pursuant to N.J.A.C. 19:14-1.5(d)..." (emphasis supplied). Then on December 9, 1986, the Director sent a letter to the Charging Party, which stated that its failure to have responded was "...deemed a withdrawal of the charges pursuant to N.J.A.C. 19:14-1.5(d)...." and that "Accordingly, the charges are deemed withdrawn and these cases are closed..." (emphasis supplied). Thus, as of December 9, 1986, the original Unfair Practice Charge, docketed July 31, 1986, did NOT exist as a viable charge before the Commission.

[2] N.J.S.A. 34:13A-5.4(c) provides, in part, that "...no complaint shall issue based upon any unfair practice occurring more than six (6) months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which the six (6) months period shall be computed from the date he was no longer so prevented..." (emphasis supplied).

[3] The New Jersey Supreme Court in Kaczmarek v. N. J. Turnpike Auth., 77 N.J. 329 (1978) considered whether or not the Section 5.4(c) 6-month statute of limitations in our Act could be applied where a complainant was deemed to have been "prevented" from filing a timely charge by certain erroneous information from the Commission staff and, who thereafter instituted a court proceeding. The Court decided that the Legislature's inclusion of the phrase "...unless the person aggrieved thereby was prevented..." in Section 5.4(c) "...evinced a purpose to permit equitable considerations to be brought to bear..." (77 N.J. at 339)[emphasis supplied]. Thus, the six-month statute of limitations may be excused if legally sufficient "equitable considerations" are present.

[4] There is no contention in any of the legal arguments or supporting papers of CWA that it was prevented from filing a timely charge within the meaning of Kaczmarek. Thus, the question is whether or not the Director of Unfair Practices had any discretion to abrogate the mandate of Section 5.4(c) of the Act. In the opinion of the Hearing Examiner there is no discretion whatsoever in view of the terms contained in his December 9, 1986 letter, supra.

[5] On February 4, 1988, just about twelve months following the CWA's letter of February 10, 1987, supra,[6/] an Assistant to the Director sent a letter to the Respondent, enclosing a copy of the Director's letter of December 9, 1986, with the statement that the original Unfair Practice Charge had been deemed withdrawn.

[6] Then on March 7, 1988, counsel for CWA sent a letter to the Director of Unfair Practices, stating that: (1) the information she had received from an Assistant to the Director that the matter had been closed was "...simply not correct..." and (2) that an agreement had been reached with CWA on December 16, 1986 "...that the case would remain open..." and, thereafter, "...PERC further verified that the case was open by accepting an amendment to the charge which was filed in January of 1987..." However, this Hearing Examiner concludes that as of March 7, 1988, or for that matter, January 1987, there was no viable unfair practice charge as to which an amendment could have attached.

[7] To compound the matter, the Director of Unfair Practices on March 21, 1988, addressed a letter to counsel for CWA with a copy to the Respondent that "...In the light of the timely amendment filed in the case docketed CO-87-33, I will grant your request to reopen that case..." (emphasis supplied). Again, there

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6/ There is nothing in the Commission file which indicates any activity in this matter between February 10, 1987 and February 4, 1988.

was no basis for concluding that there had been a "timely amendment" filed by CWA, as of February 13, 1987, since on December 9, 1986, the Director had deemed the charge "withdrawn." The mere fact that N.J.A.C. 19:14-1.5(d) allows for a withdrawal "without prejudice" does not mean that an unfair practice charge, or an amendment to the unfair practice charge, may be filed beyond the period allowed in Section 5.4(c), which states, once again, in unequivocal terms that "no complaint shall issue based upon any unfair practice occurring more than six (6) months prior to the filing of the charge..." (emphasis supplied).

[8] Even allowing for the fact that N.J.A.C. 19:10-3.1(a) permits the Director or, in this case, a hearing examiner to consider the existence of "...unusual circumstances or good cause..." for relief from "...strict compliance with the terms of these rules..." to avoid "...an injustice or unfairness...," there exists no basis in this case for departing from the mandate of Section 5.4(c), supra.

[9] Thus, when a Complaint issued on April 22, 1988, based upon the original Unfair Practice Charge, docketed July 31, 1986, together with the first amended Unfair Practice Charge, docketed February 13, 1987, this Complaint issued with no force and effect since the original Unfair Practice Charge of July 31, 1986, had been deemed "withdrawn" as of December 9, 1986. No amendment had been filed with the Commission on or before December 31, 1986, which would have been six months from the date of expiration of the

six-month limitation, based upon the date of filing of the original Unfair Practice Charge. Thus, when the first amendment to the original Unfair Practice Charge was docketed on February 13, 1987, there was no viable unfair practice charge on record with the Commission to which an amendment could have validly attached. So, too, the same situation obtained when the Second Unfair Practice Charge was docketed with the Commission on June 14, 1988, supra.

* * * *

Based upon the foregoing undisputed procedural facts and the above analysis, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent was not denied procedural due process of law since after receipt of a copy of the letter of December 9, 1986, from the Director of Unfair Practices to the Charging Party, stating that the original Unfair Practice Charge was deemed withdrawn, the Respondent was thereafter put on notice of the filing of the first amendment to the original charge on or about February 10, 1987.

2. The Director of Unfair Practices was without authority to issue a Complaint and Notice of Hearing on April 22, 1988, because the original Unfair Practice Charge, docketed July 31, 1986, had been deemed withdrawn as of December 9, 1986, and the first and second amendments to that Unfair Practice Charge were not filed until February 13, 1987, and June 14, 1988, more than six months after the alleged violations of the Act had occurred: N.J.S.A.

34:13A-5.4(c) there being no mitigating "equitable considerations" within the meaning of Kaczmarek v. N. J. Turnpike Auth., 77 N.J. 329 (1978).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Respondent's Motion to Dismiss be granted and that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: August 22, 1988
Trenton, New Jersey