P.E.R.C. NO. 97-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-372

EAST BRUNSWICK ADMINISTRATORS AND
SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission vacates an order dismissing a Complaint against the East Brunswick Township Board of Education. The Complaint, based on an unfair practice charge filed by the East Brunswick Administrators and Supervisors Association, alleges that the Board violated the New Jersey Employer-Employee Relations Act by refusing to negotiate over a salary adjustment for the supervisor of athletics after his workload and work time were increased following a reduction in force. The Commission finds that the Director of Unfair Practice's determination to issue a Complaint may not be appealed before hearing except by seeking special permission to appeal and that the Hearing Examiner should not have entertained the employer's motion to dismiss. Treating the board's filing as such a request, the Commission denies the request and remands the case to the Director of Unfair Practices for reassignment to a new Hearing Examiner for a plenary hearing.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, P.C., attorneys

For the Charging Party, Lake & Schwartz, attorneys
(Robert M. Schwartz, of counsel)

DECISION AND ORDER

On June 10, 1994, the East Brunswick Administrators and Supervisors Association filed an unfair practice charge against the East Brunswick Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] by refusing to negotiate over a salary adjustment for

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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. (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...."

the supervisor of athletics after his workload and work time were increased following a reduction in force.

On January 18, 1995, a Complaint and Notice of Hearing issued. On January 30, the Board filed an Answer denying that there had been a workload increase or that it had refused to negotiate. It also asserted that the charge was untimely.

On February 15, 1995, the Board filed a motion to dismiss before hearing with the Hearing Examiner. It argued that it had no obligation to negotiate over the impact of a reduction in force on remaining personnel and that the charge was untimely. On February 24, the Association responded that compensation for this workload increase was a severable and mandatorily negotiable issue and that it was unaware of the Board's refusal to negotiate over compensation until January 24, 1994, less than six months before it filed its charge.

On May 25, 1995, Hearing Examiner Lorraine H. Tesauro heard argument on the motion. On June 5, 1996, she dismissed the charge as untimely. H.E. No. 96-23, 22 NJPER 416 (¶27227 1996).

On July 11, 1996, after extensions of time, the Association appealed. It contends that the refusal to negotiate over compensation occurred in January 1994 and that it had six months from that refusal to file its charge. On July 18, the Board filed a response. It contends that the statute of limitations should be measured from the time of the alleged unilateral change and cannot be extended by a later demand to negotiate over the alleged workload

increase. It relies on Salem Cty., P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987).

N.J.S.A. 34:13A-5.4(c) provides that no Complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge unless the charging party was prevented from filing a charge earlier. The alleged assignment of additional duties to the supervisor of athletics occurred in September 1993. But the Association is not challenging that assignment. Instead it asserts that the assignment of those duties caused the supervisor's workload to be increased and when it sought to negotiate over compensation for that workload increase, the Board refused to negotiate. The Association contends that it had six months from that alleged refusal to file its charge.

The Director of Unfair Practices reviews the allegations in every unfair practice charge and issues a Complaint if it appears that the allegations, if true, may constitute an unfair practice. N.J.A.C. 19:14-2.1. The Director determined that a Complaint should issue and that determination may not be appealed before hearing except by seeking special permission to appeal. N.J.A.C. 19:14-2.3.[2/] The Hearing Examiner should not have entertained the employer's motion to dismiss. See Englewood Bd. of Ed., P.E.R.C. No. 93-119, 19 NJPER 355 (¶24160 1993). Accordingly, we vacate the

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2/ Should a respondent believe a charge is untimely based on facts outside the charge, it may file a motion for summary judgment pursuant to N.J.A.C. 19:14-4.8.

order granting the motion. However, because the employer directed its appeal of Complaint issuance to the Hearing Examiner in the form of a motion to dismiss before hearing, and because the Hearing Examiner entertained the motion, we will treat the employer's filing with the Hearing Examiner as a request for special permission to appeal to avoid any further delay in these proceedings.

In Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987), we held that compensation for employees whose workload is significantly increased after a reduction in force is mandatorily negotiable. Thus, we reject the Board's argument that, as a matter of law, an employer never has an obligation to negotiate over compensation after a reduction in force, even if an employee's workload is significantly increased.

We also reject the argument that the statute of limitations began to run in September 1993, when the Board assigned the additional duties, and that therefore this charge, on its face, is untimely. We have never addressed when the limitations period begins to run after an employer acts pursuant to a managerial prerogative and the employee representative seeks to negotiate over a mandatorily negotiable issue severable from the managerial decision. Salem Cty. is inapposite. In that case, a unilateral change in an employment condition occurred more than six months before the charge and we rejected the union's claim that there was a continuing violation. Here, the Association does not contend that the Board had an obligation to negotiate or that the Board violated

the Act when it assigned the additional duties. Thus, the statute of limitations did not begin to run at that time.

The Association contends that the Board refused to negotiate over compensation for an alleged workload increase severable from the assignment of additional duties. It specifically alleges that the Board refused to negotiate in January 1994. We cannot, at this stage of the proceedings, determine when the statute of limitations began to run for that alleged refusal to negotiate. That determination turns on the question of when the Board's representatives allegedly refused to negotiate, but may also involve the question of when the Association sought, or should have sought, those negotiations. The answers to these questions depend on facts not yet before us. Accordingly, the Director was correct in determining that the allegations in the charge, if true, might constitute an unfair practice. A Complaint properly issued and special permission to appeal is denied. We remand this matter to the Director of Unfair Practices for reassignment to a Hearing Examiner for a plenary hearing.[3/]

ORDER

The Order in H.E. No. 96-23 dismissing the Complaint is vacated. Special permission to appeal the issuance of a Complaint is denied. This matter is remanded to the Director of Unfair

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3/ The assigned Hearing Examiner has become unavailable. See N.J.A.C. 19:14-6.4.

Practices for reassignment to a new Hearing Examiner for proceedings in accordance with this decision.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Buchanan, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Finn abstained from consideration.

DATED: December 19, 1996
Trenton, New Jersey
ISSUED: December 20, 1996

H.E. NO. 96-23

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EAST BRUNSWICK ADMINISTRATORS/
SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants the East Brunswick Board of Education's Motion to Dismiss the Complaint. The East Brunswick Administrators Supervisors Association had alleged that the Board had failed to negotiate over a workload increase. The Board's Motion alleged that the charge was untimely filed. The Hearing Examiner held that since the charge was filed more than 9 months after the alleged workload increase, the Motion was granted.

Pursuant to N.J.A.C. 19:14-4.7, unless an appeal is filed within ten (10) days from the date of the order of dismissal, the case shall be closed.

H.E. NO. 96-23

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Appearances:

For the Respondent, Martin R. Pachman, Esq.

For the Charging Party, Lake & Schwartz, attorneys
(Robert M. Schwartz, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION TO DISMISS

On June 10, 1994, the East Brunswick Administrators and Supervisors Association ("Association") filed an unfair practice charge alleging that the East Brunswick Board of Education ("Board") violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey

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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. (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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), by failing to negotiate a salary adjustment for Frank Noppenberger, the supervisor of athletics. The Association alleged that Noppenberger's work load and work hours were increased when, at the beginning of the 1993-94 school year, the Board eliminated the title of department chairperson of physical education and transferred some of the department chair's duties to him.

On January 18, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On January 30, 1995, the Board filed an Answer denying that it committed an unfair practice.

On February 15, 1995, the Board filed a Motion to Dismiss and supporting brief. The Board argued that it had no obligation to negotiate the impact of a work load increase resulting from a reduction-in-force and that the charge was not timely filed.

On February 24, 1995, the Association replied to the Board's motion. It argued that the issue of compensation is negotiable and severable from the Board's decision to reduce force. The Association asserts that it was unaware of the Board's refusal to negotiate the issue of salary until January 24, 1994, when Noppenberger's supervisor "denied [a] demand for negotiations." (CP-1)

On May 25, 1995, I heard argument on the Motion to Dismiss. Based upon the Complaint and uncontested documents submitted, I make the following:

FINDINGS OF FACT

1. The Board is a public employer within the meaning of the Act.

2. The Association is an employee organization within the meaning of the Act and it represents supervisors, department chairpersons, principals and vice principals employed by the Board.

3. Frank Noppenberger is employed by the Board as a supervisor of athletics.

4. At the beginning of the 1993-94 school year, the Board eliminated the position of department chairperson for physical education. The extent to which Noppenberger's work hours or work load increased in September, 1993 is disputed.

5. On or about January 14, 1994, Association President Charles King advised Superintendent Dr. JoAnn Magistro that, since no offer to negotiate Noppenberger's salary had been made, the Association was grieving the matter.

6. On or about January 24, 1994, Superintendent Magistro replied that she was unaware of any related grievance. On January 28, 1994, Magistro advised King that she met with Noppenberger that day, and he told her of his intention to grieve the matter. Magistro added that she could not resolve the issue and would pass the grievance to the next level.

7. In response to Magistro's correspondence, the Association filed a grievance demanding negotiations over Noppenberger's salary. On March 11, 1994, the Assistant Superintendent of Schools denied the grievance.

ANALYSIS

In a motion to dismiss made prior to hearing "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted," and the motion may only raise issues of law. Reider v. State of New Jersey, Dept. of Transportation, 221 N.J.Super. 547, 552 (App. Div. 1987); Smith v. City of Newark, 135 N.J.Super. 107, 112 (App. Div. 1975). See also Wuethrich v. Delia, 134 N.J.Super. 400 (Law Div. 1975), aff'd 155 N.J.Super. 324 (App. Div. 1978).

I therefore assume that Noppenberger's work load and hours increased with the commencement of the 1993-94 school year. I further assume that Association President King asked Superintendent Magistro to negotiate a salary adjustment. I assume that Magistro, on January 24 and 28, 1994, indicated that she lacked the authority to address the issue and that the Association subsequently filed a grievance on Noppenberger's behalf which was denied by the Board on March 11, 1994.

Taking all of the above assumptions as true, and drawing reasonable inferences therefrom, I nevertheless grant the Motion to Dismiss.

The charge is not timely filed.

N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue based upon an unfair practice occurring more than six months prior to the filing of the charge.[2/]

The charge alleged that Noppenberger's work load and hours were increased (as a result of the elimination of a department chair position) "[a]t the commencement of the 1993-94 school term." Neither the filing of a grievance, nor a demand for negotiations tolls the statute of limitations. State of New Jersey and NJSFT, P.E.R.C. No. 77-14, 2 NJPER 308 (1976); Salem County, P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987). The charge was not filed until

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2/ N.J.S.A. 34:13A-5.4(c) provides, "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented."

June 10, 1994, approximately nine months after the alleged change in work load and hours. No facts suggest and no inference can be made that the Association was prevented from timely filing its charge. Compare Kaczmarck, 77 N.J. 329 (1978). Accordingly, the motion is granted. Please see N.J.A.C. 19:14-4.7.

Lorraine H. Tesauro
Hearing Examiner

Dated: June 5, 1996
Trenton, New Jersey