

D.U.P. NO. 2023-8

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

RUTGERS, THE STATE UNIVERSITY  
OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2020-022

UNION OF RUTGERS ADMINISTRATORS  
AMERICAN FEDERATION OF TEACHERS,  
LOCAL 1766, AFL-CIO,

Charging Party.

**SYNOPSIS**

The Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO (the Charging Party or Local) filed an unfair practice charge against Rutgers, the State University of New Jersey (Respondent or University) alleging that the University committed numerous unfair practices that violated subsections 5.4a(1), (2), (3) and (5) of the Act as well as the WDEA. The Director of Unfair Practices dismisses all the Local's claims, with the sole exception of the alleged retaliatory lay-off of Kathleen Schechter in violation of 5.4a(3) and (1) of the Act.

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Appearances:

For the Respondent,  
(Timothy D. Cedrone, In House Counsel)

For the Charging Party,  
(Gregory Rusciano, Staff Representative)

**PARTIAL REFUSAL TO ISSUE COMPLAINT**

On July 30, 2019, and August 22, 2019, and November 1, 2019, the Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO (the Charging Party or Local) filed an unfair practice charge and amended charge, respectively, against Rutgers, the State University of New Jersey (Respondent or University). The charge, as amended, alleges that the University committed numerous violations of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

First, the Local alleges that on April 8, 2019, the University unilaterally removed ten (10) unit employees by

reclassifying their positions as non-aligned/confidential positions in the Institutional Planning and Operations (IP&O) Employee Services Department. Second, the Director of IP&O Human Resources allegedly made a veiled threat to unit employees when she notified affected staff "via an email message in advance of April 8, 2019" of their conversion to confidential status and advised them that if they felt differently she would attempt to find them a job outside of IP&O Employee Services. Third, the Local alleges that the Director suspended and then threatened to terminate one of the reclassified employees, Marquis Davis, soon after changing his classification to confidential in May 2019, who subsequently resigned on or around May 28, 2019. Fourth, the University allegedly discharged Lillian Cruz on or around December 4, 2018, in retaliation for her protected activity. Fifth, the University allegedly laid-off Kathleen Schechter on around October 7, 2019, in retaliation for her protected activity. Sixth, the University allegedly laid-off Lisa Scott on September 11, 2019 in retaliation for her protected activity. Seventh, the University allegedly laid-off Christopher Pflaum on August 7, 2019 in retaliation for his protected activity. Eighth, on July 10, 2019, Timothy Fournier allegedly engaged in "intimidated and menacing action against Greg Rusciano . . . when he arbitrarily and capriciously investigated and enforced an unrelated work policy." Ninth, on June 26, 2019, the University,

Associate Director Aida Martin, Assistant Vice Chancellor Melodee Lasky, Nurse Supervisors Joseph Rudowsky and Cynthia Stitt "intimidated and restricted Greg Rusciano, Union Director from accessing the workplace to meet with employees represented by the union" at the Hurtado Health Center in New Brunswick. These managers also allegedly intimidated union members from speaking with Representative Rusciano during meetings about union matters and attempted to have him removed from the building by the Rutgers Police Department. In its eleventh and final claim, the University allegedly laid off Barbara McAleese on April 8, 2019.

The Local alleges that these actions violated subsections 5.4a(1), (2), (3) and (5) of the Act<sup>1/</sup> as well as the New Jersey Workplace Democracy Enhancement Act (WDEA)<sup>2/</sup> N.J.S.A. 34:13A-5.11 through 5.15.

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1/ This provision prohibits 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."

2/ Alleged violations of the WDEA do not necessarily implicate this agency's unfair practice jurisdiction, as the statute clearly identifies only certain limited conduct as an unfair practice under the Act. See N.J.S.A. 34:13A-5.14(c)

By email on September 28, 2020, the University submitted a position statement with supporting documentation and copied the Charging Party's representative on those communications.

By email dated March 27, 2021, the Charging Party withdrew the portion of the allegations that pertained to Lisa Scott and Barbara McAleese. Therefore, all Local's allegations relating to Lisa Scott's lay-off in its sixth claim and Barbara McAleese's lay-off in its eleventh claim are not addressed in my findings of facts or my analysis.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The University is a public employer within the meaning of the Act. The University and the Local are parties to a collective negotiations agreement (CNA) extending from July 1, 2018 through June 30, 2022. The Local ratified the CNA on June 13, 2019. The Local represents a negotiations unit comprised of

administrative employees employed by the University at its many campuses. About 2,500 employees are in the unit.

Article 14 of the parties' CNA sets forth their negotiated grievance procedure. It has four enumerated steps, culminating in binding arbitration at the fourth step.

***The Unilateral Transfer of Unit Employees to Confidential Positions***

Institutional Planning and Operations (IP&O) is a division within the University. Employee Services is a department within IP&O. According to the University's position statement, following the appointment of April Leavy as the Acting Director of IP&O Employee Services in June 2018, the University undertook a review of the department's structure and reorganized the department (University PST Ex. 18-20). As a result, the Acting Director determined that ten employees in the department possessed job duties that rendered their positions confidential within the meaning of the Act. These ten employees were notified in a series of emails dated April 9 through 15, 2019, that they were appointed to new positions, effective April 8, 2019 and were confidential under the Act (University PST Ex. 19). Eight of the ten employees were appointed to the new title, Employee Relations Coordinator; and the other two were appointed to the new title, Senior Coordinator of Staff Relations. There is no dispute that these employees were previously represented by the Local in their previously-held titles.

The Local filed a grievance contesting their removal. The Local advanced its grievance to arbitration in docket number AR-2020-183 (University PST Ex. 21-22).

***The Alleged Veiled Threat to Reclassified Employees***

According to the amended charge, ten (10) unit employees in the IP&O Employee Services department were reclassified to non-aligned/confidential positions on April 8, 2019. The Acting Director of IP&O, April Leavy, allegedly issued a veiled threat in an email she issued informing unit employees of the University's intent to convert them to confidential positions and advising that if they felt differently she would attempt to find them a position outside of IP&O Employee Services Department. The charge does not specify a date when this email was purportedly sent. Instead, it alleges that this email was sent "in advance of April 8, 2019."

The University denies Acting Director Leavy sent this email, but asserts that even if she did, the statement does not constitute an implied threat. It contends that the statement attributed to Leavy is merely a statement of fact regarding the employees' reclassification and an offer to assist employees in finding another position that would enable them to remain in the negotiations unit in another department.

***The Discipline and Threatened Discharge of Marquis Davis***

On April 9, 2019, Marquis Davis received an email from Acting Director of IP&O, April Leavy, notifying him that he was being reclassified as a confidential employee with a new title of Employment Relations Coordinator (he was one of ten impacted employees). As a result, Acting Director Leavy informed him that he was no longer within the Charging Party's negotiations unit (University PST Ex. 19).

On or around May 20, 2019, Davis received a letter from Nyree Agbara, the Employment Relations Manager in IP&O, notifying him that he was facing a suspension (University PST Ex. 23). The letter, provided by the University, recapitulates seven previous instances between August 15, 2018 and April 18, 2019 in which Davis was counseled or received a verbal warning for workplace misconduct, including watching movies during working hours and missing staff meetings and training. Five of the seven instances occurred before Davis's reclassification, and while he was included in the negotiations unit. The letter also notes five additional workplace performance issues, such as allegedly disappearing from work for an hour and incomplete work. Agbara explained that Davis had been provided with multiple counseling sessions and verbal warnings from her, the Director and the Vice President "regarding these problems and [his] overall disregard for departmental policies and procedures." She reminded him that



personal social browsing should not be conducted when there is work that needs to be completed. She also asserted that Davis had an excessive number of tickets in his queue that should have been completed. She concluded that "such ongoing poor job performance is unacceptable and cannot be tolerated."

Consequently, Davis was suspended without pay for three days and advised he could return to work on May 24, 2019.

The Local alleges that Davis was suspended by Acting Director Leavy "for not adhering to the 'new culture of the department' and for questioning department protocols that she established in her role as 'the boss'." It is unclear from the charge which agent of the University allegedly made the quoted statements; the Charging Party doesn't attribute the quoted language to any specific agent of the University. The suspension letter provided by the University is not from Acting Director Leavy, but from a different supervisor, Employee Relations Manager Agbara. Agbara's letter notifying Davis of his suspension does not include any statements from the charge that the Charging Party placed in quotation marks.

By letter dated May 29, 2019, Employment Relations Manager Nyree Agbara advised Marquis Davis that she was considering his termination of employment with the University (University PST Ex. 23). She scheduled a pre-termination conference with him the following morning. The same day that Davis received this notice,

he submitted his written resignation to the University. The University provided a copy of that letter. Davis addressed the letter to Acting Director Leavy and explained that "for several months at employee services I have not felt comfortable under your management and devalued as one of your employees"

(University PST Ex. 23).

***The Alleged Retaliatory Discharges and Lay-offs of Four Union Representatives***

The charge as amended alleges that the following union representatives' employment ended as a result of retaliation: (1) Lilian Cruz; (2) Kathleen Schechter; (3) Lisa Scott; and (4) Christopher Pflaum. The charge asserts that a contractual grievance was filed on behalf of Scott. As noted above, the Charging Party withdrew the allegations pertaining to Scott, and therefore those claims will not be analyzed here.

A. Lilian Cruz's discharge

On December 3, 2018, Lilian Cruz was notified that she was terminated effective December 4, 2018. Cruz previously served as a shop steward for the Charging Party for "many years." The amended charge claims that "[o]n or around her termination date, she filed a complaint internally with Rutgers University's Office of Employment Equity (OEE) claiming retaliatory discharge under the University Policy Prohibiting Sexual Harassment, Sexual Violence, Relationship Violence, Stalking and Related Misconduct." The amended charge claims that "Ms. Cruz was

trained in how to file complaints like these as a steward and had a track record of filing complaints about supervisor behavior while serving as a steward in representation of herself and colleagues." Although Cruz was discharged on December 4, 2018, the Charging Party claims that it learned the following information on August 6, 2019, when the OEE investigation report was released:

(1) that Ms. Cruz attempted to report a sexual misconduct complaint against her supervisor William Norville in March 2018 and that her second level supervisor, Ronald Lucowicz was found culpable for not properly reporting the complaint around March 2018, and (2) that Mr. Norville knew well in advance of December 4, 2018 of Mr. Cruz' attempt to complain about him and that he confronted her in order to intimidate her on April 2, 2018 stating that 'if she continued to complain about him he would win because he is on the Senate and his wife works for Henry Velez.'

In its position statement, the University asserts that it terminated Lillian Cruz from her position as a custodial foreperson for interfering with a workplace violence investigation being conducted by the Office of Employment Equity into her brother and fellow custodial foreperson, William Cruz. According to the University, on July 18, 2017, a University employee filed a complaint with the OEE alleging that William Cruz violated the University's Policy Prohibiting Workplace Violence. While the OEE investigation proceeded, William Cruz was placed on paid administrative leave. Lillian Cruz then

allegedly created a petition in support of her brother, and on or around August 16, 2017, she circulated the document among custodial employees who were her subordinates and solicited their signatures. Some employees had concerns about being solicited by a supervisor to sign a petition in support of her brother, and they alerted their union representatives from AFSCME Local 888, who in turn complained to the University. Based on the investigative report and determinations from OEE regarding these complaints, the University determined that Lillian Cruz's dismissal was warranted (University PST Ex. 16).

The Union promptly grieved the termination at step 2 of the grievance procedure on or around December 4, 2018 and pursued it to arbitration.

#### B. Kathleen Schechter's Lay-off

According to the University's position statement, Schechter was employed as an administrative assistant in the Rutgers Communications and Marketing ("R-Comm") office. According to the amended charge, Schechter previously served as an elected union officer, steward, a member of the negotiations committee and a COPE Committee Chairperson. Additionally, on or around November 14, 2018, Schechter "advocated on behalf of Margaret Hare, a colleague in her department, who was improperly classified . . . ." under the contract. The amended charge does not provide any details regarding what specific conduct this advocacy

entailed or what management representative was aware of such advocacy.

The amended charge further asserts that “[h]er supervisors were generally aware of her roles with the union and specifically aware of her need to attend negotiations sessions . . . .” It claims that “[t]here were instances of restrictions placed on Ms. Schechter attending these sessions by her supervisor Melissa Selensky, who continually challenged her rights to leave work to attend the sessions.” The amended charge claims that Schechter “. . . was directed not to participate in scheduled negotiations on behalf of the union,” but fails to identify who issued this directive or when it was made. The amended charge alleges that Supervisor Selensky informed Schechter “on more than one occasion that she had attempted to restrict her from attending scheduled negotiations sessions by emailing Jeffrey [sic] Maschi of the Office of Labor Relations.” Around March 2019, Supervisor Selensky “shared at least one of those emails” with Schechter.

The amended charge identifies the following three specific dates on which Supervisor Selensky allegedly restricted Schechter from attending negotiations<sup>3/</sup>: October 30, 2018; April 3, 2019;

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3/ The amended charge notes that the parties’ contract provides that “the URA-AFT may have eleven (11) members, who are in the bargaining unit . . . on the contract negotiating committee.” The amended charge does not allege that the instances in which Schechter did not attend caused the Local to have less than the 11 members that may be permitted under  
(continued...)

and April 24, 2019. In its position statement, the University explains that there were a total of thirty-six [36] negotiations sessions. Negotiations commenced on April 9, 2018 and the final session occurred on May 29, 2019. The University contends that Schechter attended the vast majority of negotiations sessions. In support, it provided as an exhibit copies of the sign-in sheets from those negotiations sessions (University PST Ex. 63). Although the Local asserts that Schechter's supervisor restricted her from attending negotiations on April 3, 2019, the University's exhibit shows the name "Kay Schechter" appearing on the sign-in sheet for the April 3, 2019 session.

The University asserts that Schechter and two other employees were laid-off as a result of their positions being eliminated as part of a broader reorganization. In February, 2019, Jennifer Hollingshead, became the leader of R-Comm as the University's Vice Chancellor for Marketing and Communications. By April 11, 2019, Hollingshead decided to eliminate the positions of Assistant Director of Editing and Media Services in the office's Digital Strategy Unit, an Editor/Media Specialist II in the creative unit, and an Administrative Assistant in the Community Affairs unit. The University maintains that the first position was not included in any negotiations unit, and that the

second and third positions were in the Local's negotiations unit. According to the University's position statement, Schechter's Administrative Assistant position was eliminated because it was no longer needed and the work could be redistributed to others within R-Comm. On June 4, 2019, Schechter and the two other employees were notified in writing that they would be laid-off. Schechter's separation would be effective October 3, 2019, but was extended to October 7, 2019 (University PST Ex. 25-27). Hollingshead also formally notified the department that the reorganization would become effective July 1, 2019 (University Pst. Ex. 28).

#### C. Christopher Pflaum's lay-off

According to the amended charge, Pflaum previously served as an officer, building representative and contract negotiations member for the Local. As with Schechter, the charge alleges that Pflaum's "supervisors were generally aware of his roles with the union and specifically aware of his need to attend negotiations sessions . . ." The amended charge alleges that Pflaum tried to attend all negotiations sessions, but "there were instances of restrictions placed on [him] attending." The amended charge does not specify who restricted<sup>4/</sup> Pflaum's attendance, does not

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<sup>4/</sup> The amended charge does not allege that the instances in which Pflaum did not attend caused the Local to have less than the 11 members potentially permitted under the contract.

provide any details regarding the alleged restriction, and does not identify which negotiations dates he missed. Using the sign-in sheets, the University determined that Pflaum attended 31 out of the 36 negotiations sessions.

The University's position statement explains that prior to his lay-off, Pflaum was employed as a Senior Program Coordinator in the New Ventures and Commercialization Funding sub-unit ("New Ventures") of the Office of Research Commercialization ("ORC"), which was part of the University's Office of Research and Economic Development ("ORED"). The University maintains that Pflaum and other employees were laid-off as a result of a reorganization that impacted a number of areas across ORED. With respect to ORC in particular, four positions were eliminated; one position was represented by another union; one position was not represented by any union; and two Senior Program Coordinator positions were included in the Local's unit. Pflaum and the other Senior Program Coordinator were notified by letter dated June 25, 2019 that their positions were being eliminated, effective August 7, 2019 (University PST Ex. 40). Four other positions elsewhere within ORED were also eliminated (University PST Ex. 41).

### ***The Hurtado Health Center Allegations***

The amended charge alleges that on June 26 2019, Associate Director Aida Martin, Assistant Vice Chancellor Melodee Lasky,



Manager Joseph Rudowsky and Nurse Supervisor Cynthia Stitt "intimidated and restricted" the Local's representative, Greg Rusciano, from accessing the Hurtado Health Center to meet with employees represented by the Local. The amended charge also claims that these managers "intimidated union members from speaking with Mr. Rusciano during meetings about union matters and attempted to have Mr. Rusciano removed from the building via the Rutgers Police Department." Rusciano is not an employee of the University.

The University explains in its position statement that through Rutgers Student Health ("RSH"), it provides health and wellness services to University students at three health centers, including the Hurtado Health Center at the New Brunswick campus. The Center provides a variety of medical, health and laboratory services, and typically does not permit individuals to enter areas beyond the reception area without an appointment. The University claims that the front desk receptionist informed Rusciano that the employee he was seeking to meet was absent. The University claims that Rusciano proceeded to enter restricted areas of the Hurtado Health Center without an appointment to meet with unit members. The University claims that its representatives advised Rusciano that he could meet with unit members if he made an appointment, but he declined. The University does not dispute that it contacted the Rutgers

University Police Department, but maintains it only did so after repeated unheeded requests of him to leave. The University produced a copy of the police report as one of its exhibits, in which one of the responding officers explains that Rusciano advised he was a union rep and was going around talking to employees in the union (University PST Ex. 43).

Article 53 of the parties' contract, entitled "Use of University Facilities, Campus Mail and Equipment," addresses the rights and obligations of the Local regarding its access of the University's property (University PST Ex. 1). Subsection 1 provides in pertinent part: "The right to meet with individual negotiations unit employees on the premises of Rutgers during the work day to investigate and discuss grievances, workplace-related complaints and other workplace issues." Subsection 4 of Article 53, sets forth conditions on the Local's access to unit employees as set forth in subsection 1, including the following: "The Union will follow all regular University procedures applicable to reserving and using University buildings, facilities or rooms. The Union's access shall not interfere with University operations . . . ."

***The Alleged Retaliation Against Representative Greg Rusciano***

The amended charge alleges that "[o]n July 10, 2019, Timothy Fournier, engaged in intimidating and menacing action against Greg Rusciano and the URA-AFT in retaliation for asserting

protected union rights as the exclusive representative, when he arbitrarily and capriciously investigated and enforced an unrelated work policy." The amended charge does not identify the particular work policy, does not identify any information regarding the circumstances of the investigation, or provide any other specific factual allegations in support of its retaliation claim.

The University provides additional context for the claims in its position statement. Since adopted in 2001, the University has maintained a policy entitled "Policy Prohibiting Workplace Violence," which prohibits workplace violence, including but not limited to "menacing or threatening behavior . . . where such behavior would be interpreted by a reasonable person as evidence of intent to cause physical harm to individuals or property or coerce behavior from individuals." The policy applies broadly to all University employees, contractors, vendors, customers and visitors. It also sets forth a reporting procedure. The University provided a copy of this policy as an exhibit in its position statement (University PST Ex. 45).

In December, 2018, three University employees filed complaints under this policy alleging that Gregory Rusciano violated it, based on conduct and statements he made at a Step 2 grievance hearing on November 29, 2018. The University conducted an investigation by interviewing the complainants and witnesses.

Because of conflict of interest concerns, the Office of Employment Equity did not conduct the investigation. Instead, the University's Ethics and Compliance offices investigated the complaints against Rusciano. It produced a copy of this investigative report as an exhibit (University PST Ex. 47). The report concluded that Rusciano's conduct and statements at the hearing violated the Policy Prohibiting Workplace Violence with respect to the claims made by two of the complainants, and that the investigation revealed a consistent and troubling pattern of such behavior in Rusciano's interactions with University employees.

By letter dated July 10, 2019, Dr. Timothy Fournier, Senior Vice President and Chief Enterprise Risk Management, Ethics, Audit and Compliance Officer, advised Christine O'Connell, President of the Local, that he concluded that Rusciano violated the Policy Prohibiting Workplace Violence Policy based on the facts submitted in the investigative report (University PST Ex. 48). The University also asserts that Rusciano had previously been found to have violated this policy following a complaint made by another employee on September 28, 2016. The Local was notified of the violation by letter dated November 22, 2016, and the University claims that neither the Local nor Rusciano disputed the finding. The University provided a copy of the investigative report and related letter. (University PST Ex. 44)

**ANALYSIS*****The Unilateral Transfer of Unit Employees to Confidential Positions***

This claim fails to satisfy the pleading requirements, and therefore, must be dismissed. Under N.J.A.C. 19:14-1.3a(3), a charge "shall contain . . . [a] clear and concise statement of facts constituting the alleged unfair practice." As the University correctly points out in its position statement, the charge, as amended, fails to specifically allege that the employees are not confidential within the meaning of the Act, and fails to identify any specific facts regarding their particular job duties that would tend to support the conclusion that they do not perform confidential work. Instead, the amended charge merely alleges that the employees were unilaterally removed from the unit as a result of their reclassification to non-aligned/confidential positions.

Public employers have a clear and long-established managerial prerogative to transfer and reassign employees. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978); Local 195, IFPTE v. State, 88 N.J. 393, 418 (1982) Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983). Also, confidential employees do not have statutory rights under the Act to collective negotiations because they are not public employees within the Act's definitions. N.J.S.A. 34:13A-3(g); Clearview Regional H.S. Bd. of Ed., D.R. No. 78-2, 3

NJPER 248 (1977). “[A] public employer can never permanently waive the right to assert that certain employees are statutorily prohibited from inclusion in a negotiations unit.” Maplewood Tp., D.R. No. 2007-013, 33 NJPER 105 (¶36 2007) (additional citations omitted).

The University’s reclassification of positions as confidential, without more, does not constitute a potential violation of the Act. As the Commission has explained, “management’s right to fill confidential positions outweighs an individual employee’s right to remain in a negotiations unit position.” Tp. of Howell, P.E.R.C. No. 2003-30, 28 NJPER 452 (¶33166 2002). Accordingly, the first allegation of the charge fails to provide a clear and concise factual statement constituting an alleged unfair practice under 5.4a(5) or a(1) and is dismissed.

The Local has alleged no facts that indicating that the University violated 5.4a(2) or (3) of the Act or any provision of the WDEA over which this agency has jurisdiction. Therefore, these claims are dismissed without further analysis.

***The Alleged Veiled Threat to Reclassified Employees***

This claim also fails to meet the pleading requirements of the Act. Under N.J.A.C. 19:14-1.3a (3), a charge “shall contain . . . [a] clear and concise statement of facts constituting the alleged unfair practice. The statement must specify the date and

place the alleged acts occurred . . . ." Thus, this claim fails to provide the requisite information. The charge, as amended, does not identify when the email allegedly containing the veiled threat was sent. The only information provided regarding the date of the allegedly unlawful written statement is that it was issued "in advance of April 8, 2019." That date is not the date of the alleged unlawful statement. Nor does the charge allege an approximate date; it merely avers that the unlawful statement occurred sometime before a specified date.

Even if April 8, 2019 is considered to be the date of the alleged unlawful statement, I find the allegation that it violates section 5.4a(1) of the Act is time-barred. Although the charge was originally filed on July 30, 2019, the Charging Party did not raise this alleged unlawful statement until its amendment was filed on November 1, 2019. N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

[N]o 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 a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of

stale claims. Id. at 337-338. The Local claims it learned of the statement for the first-time on October 9, 2019, but it does not identify any specific facts establishing that it was prevented from learning of the statement until October 9, and it does not explain why the Local, upon discovery, continued to wait to amend the charge for another three weeks. Consequently, this allegation is dismissed as untimely.

The Local has alleged no facts indicating that the University violated 5.4a(2), (3), and (5) of the Act or any provision of the WDEA over which this Commission has jurisdiction. Therefore, these claims are dismissed without further analysis.

***The Discipline and Threatened Discharge of Marquis Davis***

The allegations relating to Davis's suspension and attempted discharge must be dismissed. The standards for determining whether an employer has violated N.J.S.A. 34:13A-5.4a (3) are set forth in Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984) (Bridgewater Tp.). No violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be demonstrated by direct evidence or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile



toward the exercise of protected rights. Id. at 246.

“‘Protected activity’ [is] . . . defined as conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual.” Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013) (citing North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff’d NJPER Supp. 2d 63 (¶45 App. Div. 1979); Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523 (¶24243 1993)). “In addition to pleading protected activity and an adverse employment action resulting from that activity, ‘the protected conduct must be pled with the specificity required by N.J.A.C. 19:14-1.3(a)(3).’” Id. (quoting Edison Tp., D.U.P. No. 2012-9, 38 NJPER 269, 272 (¶92 2011), adopted P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013)).

The Charging Party fails to identify any specific facts establishing that Davis engaged in protected activity. The Charging Party also fails to identify when<sup>5/</sup> Davis engaged in protected activity. Rather than providing the necessary factual support to satisfy the complaint-issuance standard, the Charging Party makes vague, conclusory statements about the purported motivation of Davis’s supervisor and Davis’s conduct when it

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<sup>5/</sup> It appears that Davis’s resignation letter reveals his troubled relationship with management predates his reclassification in April, 2019, when he wrote at the end of May, 2019 that he felt uncomfortable with Acting Director Leavy for the past “several months” (University PST Ex. 23).

alleges that Davis was suspended for "not adhering to the 'new culture of the department' and for questioning departmental protocol that Leavy established in her role as 'the boss.'" The Local does not provide specific factual allegations regarding how Davis did not adhere to workplace culture; how he questioned protocols or how he undertook such conduct in a manner that was potentially protected under the Act. Even assuming that Davis's suspension lacked sufficient cause, I find that that adverse action wasn't the consequence of any alleged protected activity, a necessary component of a 5.4a(3) claim under the Act. We have repeatedly dismissed retaliation and other unfair practice claims that are vague and conclusory because such bare allegations fail to meet the pleading requirements of our Act and fail to implicate the protections afforded under the Act. See e.g., State of New Jersey (Juvenile Justice Commission), D.U.P. No. 2015-1, 41 NJPER 142 (¶47 2014) (dismissing "intimidation and harassment" claims of a union representative as lacking the requisite specificity); UMDNJ (Tyrone Bodison), D.U.P. No. 2006-9, 32 NJPER 206 (¶90 2006) (dismissing employee's retaliation claim where he failed to allege specific facts showing he engaged in activity related to the collective negotiations process, grievance processing or any other activity on behalf of his majority representative); Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523 (¶24243 1993) (dismissing employees discrimination

claims where their charge failed to allege any facts that show the complained of conduct had any relationship to the Act's protections). Thus, the 5.4a(3) retaliation claims pertaining to Davis are dismissed.

The Local has alleged no facts that indicating that the University violated 5.4a(1), (2) and (5) of the Act or any provision of the WDEA over which this agency has jurisdiction. Therefore, these claims are dismissed without further analysis.

***The Alleged Retaliatory Discharge of Lillian Cruz***

The Local failed to timely file this charge contesting Cruz's discharge, and therefore, this allegation must be dismissed. N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

[N]o 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 a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims. Id. at 337-338.

Cruz was discharged on December 4, 2018. The Local was aware of her discharge because it promptly filed a grievance

contesting it. However, the Local did not file its unfair practice charge until July 30, 2019. Nor has it alleged any facts suggesting that it was prevented from filing a timely charge. In its amended charge, the Local notes that it learned certain information on August 6, 2019, when the OEE report was released. But the Local did not need the OEE report to know that Cruz attempted to report a sexual misconduct complaint against her supervisor in March, 2018 because that information could have been obtained from Cruz, who had personal knowledge of the complaints she made both in March 2018 and on the day of her discharge. Similarly, the Local did not need the OEE report to learn that her supervisor, Norville, was aware of her complaint because Cruz would also have personal knowledge of this information since Norville allegedly confronted her on April 2, 2018 about her efforts to complain about him. Most importantly, the report's disclosure in August, 2019 and information contained therein could not have prevented and in fact did not prevent the timely filing of the charge, because the Local had already filed the charge claiming that Cruz was discharged in retaliation for her protected activity on July 30, 2019, i.e., before the OEE report was released. Accordingly, the allegations pertaining to Ms. Cruz are untimely and must be dismissed.

Even if I assume that the allegations about Cruz are timely, the retaliatory discharge claim should be dismissed because the

Local did not set forth facts showing that Cruz engaged in activity protected by the Act. Lillian Cruz's status as a union shop steward for many years, without more, does not establish that she engaged in protected activity at a time proximate or related to her discharge. State of New Jersey (Trenton State Coll.), H.E. No. 90-48, 16 NJPER 337 (¶21139 1990), adopted P.E.R.C. No. 91-1, 16 NJPER 419 (¶21175 1990). The charge indicates that Cruz had a "track record of filing complaints about supervisor behavior" but does not identify any specific facts lending credence to such a record. The only specific conduct that the Local identifies in its charge pertains to Cruz's filing of a sexual misconduct complaint in March 2018 and a retaliation claim on the date of her termination under the University's sexual harassment policy. As with race and age discrimination complaints, sexual harassment and discrimination complaints do not fall within the scope of activity afforded protections under the Act. See, e.g. Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989); City of Atlantic City (Melvin T. Jones), D.U.P. No. 99-18, 25 NJPER 312 (¶30133 1999) (no jurisdiction over age and race discrimination claims citing Elizabeth Ed. Ass'n (Jefferson), D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1995); State of New Jersey (Dept. of Military and Veterans Affairs), D.U.P. No. 94-12, 19 NJPER 520 (¶24240 1993); Marlboro Tp. Bd. of Ed. (Watson), D.U.P. No. 91-1, 16 NJPER 420

(¶21176 1990). Therefore, absent allegations of retaliation or discrimination based upon activities protected by our Act, we have no jurisdiction to review Cruz's untimely retaliatory discharge claim.

The Local has alleged no facts that indicating that the University violated 5.4a(1), (2), and (5) of the Act or any provision of the WDEA over which this agency has jurisdiction. Therefore, these claims are dismissed without further analysis.

***The Alleged Retaliatory Layoff of Kathleen Schechter***

This allegation may proceed to complaint pursuant to a 5.4a(3) and a(1) theory because it meets the minimum pleading requirements under the Act. Although the University provides detailed documentary proffer that Schechter was able to attend the vast majority of negotiations sessions, such defense is more appropriately addressed in a dispositive motion after a Complaint issues.

The Local has alleged no facts that indicating that the University violated 5.4a(2) and (5) of the Act or any provision of the WDEA over which this agency has jurisdiction. Accordingly, these claims are dismissed without further analysis.

***The Alleged Retaliatory Layoff of Christopher Pflaum***

This claim must be dismissed because it lacks the requisite

specificity under our complaint-issuance standard. N.J.A.C. 19:14-1.3a (3) Unlike Schechter's retaliatory lay-off claim, it does not identify any specific dates on which Pflaum was actually prevented from attending negotiations. Instead, it merely alleges that ". . . there were instances of restrictions placed on [him] attending." Such vague and conclusory allegations do not satisfy the Act's pleading requirements. See e.g., State of New Jersey (Juvenile Justice Commission), D.U.P. No. 2015-1, 41 NJPER 142 (¶47 2014). Also, the amended charge does not identify who restricted Pflaum's attendance or otherwise caused the "instances of restrictions." Such fundamental pleading deficiencies cannot support a retaliation claim under 5.4a(3), and a(1).

The Local has alleged no facts that indicating that the University violated 5.4a(2) or (5) of the Act or any provision of the WDEA over which this agency has jurisdiction. Accordingly, these claims are dismissed without further analysis.

### ***The Hurtado Health Center Allegations***

The Charging Party's allegation that the managers at the Hurtado Health Center intimidated union members, impeding them from speaking with Local Representative Rusciano must be dismissed because it lacks the specificity required under our complaint-issuance standard. N.J.A.C. 19:14-1.3a (3). The Charging Party omits any specific factual allegation supporting

its claim that the managers intimidated union members. Such vague and conclusory allegations do not satisfy the Act's pleading requirements. See e.g., State of New Jersey (Juvenile Justice Commission), D.U.P. No. 2015-1, 41 NJPER 142 (¶47 2014).

The Charging Party's claims that Local Representative Rusciano's access to the health center was restricted and that the health center managers sought the assistance of campus police in an attempt to remove him from the health center must also be dismissed as neither the Act nor the WDEA confers a right of unfettered access to employer property to non-employee representatives.

Generally, agents of a majority representative have a recognized right of reasonable access to the property of a public employer. See e.g., Perth Amboy Bd. of Ed., H.E. No. 2016-13, 42 NJPER 410 (¶113 2015) (the access rights of a union representative, who was also a faculty member, were unreasonably restricted when an administrator imposed new limitations, such as limiting the representative's access to the teacher's lounge and cafeteria, directing that she report to the administrator any time she visited, and inquiring into the details of union business); Atlantic City, P.E.R.C. No. 98-8, 23 NJPER 466, 208 (¶28217 1997) (concluding that the imposition of a total access ban against a discharged union president, without identifying a substantial legitimate business reason in support of the total



ban, was unreasonable, and that any issues about the precise extent of union access to county facilities should be left to the negotiated grievance procedure). Nothing in the WDEA upends this existing case law.<sup>6/</sup> Rather than recognize a broad right of full and unconditional access, the Commission has instead “. . . emphasize[d] that the claimed rights of access to the premises of a public employer must be determined on a case-by-case and fact-by-fact basis.” Bergen Cty., P.E.R.C. No. 8, 9 NJPER 451, 457 (¶14196 1983). Consistent with this fact-sensitive inquiry, it has explained that “some governmental property may be more ‘public’ than other governmental property . . . .” Id. And the scope of access rights depends in part on whether the agent of the majority representative is also an employee. N.J. Dept. of Transportation, P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990), motion for recon. den. P.E.R.C. No. 91-28, 16 NJPER 535 (¶21237 1990).

The Charging Party does not specify how the University representatives intimidated Rusciano or specify what restrictions were placed upon him in order to access unit employees working in this type of medical facility. The Charging Party does not

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6/ Classical Academy Charter School, D.U.P. No. 2022-1, 48 NJPER 113 (¶29 2021), (explaining that violations of the access rights afforded to majority representatives under the WDEA are not unfair practices per se and that the WDEA does not create a right of unfettered access to public employer property).

allege that the clear language of the parties' contract entitled Local Representative to the unconditional access of the health center. And the contract does not plainly afford such a right, as it sets forth conditions on the use and access of its property.<sup>7/</sup> The Charging Party does not allege that there was an emergent or time-sensitive representational issue that warranted Local Representative's unconditional and immediate access to the health center. The Charging Party does not allege that the University's unspecified efforts to restrict his access to a student health center in some way deviated from the past practice of the parties, or that the University's access protocols were applied more stringently to a union representative than to other visitors. The Charging Party does not allege that Rusciano made any prior efforts to notify University representatives that he would be seeking to meet with unit employees at the health center, and then was subsequently restricted. Instead, the Charging Party merely alleges that Local Representative Rusciano, who is not a public employee, did not have unrestricted access to a student medical facility on one of his visits, nonetheless managed to obtain access to speak with unit employees, and campus police were contacted. Therefore, the allegations do not

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<sup>7/</sup> To the extent the Charging Party is alleging a contract violation, the Commission does not exercise jurisdiction over mere breaches of contract. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

constitute an unfair practice.

The Local has alleged no facts that indicating that the University violated 5.4a(1), (2), (3) or (5) of the Act or any provision of the WDEA over which this agency has jurisdiction. Accordingly, these claims are dismissed without further analysis.

***The Alleged Retaliation Against Representative Greg Rusciano***

These allegations must be dismissed. First, the Charging Party's claim that University representative, Dr. Timothy Fournier, engaged in "intimidating and menacing action against Greg Rusciano . . . when he arbitrarily and capriciously investigated and enforced an unrelated work policy" fails to meet the pleading requirements of our Act. N.J.A.C. 19:14-1.3a(3). The Charging Party omits any specific factual allegation to support its (conclusory) claims that the University's investigation into Greg Rusciano was arbitrary, capricious or in some way pretextual. As previously discussed, such bare allegations of intimidation and retaliation do not satisfy the specificity requirements under our regulations.

Second, the Charging Party fails to set forth essential factual allegations that establish the required legal elements of a retaliation claim under 5.4a(3) of the Act. As noted above, the Act prohibits a public employer from "discriminating in regard to hire or tenure of employment or any term or condition of employment . . ." As explained in Bridgewater Tp., supra, no

violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. Rusciano did not suffer an action that was adverse to a term and condition of his employment because there is no employment relationship between Rusciano and the University.

Third, Greg Rusciano's status as a union representative does not transform a public employer's investigation of workplace harassment complaints and enforcement of workplace policies into an unfair practice. See, e.g., Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013) (dismissing an a(1) and a(3) claims where the union representative, who was actually employed by the board, was investigated pursuant to anti-discrimination policies). "When an employer has actual or constructive knowledge of a hostile work environment or is presented with a complaint by an employee of discrimination or harassment, the employer must take prompt and adequate remedial action to address the complaint under state and federal anti-discrimination laws." Id. Thus, the University's investigation and enforcement of its workplace policies regarding the conduct of a union representative, without more, does not constitute an unfair practice.

The Local has alleged no facts that indicating that the University violated 5.4a(1), (2) or (5) of the Act or any

provision of the WDEA over which this agency has jurisdiction. Accordingly, this claim is dismissed in its entirety.

**ORDER**

Accordingly, I will issue a Complaint under separate cover for 5.4a(3) and a(1) only, regarding the retaliatory lay-off claim for Kathleen Schechter. All of the other claims are dismissed.

/s/ Jonathan Roth  
Jonathan Roth  
Director of Unfair Practices

DATED: September 15, 2022  
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.**

**Any appeal is due by September 26, 2022.**