

D.U.P. NO. 2003-5

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

In the Matter of

TRENTON EDUCATIONAL SECRETARIES  
ASSOCIATION,

Respondent,

-and-

Docket No. CI-2001-52

DEBORAH R. BURKE,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by Deborah R. Burke, alleging that the Trenton Educational Secretaries' Association, NJEA (TESA) failed or refused to represent Burke fairly in processing a grievance over salary guide placement. The Director found that part of the charge was untimely in that it objected to the application of a nine-year old settlement agreement concerning Burke's return to work after an extended leave of absence. The Director found that the charge was filed outside the Commission's six-month statute of limitations and that no circumstances prevented Burke from filing within the limitations period. As to the allegations that TESA did not properly pursue Burke's recent grievance, the Director found that the alleged facts did not support this allegation. Thus, these allegations were also dismissed.

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Appearances:

For the Respondent,  
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys  
(Richard A. Friedman, of counsel)

For the Charging Party,  
Deborah R. Burke, pro se

**REFUSAL TO ISSUE COMPLAINT**

On February 28, 2001, Deborah Burke, a secretary employed by the Trenton Board of Education (Board), filed an unfair practice charge against her employee representative, the Trenton Educational Secretaries' Association (TESA) with the Public Employment Relations Commission (Commission). Burke alleges that TESA violated 5.4b(1), (2) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act,

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<sup>1/</sup> These subsections prohibit public employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; and (5) Violating any of the rules and regulations established by the commission.

N.J.S.A. 34:13A-1 et seq., when, from 1991 to the present, it failed or refused to appeal her leave of absence, salary guide placement and "lost" pension credits. Burke alleges that she first learned on August 31, 2000 that an administrative law judge had ruled in her favor, but that the Board had failed to properly implement the judge's "decision."

TESA disputes Burke's factual allegations and denies that it violated the Act. It also asserts that the charge is untimely and should be dismissed.

The Commission has authority to issue a complaint where it appears that the 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. In correspondence dated August 28, 2002,<sup>2/</sup> I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

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<sup>2/</sup> The commission's staff agent conducted two settlement conferences with the parties on April 26, 2001 and July 31, 2002. The parties were granted several extensions to pursue voluntary resolution of the issues and submit position statements.

Deborah Burke was hired by the Board into a clerical position in 1979. During the 1990-91 school year, she was absent due to an illness. During this period, the Board brought tenure charges against her and Burke appealed. The tenure charges were certified to the Commissioner of Education, who in turn transferred the matter to the New Jersey State Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. On April 3, 1991, a prehearing conference was conducted by an administrative law judge (ALJ). TESA provided Burke with representation by Attorney Michael Barrett.

By letter dated June 6, 1991, Barrett sent Board Attorney Thomas Sumners a letter stating that he had conferred with Burke and that she was agreeable to certain specified settlement terms. Burke was sent a copy of the letter.

On July 8 and 16, 1991, Barrett and Sumners entered into a settlement agreement. Several weeks later, both the ALJ and the Commissioner of Education approved the settlement terms. Barrett signed the agreement "on Burke's behalf." The settlement agreement, which mirrors the terms drafted in Barrett's June 6th letter, states,

The parties have reached a voluntary resolution of the within matter and hereby agree that it shall be deemed settled and resolved based upon the following terms:

1. The tenure charges against Respondent, Deborah R. Burke, are dismissed.
2. Respondent will be reinstated as of July 1, 1991 with an assignment in the Supply Department;

3. Respondent's salary for the 1991-92 school year will be at Step 8 of the salary guide of the collective bargaining agreement between the Petitioner and Trenton Educational Secretaries Association, (Respondent's labor unit) resulting in a salary of \$21,740;

4. This agreement does not restrict the Petitioner's managerial right to assign Respondent to another job location at a future date.

5. This agreement shall not constitute an admission by either party of any violation of state statute, state regulation, Petitioner's policy or past practice.

6. If the Commissioner of Education disapproves any terms of this agreement, this agreement shall be deemed null and void, provided however, that this provision shall not prejudice the parties' right to reach a revised settlement.

In December 1999, some eight years later, Burke inquired about having her salary guide placement investigated and adjusted. Initially, Burke met with NJEA Representative Maureen Cronin. On or about March 31, 2000, Burke filed a grievance with the Board seeking to have her salary guide placement adjusted and to be given pension credit for the period of her 1990-1991 leave of absence. Between December 1999 and August 2000, according to Burke, there were approximately eight meetings between Burke, Cronin, various TESA representatives, TESA President Pat Vogt and various Board representatives, including Human Resources Director Clarence Guthrie and Board Counsel Sharon Larmore. The purpose of the meetings was to explore the resolution of the issues Burke raised in the grievance. On January 12, 2001, Cronin formally requested that the grievance be moved forward to level III. The grievance was heard at

level III but the issue has not been resolved to Burke's satisfaction.

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The charge alleges that TESA violated the Act by refusing to obtain a salary guide adjustment and pension credits for unit member Deborah Burke following her reinstatement from tenure charges. TESA asserts that the charge is untimely, but that even if it were timely, TESA did not breach its duty to fairly represent Burke. As to Burke's claim that TESA failed to fairly represent her in negotiating a settlement in 1991, I find that the charge is untimely and should be dismissed. As to Burke's claim that TESA failed to fairly represent her in processing the more recent grievance, I find that the charge is not supported by the alleged facts, even if they were proven true. Thus, the charge is dismissed for this reason also.

The Act provides for a six-month statute of limitations for unfair practice charges to prevent the litigation of stale claims.

N.J.S.A. 34:13A-5.4(c) states:

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.

Cases interpreting this subsection include Piscataway Township Teachers Association (Abbamont), D.U.P. No. 90-10, 16 NJPER 162

(¶21066 1990) (statute of limitations period began when employee's

majority representative informed him that it had no basis for further action on his behalf; charge untimely where it was filed more than six months after this notice.); N.J. Turnpike Employees Union Local 914, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

The Legislature included only one exception to the statute of limitations, which is where a party is prevented from filing a charge. City of Margate (Cattie), P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993). In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), the New Jersey Supreme Court explained:

The term "prevent" may in ordinary parlance connote that factors beyond the control of the complainant have disabled him from filing a timely complaint. Nevertheless, the fact that the Legislature has in this fashion recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon fairness of imposing the statute of limitations. Cf. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S. Ct. at 1055, 13 L.Ed.2d at 946. The question for decision becomes whether, under the circumstances of this case, the equitable considerations are such that appellant should be regarded as having been "prevented" from filing his charges with PERC in timely fashion. [Id. at 340.]

Here, Burke claims that TESA did not inform her of the terms of the ALJ's "decision" until August 31, 2000. The ALJ's "decision" Burke refers to is actually an approval of a settlement agreement, mutually agreed upon between the Board and Burke, through her attorney. The documents attached to the charge appear to show

that Attorney Barrett entered into the settlement agreement with Burke's advance knowledge and agreement with her salary guide placement. Settlement of litigation ranks high in New Jersey's public policy and courts will be very reluctant to set such agreements aside. See Red Bank Bd. of Ed., P.E.R.C. No. 87-39, 12 NJPER 802 (¶17305 1986), citing Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961) certif. denied sub nom. Jannarone v. Calamoneri, 35 N.J. 61 (1961). The Commission is charged with the responsibility for the prevention or prompt settlement of labor disputes. . . ." N.J.S.A. 34:13A-2 and 6. Consistent with this responsibility, the Commission strongly advocates the voluntary resolution of labor disputes. This policy presumes finality in the process. When the parties reach a settlement and withdraw an unfair practice charge based upon such settlement, the Commission will only reopen such a matter in the most compelling circumstances, such as where the agreement is fraudulent or otherwise conflicts with State law or regulations. N. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 82-107, 8 NJPER 314, 315 (¶13141 1982); Borough of E. Rutherford, P.E.R.C. No. 82-51, 7 NJPER 680 (¶12307 1981); Union Cty. Voc. and Tech. Bd. of Ed., D.U.P. No. 2002-8, 28 NJPER 91 (¶33034 2001).

In 1991, Burke and the Board entered into a settlement agreement to resolve a tenure charge case. The terms of the settlement required the Board to reinstate Burke for a specified salary and dismiss the tenure charges. The agreement was conditional upon the approval by the Commissioner of Education, and



in time, the Commissioner did approve the settlement and fulfilled the condition. Burke returned to work at the specified salary and the Board dropped the tenure charges. If Burke is now attempting to have the merits or interpretation of the settlement reviewed, that is a subject over which the Commission does not have jurisdiction. This Commission will not interpret or expand the terms of a settlement agreement approved by an ALJ and the Commissioner of Education. In accordance with the Commission's policy favoring the voluntary settlement of disputes, and the absence of the Commission's jurisdiction over these issues, I dismiss this allegation.

Burke returned to work in July 1991 fully aware of her salary and, necessarily, aware of her placement on the salary guide. It does not appear that she was prevented from knowing this fact which she now challenges.

As to her claim to pension credits, it has been more than nine years since Burke's leave of absence in 1991. I find that she was not prevented from discovering, and with due diligence should have discovered, that she had not received the pension credit for the period of her leave of absence well before the time that the charge was filed in February 2001. Accordingly, I find that Burke was not prevented from knowing that she may have had a claim to a different salary guide placement or pension credit and could have pursued those possible claims with TESA and the Board well before 2001.

For the foregoing reasons, I find that the charges filed by Burke are untimely and that she was not prevented from filing her charges within six months of their occurrence. I dismiss the charges.

Further, even if the charge were timely, the record does not support the alleged breach of the duty of fair representation. It appears that TESA did not fail to assist her. In 1991, TESA provided her with legal counsel in her appeal of the Board's tenure charges. Then, from December 1999 to the filing of the charge, TESA's NJEA representative attended several meetings to try to resolve her grievance.

A majority representative breaches its duty of fair representation only when its conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1976). A union should exercise reasonable care and diligence in investigating and processing each grievance; it should exercise good faith in determining the merits of the grievance; and it should afford equal access to the grievance procedure and arbitration for grievances of equal merit. OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). The U.S. Supreme Court has held that claims of a breach of the duty of fair representation, ". . . carr[y] . . . the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives."

Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). And the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

Burke acknowledges that TESA, through Maureen Cronin, represented her at several meetings concerning her salary guide placement and requested that the grievance move forward to the third step. Thus, the union has exercised reasonable care and diligence in investigating and processing Burke's grievance. OPEIU Local 153. TESA did not prevent her from filing a grievance; its agent assisted her efforts. The grievance procedure in the collective agreement allows an aggrieved employee to file a grievance on her own and there is no allegation here that the Association prevented Burke from access to the grievance procedure. See Carteret Education Association (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997). Consequently, I find that TESA did not breach the duty of fair representation it owed Burke.

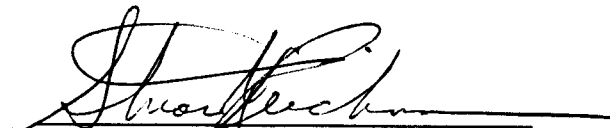
As to the allegations that TESA violated sections 5.4b(2) and (5) of the Act, no alleged facts support these allegations. Accordingly, I dismiss these as well.

Therefore, the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.<sup>3/</sup>

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: September 18, 2002  
Trenton, New Jersey

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<sup>3/</sup> N.J.A.C. 19:14-2.3.