D.U.P. NO. 2016-6

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

In the Matter of

PLAINFIELD BOARD OF EDUCATION,
Respondent,

-and- Docket No. CI-2015-008

PLAINFIELD EDUCATION ASSOCIATION,
Respondent,

-and-

SANDRA P. BURTON and LAURA FERGUSON,
Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge against the Plainfield Education Association and the Plainfield Board of Education because all of the allegations were beyond the six-month statute of limitations. Furthermore, one of the charging parties lacked standing and she was no longer a public employee due to her voluntary retirement more than eight months prior to the filing of the charge.

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Appearances:

For the Plainfield Board of Education
DiFancesco & Bateman, P.C., attorneys
(Lisa M. Fittipaldi, of counsel)

For the Plainfield Education Association
Bucceri & Pincus, attorneys
(Sheldon H. Pincus, of counsel)

For the Charging Parties
(Sandra P. Burton and Laura Ferguson pro se)

REFUSAL TO ISSUE COMPLAINT

On August 14, 2014, middle school teachers Sandra Burton (Burton) and Laura Ferguson (Ferguson), (Charging Parties), filed an unfair practice charge against their public employer, the Plainfield Board of Education (Board) and their majority representative, the Plainfield Education Association (Association). The charge alleges that from September, 2008

through June, 2013, the Board required Burton and Ferguson to instruct students for 40 minutes more per day than the respondents' collective negotiations agreement prescribes.

The Board's conduct allegedly violates 5.4a(1), (5), (6), and (7)[1/] of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). The charge does not specifically allege unlawful conduct by the Association; however, the charging parties allege that it has violated 5.4b(1), (3), (4), and (5)[2/] of the Act. As a remedy, the charging parties seek monetary compensation, including interest, for the

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the Commission."

2/ This provision prohibits 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the Commission."

additional student contact time from September, 2008 through June, 2013.[3/]

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. On May 18, 2016, I issued a letter tentatively dismissing the unfair practice charge. In the letter, I invited the charging parties to respond by May 27, 2016. No response has been filed. I find the following facts.

Burton is a former middle school teacher who voluntarily retired, effective January 1, 2014. Ferguson is currently and has been at all relevant times a middle school teacher employed by the Board. Article VI, section G (2) of the collective negotiations agreement covering the period July 1, 2009 through

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3/ On September 18, 2012, the charging parties filed a grievance seeking compensation for the extra student contact time. Prior to filing the charge, the charging parties received compensation from the Board for additional student contact time between September 6, 2012 and October 15, 2012 and excluded this time period from their requested remedy. After the filing of the charge, the Board paid the charging parties for additional student contact time occurring between October 16, 2012, and June 2013 as part of a settlement of the grievance.

June 30, 2012 between the Board and Association provides in pertinent part:

> Effective July 1, 2007, all Middle School teachers and K-8 center teachers assigned to teach grades 6,7, and/or 8 shall be assigned to teach a maximum of six (6) instructional periods per school day, according to the needs of the District as determined by the Superintendent. Each instructional period is forty (40) minutes.[4/]

The charging parties allege that from September, 2008 through June, 2013, they were required to instruct students for 280 minutes per day, despite Article VI, section G (2) of the collective negotiations agreement impliedly setting a maximum of 240 minutes per day (i.e., 6 instructional periods x 40 minutes). The charging parties filed a grievance on September 18, 2012 and as a result of a settlement agreement between the Board and Association, the Board paid the charging parties for the additional instruction time worked during the 2012/2013 school year. The Board did not compensate the charging parties for

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4/ The predecessor to the July 1, 2009 - June 30, 2012 contract, Article VI, section G (2) omitted the phrase, “and K-8 center teachers.” The phrase was added upon the Superintendent’s decision to change the designation of Cedarbrook Elementary School to the Cedarbrook K-8 Center, effective September 1, 2008. However, inclusion of the phrase, “[e]ffective July 1, 2007," was by mutual error of the parties. When the error was discovered in early 2012, the parties agreed that it was effective for K-8 center teachers subsequent to the publishing of the Agreement, which occurred in early 2012.

extra instructional time worked from September, 2008 through June, 2012.

The Board and the Association filed responses denying engaging in unfair practices. The Association and Board both assert that the charge is untimely. Further, the Association asserts that it settled the grievance with the Board prospectively, demonstrated by payment to the charging parties for the additional contact time worked in 2012-2013. For this reason, the Association asserts that it could not have violated its duty of fair representation to the charging parties.

The Commission, ". . . does not have jurisdiction over individuals who are no longer public employees, such as individuals who have resigned or retired." Asbury Park, D.U.P. No. 2002-9, 28 NJPER 160 (¶33057 2002), aff'd P.E.R.C. 2002-73, 28 NJPER 253 (¶33096 2002); See also Weisman and CWA 1040, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012); Sarapuchiello and Local 2081, D.U.P. No. 2009-4, 34 NJPER 453 (¶142 2009), aff'd P.E.R.C. 2009-47, 35 NJPER 66 (¶251 2009). Once a charging party ceases to be a public employee within the meaning of the Act, the Commission no longer retains jurisdiction over any current disputes between the former public employee and his or her former public employer and majority representative.

Thus, in Asbury Park, supra, the Director refused to issue a complaint on an unfair practice charge filed on June 20, 2001,

more than seven (7) months after the charging party retired from service on December 1, 2000. In reaching this determination, the Director explained that when, "Farrell [the charging party] retired, he ceased to enjoy the rights guaranteed to public employees by our Act." Asbury Park, supra at page 161. Consequently, the Director concluded, *inter alia,* that the charging party lacked standing to pursue the June 20, 2011 unfair practice charge since he no longer was a public employee within the meaning of the Act. Similarly, because Burton retired more than seven months prior to filing this charge, she lacks standing to pursue her claims.

N.J.S.A. 34:13A-5.4(c) establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

> . . . 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 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, and cautioned that it would consider the circumstances of individual cases. Id. at 337-338. The Court

noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

The Charging Parties apparently knew as of September 18, 2012 (the day they filed a grievance) that they were not being compensated for their additional student contact time. The charging parties filed the charge on August 14, 2014, almost two years later. The charging parties have not alleged any facts which suggest they were prevented from filing a timely charge. Therefore, I dismiss the charge as untimely.

Even if the charging parties had filed a timely charge, they have not alleged any facts indicating that the Association has violated 5.4b(1), (3), (4), and (5) of the Act.

With respect to the Board, individual employees normally do not have standing to assert an a(5) violation because the employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). Here, the

charging parties failed to assert a viable claim against the Association and thus lack standing to pursue an a(5) claim.

With respect to the allegation that the Board has violated 5.4a(6) and (7), the charging party has submitted no facts indicating that the Board has failed to reduce a negotiated agreement to writing or that the Board has violated a Commission rule or regulation.

Finally, no facts have been alleged to support an independent violation of 5.4a(1). For all of these reasons, I conclude that the charge does not meet the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.

/s/Gayl R. Mazuco
Gayl R. Mazuco
Director of Unfair Practices

DATED: June 3, 2016
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 June 13, 2016.