

D.U.P. NO. 2021-8

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

In the Matter of

NEWARK PUBLIC SCHOOLS,

Respondent,

-and-

Docket No. CI-2021-003

MARY ELIZABETH JOHNSTON,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by Mary Elizabeth Johnston (Johnston) against her employer, Newark Public Schools (NPS). The charge alleged that NPS violated N.J.S.A. 34:13A-5.4a(1) and (3) by discriminating against Johnston and another employee when placing them on a new salary guide. Johnston further alleges that NPS denied her request to submit her grievance contesting the salary step placement to binding arbitration. The Director finds the allegations are outside the Commission's six month statute of limitations. Further, even if Johnston's 5.4a(3) allegation was timely, no facts indicated that the alleged improper placement on the new salary guide was in retaliation for protected activity.

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Appearances:

For the Respondent,  
(Xiomara Alvarez, Esq.)

For the Charging Party,  
Richard J. Kaplow, P.A.  
(Richard J. Kaplow, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On August 19, 2020, Mary Elizabeth Johnston (Johnston) filed an unfair practice charge (UPC) against her employer, Newark Public Schools (NPS). The charge alleges that in or around September, 2017, NPS violated section 5.4a(1) and(3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act) by discriminating against Johnston and another employee, Anna Ferreira (Ferreira),

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, retraining or coercing employees on 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 rights guaranteed to them by this act."

when placing them on a new salary guide. Specifically, Johnston alleges that NPS denied her and Ferreira "...contractually based credit for years of service within the Newark Public School District" when their title was moved from the "Teachers Salary Guide" to the "Child Study Team Salary Guide" (CST), while providing newly-hired employees credit for years of service outside the Newark School District. Johnston further alleges that NPS denied her request to submit her grievance contesting the salary step placement to binding arbitration.

On December 11, 2020, NPS filed a letter asserting that in 2017, it and Johnston's union, Newark Teachers Union (NTU), agreed to move the title, speech language specialist, which both Johnston and Ferreria hold, from the Teachers Salary Guide to the CST Salary Guide. NPS denies any agreement between it and NTU regarding employees receiving credit for years of service. Rather, NPS asserts that it used the employee's prior salary on the Teachers Salary Guide as a minimum when moving employees to the CST Salary Guide to ensure no reduction in salary. NPS also asserts that the conduct establishing the basis of the charge occurred in September, 2017, rendering the charge untimely.

On February 2, 2021, Johnston responded to NPS's letter, asserting that the charge is not untimely because NTU advised her and Ferreria that it was in negotiations with NPS to resolve the salary step placement issue. Johnston believes that she was

"...justified in holding back on the filing of a formal charge under the doctrine of laches and general principles of fairness and equity."

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.

I find the following facts:

Johnston and Ferreira are speech language specialists employed by NPS. NTU is the majority representative for the title, speech language specialist. NPS is a public employer within the meaning of the Act. NPS and NTU signed a collective negotiations agreement (CNA) extending from July 1, 2015 through June 30, 2019.

On or around April 24, 2017, NPS and NTU signed a memorandum of agreement (MOA). By its terms, NPS and NTU agreed to modify Article XIV of the CNA to specify that "Effective September 2017, the titles of Speech Therapist and Audiologist shall be moved to the Child Study Team (CST) Salary Guide."

Also in April, 2017, Ferreira began asking NTU what her step placement would be when she is moved to the CST Salary Guide.

After the next school year began in September, 2017, Johnston and Ferreira disagreed with their CST Salary Guide placement, believing it should have been a step-for-step transfer. Johnston and Ferreira exchanged numerous email communications with NTU regarding how it would seek to remedy the step placement issue.

Communications between NTU and Johnston and/or Ferreira regarding the salary step placement issue ended in August, 2019. Specifically, on August 13, 2019, Ferreira inquired of NTU whether employees in the title, speech language specialist, were going to be placed on the "correct" step in the new contract. On August 16, 2019, NTU emailed its reply, advising that the title would remain "where they were." On August 17, 2019, Ferreira emailed NTU: "[W]e were told to wait for the new contract but since nothing happen[ed] what is the next step?" A NTU representative replied on the same date, advising: "[U]nfortunately, there really isn't any place that we as a union can go from here. We worked with [NPS] to negotiate it, but their position was clear, as I have said since the beginning of this, they do have past practice on their side."

The grievance procedure set forth in Article III of the CNA includes a multi-step process ending in binding arbitration. On or about October 8, 2019, counsel for Johnston and Ferreira filed a grievance contesting their salary guide placement when they were moved to the CST Salary Guide at the start of the 2017

school year. On December 10, 2019, a meeting was held among NPS representative(s), Johnston, Ferreira and their counsel regarding the grievance, pursuant to step 3 of the grievance procedure. On January 8, 2020, NPS issued a letter denying the grievance, finding that the CNA had not been violated and that all similarly situated employees had been treated uniformly.

On January 15, 2020, counsel for Johnston and Ferreira requested that the grievance be submitted to binding arbitration. NPS consulted NTU regarding the request. NTU advised NPS that it did not intend to move the grievance to arbitration. On February 6, 2020, NPS advised counsel for Johnston and Ferreira: "Since the NTU has articulated that it does not consent to submitting this matter to arbitration, this office can take no further action. As such, your request for arbitration is denied."

#### **ANALYSIS**

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 timely charge. In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair labor practice occurred, provided that the person(s) affected are aware of the action. The date of the action could be the date an action is announced and/or the date an action is

implemented. The action date is known as the "operative date," and the six-month limitations period runs from that date. For a charge to be timely filed, it must be filed within six months of the operative date. Charges and amendments filed beyond that date are generally untimely. Irvington Board of Education, H.E. NO. 2003-9, 28 NJPER 560 (¶33174 2002). Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the charging party that it was "prevented" from filing the charge prior to the expiration of the period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court wrote that it would look to equitable considerations in deciding whether a charging party slept on its rights, noting that it expected charging parties to diligently pursue their claims.

In Piscataway Tp. Teachers Ass'n (Abbamont), D.U.P. No. 90-10, 16 NJPER 162 (¶ 21066 1990), the charging party filed a breach of the duty of fair representation charge against his majority representative in June, 1989. The Director found that

although the charging party was discharged from his employment in or around April, 1988, the statute of limitations period did not begin to run until December, 1988, when the charging party's majority representative informed him that it had no basis to take further action on his behalf. Accordingly, the Director concluded that the charge was untimely as it was filed more than 7 months after the majority representative's December, 1988 communication.

Johnston's section 5.4a(3) claim is inextricably tied to NPS's alleged improper placement of speech language therapist on the new salary guide, of which Johnston and Ferreira became aware in September, 2017. Johnston urges that she was "prevented" from filing a charge because NTU advised her that it was attempting to resolve the matter through negotiations. Even if I agree that Johnston was "prevented" from filing a timely charge for a period, a final communication between NTU and Ferreira about salary guide placement occurred in August, 2019. On August 17, 2019, NTU emailed Ferreira, advising, "there isn't any place that we as a union can go from here." In view of the rationale set forth in Piscataway Tp. Teachers Ass'n., I find that Johnston's section 5.4a(3) claim is untimely because NTU's August 17, 2019 communication disavowing further action occurred more than a year before Johnston filed the charge against NPS.



Following NTU's final communication of August 17, 2019, Johnston filed a grievance regarding the alleged improper salary guide placement on October 8, 2019.<sup>2/</sup> Johnston's grievance was filed more than 10 months before Johnston filed the charge against NPS. That an employee initially elects to pursue a claim through a contractual grievance procedure does not toll the period for filing an unfair practice charge. New Jersey Dept. Of Human Services, P.E.R.C. No. 85-48, 10 NJPER 638 (¶15306 1984); Camden Vocational Bd. of Ed., P.E.R.C. No. 83-28, 8 NJPER 558 (¶13256 1982).

Even if Johnston's section 5.4a(3) claim was timely filed, no facts indicate that NPS's placement of Johnston and Ferreira on an allegedly improper step of the CTS Salary Guide was in retaliation for protected activity. Violations of section 5.4a(3) of the Act are evaluated under the test set forth in Bridgewater Tp v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). Under Bridgewater, the charging party must prove, by preponderance of the evidence, that protected activity was a substantial or motivating factor in an adverse employment action. In order to meet the complaint issuance standard, an a(3) charge

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<sup>2/</sup> After receiving NTU's final communication of August 17, 2019 and having filed her grievance on October 8, 2019, there appeared to be no reason that Johnston further delayed filing the charge. Accordingly, I glean no merit to Johnston's argument that she was "justified" in "holding off" on filing the charge under the doctrine of laches.

must allege that an adverse employment action occurred and was related to protected activity.

Johnston alleges that NPS "...has treated speech and language specialist hired since 2017-2018 in a manner that differs substantially from the treatment and salary step placement for speech and language specialist hired prior to 2017-2018." Johnston asserts that this "disparate treatment" is "arbitrary and discriminatory." But the charge doesn't allege any facts establishing a nexus between Johnston and/or Ferreira's activities protected by the Act and the adverse personnel action. There is no allegation that Johnston and/or Ferreira was or were discriminated against in retaliation for any activities on behalf of the union, or because they filed a grievance, or because they exercised any activity protected by the Act. Accordingly, the "disparate treatment" is unrelated to any activities falling within the protection of section 5.4a(3) of the Act.

Johnson further alleges that NPS interfered with her statutory right to submit her grievance to arbitration in violation of section 5.4a(1). This alleged violation is also untimely under N.J.S.A. 34:13A-5.4(c). NPS provided counsel for Johnston and Ferreira notice on February 6, 2020 that NTU didn't consent to the submission of the grievance to binding arbitration and consequently, it (NPS) was refusing to advance the grievance. This communication was forwarded to Johnston's counsel

electronically and by regular mail. The charge was not filed until August 19, 2020<sup>3/</sup>, more than six months after NPS's denied the request for arbitration. See PBA, Local 105 D.U.P. 90-16, 16 NJPER 380 (¶21152 1990) (charge found to be untimely when filed one day after the statute of limitations had expired).

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a compliant on the allegations of this charge. N.J.A.C. 19:14-2.3.

**ORDER**

The unfair practice charge is dismissed.

/s/ Jonathan Roth  
Jonathan Roth  
Director of Unfair Practices

DATE: April 22, 2021

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

**Any appeal is due by May 3, 2021.**

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<sup>3/</sup> The cover letter for the charge is dated August 11, 2020, however same was not received and filed until August 19, 2020. Even if the charge had been received and filed on August 11, 2020, it would have been untimely.