I.R. No. 2012-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EGG HARBOR TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-2011-465

EGG HARBOR TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge alleging that a public employer unilaterally changed a term and condition of employment by denying requests of instructional aides (unit employees) for unpaid leaves of absence with health insurance benefits and other emoluments in order to complete student teaching requirements for teaching certificates.

The Designee determined that the majority representative did not demonstrate - to a substantial likelihood of success - that granting leaves was a term and condition of employment and that the employer had unilaterally changed the circumstance under which the benefit was provided. Accordingly, the application was denied.

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Appearances:

For the Respondent, Cooper Levenson, attorneys (Amy L. Houck, of counsel)

For the Charging Party, Myron Plotkin, NJEA UniServ Representative

INTERLOCUTORY DECISION

On June 7, 2011, Egg Harbor Township Education Association (Association) filed an unfair practice charge against the Egg Harbor Township Board of Education (Board), together with an application for interim relief, a proposed Order to Show Cause, exhibits, certifications, and a brief. The charge alleges that on or around January 19, 2011, the Board denied requests from three named instructional aides (unit employees) for unpaid leaves of absence for about six weeks (or longer) from September, 2011 through December, 2011 to fulfil student teaching requirements for teaching certificates. The charge alleges that ". . . the past practice in the district was that the Board

approved unpaid leaves of absence for support staff to complete student teaching assignments." The charge also alleges that the elimination of the "consistent past practice" of granting unpaid leaves (without adverse effects upon health insurance benefits, salary and pension benefits) violates 5.4a(1), (2), (3), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The application seeks an Order directing the Board to approve the three requests for unpaid leaves of absence.

On June 10, 2011, I issued an Order to Show Cause, specifying July 6, 2011 as the return date for argument on the application in a telephone conference call. I also directed the Board to file a reply by June 29, 2011. On the return date, the parties argued their cases. The following facts appear.

The Board and Association have signed a collective negotiations agreement (for a negotiations unit which includes

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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. (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. (7) Violating any of the rules and regulations established by the commission."

instructional aides) extending from July 1, 2009 through June 30, 2012. The parties acknowledge that no provision in the agreement covers the disputed term and condition of employment.

The parties do not dispute that instructional aide Brett Hoffecker was granted an unpaid leave of absence (with emoluments) from September through December, 2010 in order to complete a required student teaching assignment.

Three instructional aides, Alexis Dilks, Donna Omogbehin and Maryanne Hamilton certify that in December, 2010 and January, 2011, each asked Board Superintendent Scott McCartney for an unpaid leave of absence from September, 2011 through December, 2011 to perform a required student teaching assignment. They separately asked that the leaves ". . . continue [their receipt of] health insurance benefits."

On January 19, 2011, Joetta Surace, Board Director of Human Resources, emailed Dilks a reply. The reply provides in a pertinent part:

> In the past, when budget years were better, the Board did approve unpaid leaves of absence for support staff to complete student teaching assignments. This was not a contractual requirement; it was only approved by the generosity of our Board.
>
> Due to our current budget crisis and with concern of the high cost of health insurance, an administration decision was made not to approve any unpaid leaves of absences.

> To date, we have received three requests for unpaid leaves for next school year - all have been denied at the Superintendent's level.
>
> I suggest a resignation as an alternative way to complete your student teaching with the hope that you would discuss your plans with your supervisor.

Hamilton certifies that she met with Superintendent McCartney on January 11, 2011 to discuss the denial of unpaid leave. She certifies that McCartney said: ". . . In the past [the Board] had paid for the health benefits to continue but the Board would not now approve the request due to the cost and the budget." She offered to waive the benefits for the duration and McCartney replied: "That [is] a union matter."

All three aides certify that they are ". . . personally aware of other staff members who have been granted unpaid leaves of absence [for student teaching] with continued insurance. . . ."

Superintendent McCartney certifies that ". . . in the past we have approved unpaid leaves of absences but they have always been on a case-by-case basis." He certifies that in late 2010 or early 2011 he informed the Association that the Board would not be granting unpaid leaves of absence. He estimates that health insurance for each employee on leave will cost from $3,000 to $8,000.

The instructional aides certify that if they resigned and were rehired they would be ineligible for health insurance coverage for sixty days.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia,90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College, P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No.94, 1 NJPER 37 (1975).

Paid and unpaid leaves of absence, together with an employer's provision of health insurance benefits to unit employees on leave are generally, mandatorily negotiable. West Orange Bd of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp 2d 291 (¶232 App. Div. 1993); Rutgers University, P.E.R.C. No. 91-81, 17 NJPER 212, 216 (¶22091 1991).

Both parties concede that the disputed term and condition of employment is not set forth in their collective negotiations

agreement. The Association maintains that the leaves have been provided based upon a "past" or "established" practice, i.e., "one that has been accepted by both parties and has existed over an extended period of time" (Association brief at 2, 4). The Board denies that the Association has demonstrated a past practice.

In Middletown Tp., P.E.R.C. No. 98-77 24 NJPER 28 (¶29010 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), the Commission described three types of cases involving allegations that an employment condition has been changed, the first two of which might be applied to this matter. In the first type, ". . . the representative alleges that the employer agreed to provide a benefit by an express contractual commitment or by an implied contractual commitment based on an established practice." Id., 24 NJPER at 29.

The facts do not demonstrate that the disputed practice is "unequivocal" or "fixed and established" or ascertainable over a "reasonable period of time." The Association identified only one such instance - in the fall of 2010 - in which an instructional aide was provided an unpaid leave with health benefits so that he could perform student teaching.

In the second type of case identified by the Commission in Middletown Tp., ". . . an existing working condition is changed and the majority representative does not claim an express or

implied contractual right to prevent that change while the employer does not claim, or cannot prove, an express or implied right to impose that change without negotiations." Id. 24 NJPER at 30. Such a change triggers the duty to negotiate under section 5.3 of the Act. The Commission wrote:

> . . . [U]nlike in the first type of case, the representative need not show an actual contractual entitlement or a binding past practice. Indeed if an entitlement or binding past practice could be shown, what would be left to negotiate? To prove a violation, absent an applicable defense, the representative need show only that the employer changed an existing employment condition without first negotiating. [Id. 24 NJPER at 30]

This is the second type of case. The Association alleges that the Board changed the existing practice of granting instructional aides unpaid leave with health insurance benefits so that they could perform required student teaching assignments.

In Middletown Tp., the disputed term and condition of employment - placing certain unit employees on step three of the salary guide - existed for more than ten years. In Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), the disputed term and condition - converting unused personal days into sick days (albeit, in error), - existed for two years and the employer admitted the practice.

In this matter, the facts demonstrate that the Board granted unpaid leave to an instructional aide in the previous year.

Although the aides' certifications reveal that each of them are "aware" of other unspecified, approved instances (some or all of which the Board has admitted), I find that the facts do not demonstrate - to a substantial likelihood of success standard - that unpaid leaves to instructional assistants comprised an "existing employment condition." The Superintendent certifies that those leaves had been approved on a "case-by-case" basis, implying that criterion or criteria was/were applied in determining if each requested leave of absence would be approved. In other words, it appears that if an employment condition existed, it included the exercise of Board discretion to grant or deny an unpaid leave request.

Under these circumstances, I find that the Association has not shown by a substantial likelihood of success that an existing employment condition was changed unilaterally.

ORDER

The application for interim relief is denied. The case shall proceed in the normal course.

Jonathan Roth
Commission Designee

DATED: July 12, 2011
Trenton, New Jersey