P.E.R.C. NO. 2002-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LUMBERTON EDUCATION ASSOCIATION,

Charging Party,

-and- Docket No. CO-H-99-229

LUMBERTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that the Lumberton Township Board of Education violated the New Jersey Employer-Employee Relations Act when it adopted a Family/Medical Leave Policy; when it applied that policy to an employee who took a disability leave, immediately followed by a leave pursuant to the Family Medical Leave Act, 29 U.S.C.A. §2601 et seq; and when it refused to negotiate with the Lumberton Education Association concerning this subject. The Commission orders the Board to rescind the Family/Medical Leave Policy and restore the working conditions that governed such leaves which were in effect prior to the change and to negotiate in good faith with the Association if the Board seeks to establish a family/medical leave policy.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Respondent.

Appearances:

For the Charging Party, Selikoff & Cohen, P.A. attorneys (Steven R. Cohen and Keith Waldman, of counsel)

For the Respondent, Jeffrey F. Belz, attorney

DECISION

On January 15, 1999, the Lumberton Education Association filed an unfair practice charge against the Lumberton Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] when it adopted a Family/Medical Leave Policy and when it applied that policy to an employee who took a disability leave, immediately followed by a leave pursuant

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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."

to the Family Medical Leave Act, 29 U.S.C.A. §2601 et seq. In addition, the Board allegedly refused to negotiate with the Association concerning this subject.

On September 2, 1999, a Complaint and Notice of Hearing issued. The Board's Answer asserts, in part, that it violated no past practice in adopting and applying its policy and that it followed applicable law. It concedes that both state and federal family leave laws allow the negotiation of more generous leave benefits, but asserts that the Association had no right to negotiate over that issue mid-contract.

The case was held in abeyance pending settlement efforts. It was reactivated when those efforts failed. The parties did, however, agree to waive a hearing and stipulate the record for submission to the Commission. On April 30 and May 1, 2001, respectively, the Association and the Board filed briefs. Their numbered stipulations follow:

1. The LEA is the exclusive majority representative of a bargaining unit consisting of all certified personnel and support staff (including teacher aides [including teaching assistants], cafeteria personnel and aides, playground aides and custodians) whether under contract, or on leave, employed by the Board. As such, it is an "employee representative" within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq. (Complaint, Statement of Position (Answer, First Count, ¶1)

2. The Board is a "public employer" within the meaning of the Act, is subject to its provisions, and is the employer of all the employees involved in these proceedings. (Complaint, Statement of Position (Answer), First Count, ¶2)

3. The LEA and the Board have been parties to a series of collectively negotiated agreements, the most recent of which is effective from July 1, 1998 to June 30, 2000. (Complaint, Statement of Position (Answer), First Count, ¶3)

4. On or about July 23, 1998, without prior negotiations, the Board adopted a Family/Medical Leave policy. (Complaint, Statement of Position (Answer), First Count, ¶4)

5. As adopted, the policy provides, in pertinent part, "Employees who have more than 60 days of applicable paid leave available shall use their paid leave." (Complaint, Statement of Position (Answer), First Count, ¶5)(Emphasis supplied)

6. As adopted, the policy does not allow such an employee to elect to either exhaust disability leave first and then take Family and Medical Leave Act ("FMLA") leave or to take FMLA without pay and to reserve his or her paid leave for a later time. (Complaint, Statement of Position (Answer), First Count, ¶6)

7. The LEA has made a number of requests to negotiate concerning this subject: The Board has failed and refused to negotiate with the LEA concerning this subject. The Board has contended that negotiation concerning FMLA leaves is not a mandatory topic of negotiations. (See Complaint, Statement of Position (Answer), First Count, ¶7-8)

8. On about December 11, 1998, the LEA, by and through its counsel, made a final request to the Board, by and through its counsel, to negotiate concerning this subject. (Complaint, Statement of Position (Answer), First Count, ¶9)

9. The LEA's December 11, 1998 request offered to negotiate concerning this subject. The LEA further indicated that unless the board agreed to engage in such negotiations by January 4, 1999, the LEA would have no choice but to file an unfair practice charge. The Board has continued in its failure and/or refusal. (Complaint, Statement of Position (Answer), First Count, ¶10)

10. [Cyndy] Bowyer is a member of the LEA and an employee of the Board's. (Complaint, Statement of Position (Answer), Second Count, ¶14)

11. On or about August 4, 1998, Charging Party Bowyer proposed to take a 19-day disability leave from September 2, 1998 through September 29, 1998, and FMLA leave from September 30, 1998 through December 23, 1998, with a return to work on January 4, 1999. (Complaint, Statement of Position (Answer), Second Count, ¶15)

12. The Board unilaterally applied Bowyer's sick days to the beginning of the leave, and required her to exhaust the FMLA leave concurrently instead of permitting her to stack her disability leave and FMLA leave. (Complaint, Statement of Position (Answer), Second Count, ¶16) The Board contends that, in

accordance with applicable law, the policy prevents "stacking" leaves of absence. (Statement of Position, Second Count, ¶16) The LEA disputes the Board's contention and contends that the "stacking" of leaves is a negotiable term and condition of employment and that the Board may not unilaterally adopt a policy concerning this term. (Complaint, Second Count, ¶16)

13. As a consequence of the Board's requiring Bowyer to exhaust the FMLA leave concurrently instead of permitting her to stack her disability leave and FMLA leave, the Board placed Bowyer in the position of having to pay approximately $734.49 for medical coverage the month of December, 1998. (Complaint, Statement of Position (Answer), Second Count, ¶17)

STIPULATION AS TO DOCUMENTS

1. The documents attached to this Stipulation as Exhibits A through C are true copies of original documents. For the purposes of this matter, the parties stipulate and agree to the admissibility of the attached documents and to their being accepted into the record as Exhibits J-1 through J-3, respectively.

STIPULATIONS REQUIRED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

1. In so stipulating, the parties recognize that the acts as stipulated constitute the complete record to be submitted to the Commission. Charging Parties are placed on notice that to the extent that the stipulated facts are insufficient to sustain the charging parties' burden of proof by a preponderance of the evidence, the Complaint may be dismissed by the Commission.

2. Similarly, the Respondent is advised that it too must rely upon the sufficiency of the stipulated record to sustain any affirmative defenses it has asserted or to rebut or disprove the case established by the Charging Parties.

3. The parties will submit their briefs contemporaneously within thirty (30) days of the date of this stipulation.

4. Pursuant to N.J.A.C. 19:14-6.7, the parties submit this case to the Commission without a hearing, and waive a hearing examiner's report and recommended decision.

ANALYSIS

We begin with the obligation to negotiate over mandatorily negotiable terms and conditions of employment. N.J.S.A. 34:13A-5.3 provides:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

This sentence embodies the Act's proscription against the establishment of working conditions through unilateral employer action. Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). The obligation to negotiate is continuing:

> We note that by its express terms, the statutory proscription of any unilateral implementation of a change in any of the terms and conditions of public employment is not limited in its applicability to the period of negotiation for a new collective agreement. Rather, it applies at all times.... [78 N.J. at 48 n.9]

The stipulated record shows that the Board implemented its policy without prior negotiations and refused the Association's repeated demands to negotiate. Thus, the Board will have violated its statutory obligation to negotiate if the subject of its policy is mandatorily negotiable.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

In general, paid and unpaid leaves of absence intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. See, e.g., Burlington Cty. College Faculty Ass'n v. Board of Trustees, Burlington Cty. College, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-44 (1977); South River Bd. of Ed., P.E.R.C. No. 81-108, 7 NJPER 156 (¶12069 1981); Hoboken Bd. of

Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd NJPER Supp.2d 113 (¶95 App. Div. 1982), app. dism. 93 N.J. 263 (1983). Maternity or child-rearing leave has specifically been held to be mandatorily negotiable. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. NO. 90-58, 16 NJPER 40, 42 (¶21018 1989); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-91, 8 NJPER 231 (¶13096 1982); Hackensack Bd. of Ed., P.E.R.C. No. 81-138, 7 NJPER 341 (¶12154 1981), rev'd on other grounds 184 N.J. Super. 311 (App. Div. 1982). Negotiations will be preempted, however, if contract language conflicts with a statute or regulation that expressly, specifically and comprehensively sets that term and condition of employment. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Morris School Dist. Bd. of Ed. and The Ed. Ass'n of Morris, 310 N.J. Super. 332, 341-342 (App. Div. 1998), certif. den. 156 N.J. 407 (1998) (statutory sick leave sections provide only minimum standards). To be preemptive, such a statute or regulation must eliminate the employer's discretion to agree to grant the benefit sought.

This dispute focuses on the policy's mandate that an employee's FMLA entitlement run concurrently with "applicable paid leave." The Board asserts that it has the sole right to make that

election under applicable laws and that implementing its policy breached no contractual provision or practice.2/ Specifically, it relies on this FMLA provision:

> 29 U.S.C.A. §2612(d) Relationship to paid leave.
>
> (2) Substitution of paid leave.
>
> (A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for [child-rearing] leave.
>
> (B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave [necessitated by the employee's serious health condition], except that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

The Association counters that the FMLA guarantees a minimum level of benefits and that the law allows benefits to be increased through collective negotiations. It asserts that discretionary provisions of the FMLA relate to terms and conditions of employment and are mandatorily negotiable. Specifically, it relies on these FMLA provisions:

> 29 U.S.C.A. §2652 Effect on existing employment benefits

2/ The policy cites both the federal FMLA and the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq. (FLA), as well as their implementing regulations. The benefits provided under the FMLA and the FLA are similar but not identical.

> (a) More protective. Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.
>
> (b) Less protective. The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.
>
> 29 U.S.C.A. §2653. Encouragement of more generous leave policies
>
> Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

Under the preemption standards, the issue is whether the statutes cited by the employer preempt its discretion to agree with the Association to have leave benefits run consecutively rather than concurrently. The answer is no. None of these statutes nor any implementing regulations comprehensively set whether leave allowances granted by any of these statutory schemes (FMLA, FLA, and Title 18A) are to run consecutively or concurrently. Nor do any of these statutes or regulations require that the decision to have leave run consecutively or concurrently be made by the employer unilaterally.

The FMLA cases relied on by the employer are also inapposite because they simply affirm that an employer is not statutorily obligated to provide more than 12 weeks of leave. The

cases do not insulate the employer from the obligation to negotiate over whether family/medical leave will be taken concurrently or consecutively with paid leave.

Piscataway, 152 N.J. Super. 235, another case relied upon by the employer, is distinguishable. There, the Title 18A statute in question required that a board's decision to grant an employee extended sick leave had to be made by the board on a case-by-case basis. Therefore, a union could not negotiate that extended sick leave be made available to all employees on a blanket basis. Here, the Title 18A statute does not apply and the decision to have contractual leave run consecutively or concurrently with family/medical leave can be made on a blanket basis. In fact, the employer's policy does just that.

Thus, we conclude that a decision by a school board to prohibit stacking of leaves is not preempted and is generally subject to mandatory negotiations. Cf. Hoboken Bd. of Ed. (order in which a school employee exhausts annual and accumulated sick leave is mandatorily negotiable). As it acted unilaterally and rejected repeated demands to negotiate over a proposed new rule governing a working condition, the Board violated N.J.S.A. 34:13A-5.4a(5) and, derivatively, section 5.4a(1) with respect to the allegations made in Count I of the Complaint. We will order the Board to rescind the policy and negotiate with the Association over whether family leave must be taken concurrently with paid leave.

In Count II, the Association alleges that as a result of the unilaterally implemented policy, Board employee Cyndy Bowyer was required to exhaust her paid sick leave concurrently with FMLA leave. As we have concluded that the Board's policy was unlawfully implemented and must be rescinded pending negotiations, we hold that Bowyer's leave must be treated in accordance with the conditions that prevailed before the policy was in place or in accordance with any policy that is negotiated to cover her situation and others.

ORDER

The Lumberton Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally implementing and refusing to negotiate over policies affecting leaves of absence, including the Board policy on Family/Medical Leave.

2. 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, particularly by unilaterally implementing and refusing to negotiate over policies affecting leaves of absence, including the Board policy on Family/Medical Leave.

B. Take this action:

1. Immediately rescind the Family/Medical Leave Policy adopted on July 23, 1998 and restore the working conditions

that governed such leaves which were in effect prior to July 23, 1998.

2. Negotiate in good faith with the Association if the Board seeks to establish a family/medical leave policy that affects mandatorily negotiable terms and conditions of employment.

3. Immediately review the leave taken by Cyndy Bowyer from September 2, 1998 to September 29, 1998 and from September 30, 1998 until her return to work on January 4, 1999, in accordance with the conditions that were in effect prior to July 23, 1998, or in accordance with any policy that is negotiated to cover her situation and others.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

6. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: September 26, 2001
Trenton, New Jersey
ISSUED: September 27, 2001

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally implementing and refusing to negotiate over policies affecting leaves of absence, including the Board policy on Family/Medical Leave.

WE WILL cease and desist from refusing to negotiate in good faith with the Lumberton Education Association concerning terms and conditions of employment of employees in its negotiations unit, particularly by unilaterally implementing and refusing to negotiate over policies affecting leaves of absence, including the Board policy on Family/Medical Leave.

WE WILL immediately rescind the Family/Medical Leave Policy adopted on July 23, 1998 and restore the working conditions that governed such leaves which were in effect prior to July 23, 1998.

Docket No. CO-H-99-229

LUMBERTON TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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