P.E.R.C. NO. 2011-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PARSIPPANY-TROY HILLS

Petitioner,

-and- Docket No. SN-2010-041

PARSIPPANY PUBLIC EMPLOYEES LOCAL 1,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of the subject of an unfair practice charge filed by Parsippany Public Employees Local 1 against the Township of Parsippany-Troy Hills. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) when it required an employee to complete a Family Medical Leave Act medical certification form when the employee wanted to use paid leave rather than take FMLA leave. The Commission holds that where the parties have not reached an agreement requiring the use of paid leave concurrently with FMLA leave and where an employee has declined to take FMLA leave, the employer has neither a managerial prerogative nor a preemptive right to require employees to complete the form.

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.

P.E.R.C. NO. 2011-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PARSIPPANY-TROY HILLS

Petitioner,

-and- Docket No. SN-2010-041

PARSIPPANY PUBLIC EMPLOYEES LOCAL 1,

Respondent.

Appearances:

For the Petitioner, Knapp, Trimboli & Prusinowski, LLC, attorneys (Stephen E. Trimboli, of counsel)

For the Respondent, Castronova McKinney, attorneys (Thomas McKinney, of counsel)

DECISION

On August 25, 2009, Parsippany Public Employees Local 1 (PPE) filed an unfair practice charge against the Township of Parsippany-Troy Hills. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it required an employee to complete a Family Medical Leave Act (FMLA)[1/] medical certification form when the employee wanted to use his paid leave rather than take an FMLA leave (Docket No. CO-2010-066). On November 17, the Township filed this scope of negotiations petition after a conference designed to explore the possibility of settling the

1/ 29 U.S.C.A. § 2601 et seq.

unfair practice charge. We find that where the parties have not reached an agreement requiring the use of paid leave concurrently with FMLA leave and where an employee has declined to take FMLA leave, the employer has neither a managerial prerogative nor a preemptive right to require employees to complete the medical certification form.

The parties have filed briefs and exhibits. These facts appear.

PPE represents the Township's blue collar employees. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2006. The grievance procedure ends in binding arbitration.

The form at issue is entitled, "Certification of Health Care Provider (Family Medical Leave Act of 1993)." It solicits details about the nature of the medical condition of the employee or employee's family member, including whether or not the condition is a "serious health condition" within the meaning of the FMLA, the date the condition commenced, the probable duration of the condition, the duration of treatment, and whether it will be necessary for the employee to miss work or work a modified schedule.

On February 24, 2009, the Township threatened to suspend an employee indefinitely if he did not submit the form by February 27. The employee wanted to use his paid leave rather than

request an FMLA leave, but submitted the form by the Township's deadline.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the test 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]

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Township argues that FMLA regulations require it to inform employees of their leave rights under the FMLA and when an employee's circumstances are FMLA-qualifying. The Township contends that FMLA regulations require employees to complete and submit the form. The Township also contends that the form is used to verify sick leave and, therefore, it has a managerial prerogative to require that it be completed.

PPE responds that neither the FMLA nor its implementing regulations requires an employee to complete a medical form and neither requires the Township to solicit information to determine an employee's FMLA eligibility. PPE asserts that the Township is not obligated to solicit information from employees and that the Township's FMLA responsibilities kick in only after an employee requests information on FMLA leave. PPE further asserts that the form is unrelated to sick leave verification and is a means to force employees to apply for FMLA leave, which would circumvent negotiations concerning the concurrent or consecutive use of paid leave with an FMLA leave. PPE argues that the form is wholly related to FMLA, as evidenced by its title, and, therefore,

should be provided to employees only upon their request for an FMLA leave.

We will first address the Township's preemption argument. FMLA's implementing regulations place an affirmative obligation on the employer to notify employees of their FMLA leave eligibility. 29 C.F.R. § 825.300(b)(1). The regulations also place an affirmative duty on the employer to solicit necessary information from an employee to designate whether leave is FMLA qualifying. 29 C.F.R. § 825.300(d). The FMLA regulations provide, in pertinent part:

> In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson[2] to ascertain whether leave is potentially FMLA-qualifying.
>
> [29 C.F.R. § 825.301(a)]

The implementing regulations permit the employer to use a doctor's certification as a tool to secure adequate information to meet that obligation. FMLA regulations provide, in pertinent part:

> An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the

2/ 29 C.F.R. § 825.301(a) defines spokesperson as follows, "if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave."

> employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member.
>
> [29 C.F.R. § 825.305(a); emphasis added]

Under this regulatory framework, an employer may need to use a doctor's certification or similar means to ascertain an employee's FMLA eligibility and meet its notice and designation obligations. However, there may be circumstances where the employer has sufficient information from the employee to meet its designation obligations without the use of a doctor's certification. For example, when an employee has a broken arm and the medical condition is obvious. Accordingly, the employer's ability to compel an employee to submit a doctor's certification depends on the facts surrounding each employee's leave.

The FMLA regulations do not address an employer's duty to designate leave as FMLA-qualifying when, as in this case, the employee declines FMLA leave and wishes to use paid leave.[3/] Therefore, under these specific facts, the employer did not have

---

3/ The parties do not dispute that the obligation to use paid leave concurrently with FMLA leave is mandatorily negotiable. Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd 28 NJPER 427 (¶33156 App. Div. 2002). These parties have not reached an agreement on whether or not paid leave and FMLA leave must run concurrently. The employer, therefore, is not using the form to implement a negotiated leave system requiring employees to take FMLA leave whenever eligible.

a statutory right to require completion of the form. However, an employee who decline FMLA leave and does not complete a medical certification may waive FMLA protections. Ridings v. Riverside Medical Center, 537 F.3d 755 (7th Cir. 2008).

We next address the employer's argument that requiring completion of the form is a lawful exercise of its managerial prerogative to verify sick leave.

An employer has a prerogative to establish a sick leave verification policy and to use reasonable means to verify employee illness or disability. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982). Since Piscataway, we have decided dozens of cases involving sick leave verification policies. We have repeatedly held that an employer has a prerogative to require employees on sick leave to produce doctors' notes verifying their sickness. See, e.g., Hudson Cty., P.E.R.C. No. 93-108, 19 NJPER 274 (¶24138 1993); City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24102 1993); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988). However, sick leave verification does not permit an employer to routinely request details of an employee's illness. City of Trenton, P.E.R.C. No. 2005-20, 30 NJPER 413 (¶135 2004) (absent a record of sick leave abuse, sick leave

verification does not entitle an employer to details of an employee’s illness).

Unlike a doctor’s note, the form at issue requires an employee’s healthcare provider to detail the illness and treatment timeline for the employee or the employee’s family member. Because the employer does not need the details of an illness to verify sick leave, on balance, absent a question of sick leave abuse or fitness for duty, an employee’s privacy interests outweigh the employer’s interest in obtaining details of an employee’s illness or injury. Id.

ORDER

The Township of Parsippany-Troy Hills has neither a managerial prerogative nor a statutory right to require employees who decline FMLA leave to complete a FMLA medical certification.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: August 12, 2010

Trenton, New Jersey