P.E.R.C. NO. 2011-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIDGETON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-203

BRIDGETON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses the Complaint in an unfair practice case filed by the Bridgeton Education Association against the Bridgeton 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., when it unilaterally established a policy requiring employees who take leave under the federal Family and Medical Leave Act to concurrently use their accrued paid sick leave. The Commission holds that the Association's refusal to negotiate the policy, citing the pending unfair practice charge, once the Board requested negotiations is a waiver of its rights to negotiate the 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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Appearances:

For the Respondent, Casarow, Kienzle & Raczenbek, attorneys (A. Paul Kienzle, Jr., of counsel)

For the Charging Party, Law Office of Ned P. Rogovoy (Ned P. Rogovoy, of counsel)

DECISION

On December 9 and 16, 2008, and on May 11, 2009, the Bridgeton Education Association filed an unfair practice charge and amended charges against the Bridgeton Board of Education. The charge, as amended, alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(5)[1/], by unilaterally establishing a policy requiring employees who take leave under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., to

1/ This provision prohibits public employers, their representatives or agents from: "(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."

concurrently use their accrued paid sick leave. We find no violation of the Act and dismiss the Complaint.

On July 27, 2009, a Complaint and Notice of Hearing issued. On August 24, the Board filed an Answer denying the allegations and asserting that the Association waived its right to negotiate over the policy.

On October 13, 2010[2/], the parties appeared before Hearing Examiner Steven Katz and agreed to stipulate the facts, waive a hearing examiner's report and recommended decision, and have the Commission issue a decision based on the stipulated facts and the parties' legal arguments.[3/] See N.J.A.C. 19:14-6.7.

Based upon the parties' stipulations and the exhibits admitted into evidence, these facts comprise the entire record:

1. Respondent, Bridgeton Board of Education, is a public employer within the meaning of the New Jersey Employer-Employee Relations Act.

2/ In the interim, the matter was held in abeyance at the parties' request during protracted settlement efforts.

3/ The parties were advised that the facts as stipulated constitute the complete record to be submitted to the Commission. The Association was placed on notice that to the extent that the stipulated facts are insufficient to sustain its burden of proof by a preponderance of the evidence, the Complaint may be dismissed by the Commission. Similarly, the Board was advised that it too must rely upon the sufficiency of the stipulated record to sustain any affirmative defenses it has asserted to rebut or disprove the existence of a prima facie case established by the Association.

2. Charging Party, Bridgeton Education Association, is an employee representative within the meaning of the Act.

3. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 2009 through June 30, 2012.

4. Upon the enactment of the FMLA in 1993, the Board unilaterally established a policy requiring employees who take leave under the FMLA to concurrently use their accrued paid sick leave to exhaustion.

5. The Association President was approached by a bargaining unit member on or about November 24, 2008 about her desire to have her FMLA leave and her accrued paid sick leave run consecutively. At this time, the Association President contacted a New Jersey Education Association (NJEA) UniServe Representative regarding this issue. The UniServe Representative determined that since the enactment of the FMLA, the Board's policy has been to run FMLA leave and accrued paid sick leave concurrently. This unfair practice charge ensued.

6. Since the enactment of the FMLA, hundreds of Board employees have taken FMLA leave and the Board has consistently applied its policy to all.

7. Within a month after the unfair practice charge was filed, the Board proposed to negotiate the policy with the Association during a negotiations session for a successor collective negotiations agreement. The Board again proposed to negotiate the policy with the Association at three subsequent negotiations sessions. Each time, the Association refused to negotiate the policy, citing the pendency of the unfair practice charge.

The Association argues that the Board's unilateral establishment of the policy in 1993 was a per se violation of the Act's requirement to negotiate in good faith.

The Board does not dispute that the policy is mandatorily negotiable. See Lumberton Ed. Ass'n and 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) (whether an employer runs an employee's FMLA leave and accrued paid leave concurrently or consecutively is a mandatorily negotiable term and condition of employment). It argues that the Association waived its right to negotiate the policy by refusing to negotiate it at four negotiations sessions between the parties in the months after the charge was filed. We agree.

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]

Majority representatives may waive their right to negotiate over a mandatorily negotiable subject. But any waiver of a statutory right to negotiate must be "clear and unmistakable."

Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); See also UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009).

Negotiations for a successor agreement commenced within a month after the initial unfair practice charge was filed. At four negotiations sessions, the Board proposed to negotiate the policy with the Association. The Association refused each time, citing the pendency of the unfair practice charge. The Association's refusal to negotiate once it had notice of the policy constitutes a clear and unmistakable waiver of its right.

The parties stipulated that the Association raised the issue of the Board's policy on or about November 24, 2008, after the policy had been in effect for approximately 15 years. Based on the stipulated record, we are unable to conclude that the Association had waived its right to negotiate the policy prior to the Board's proposal to negotiate.

We need not address the merits of the Association's argument that the Board's unilateral establishment of the policy in 1993 was a per se violation of the Act's requirement to negotiate in good faith because the unfair practice charge was filed well beyond the Act's six-month statute of limitations. N.J.A.C. 34:13A-5.4(c). See also State-Operated Sch. Dist. of the City of Newark, P.E.R.C. No. 98-68, 24 NJPER 11 (¶29007 1997), aff'g H.E. No. 97-29, 23 NJPER 327 (¶28149 1997) (absent a demand to

negotiate, there can be no violation of the duty to negotiate in good faith). Once the Association addressed the FMLA policy with the Board on November 24, 2008, the Board agreed to include the issue in the parties' successor negotiations, which were commencing in one month. The Board's delay of one month is not tantamount to a refusal to negotiate in good faith.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eaton, Eskilson, Krengel and Voos voted in favor of this decision. None opposed.

ISSUED: February 24, 2011

Trenton, New Jersey