D.U.P. NO. 86-11

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

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-86-190

FREEHOLD REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION,

Charging Party.

Synopsis

The Director of Unfair Practices declines to issue a complaint with respect to allegations of refusal to negotiate filed by the Charging Party against Freehold Regional High School District. The Director finds that under In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-6, 8 NJPER 95 (¶13039 1982), and In re Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984), the sick leave verification policy implemented by Respondent is a non-negotiable matter of managerial prerogative.

Further, the Director finds that the sick leave verification policy held to be invalid by the Commissioner of Education in City of Burlington, 1985 SLD ___ (Comm. of Ed. 7/1/85, aff'd St. Bd. of Ed. 11/8/85), is distinguishable from the instant policy in that no arbitrary discipline is imposed without consideration first being given to possible legitimate absences and/or mitigating circumstances.

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Appearances:

For the Respondent
Kenney & McManus, Esqs.
(Malachi J. Kenney, of counsel)

For the Charging Party
Selikoff & Cohen, P.A.
(Joel S. Selikoff, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 22, 1986, the Freehold Regional High School Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"), against the Freehold Regional High School District Board of Education ("Board"), alleging violations of subsections

(a)(1) and (5) of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/]

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charge.[2/] The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act. The Commission's rules also provide that I may decline to issue a

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1/ These subsections 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 and (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."

2/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice ... Whenever it is charged that anyone has engaged or is engaging in any such practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof..."

complaint if the allegations in the charge do not on their face constitute an unfair practice.[3/]

The Association alleges that the Board committed an unfair labor practice by unilaterally implementing "A Remedial Plan for Staff Attendance", Policy #4100, and by requiring conferences with individual employees whose rate of absences exceeded 3.5% of scheduled school days. The Association maintains that this sick leave verification policy as framed imposes discipline on employees for utilization of their entitled sick leave and thus is subject to negotiation. Further, the Association asserts that the required conferences are triggered by an arbitrary number of absences and not by the desire to verify an employee's absences.

The Board, on the other hand, denies it has committed an unfair practice. It is the Board's position that the actions taken were a permissible exercise of inherent management rights and therefore are not negotiable. The Board relies on In re Piscataway Twp. Bd. of Education, P.E.R.C. No. 82-6, 8 NJPER 95 (¶13039 1982)(Piscataway I); In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 83-11, 9 NJPER 152 (¶14072 1983)(Piscataway II) and In re Freehold Regional High School District Bd. of Ed., P.E.R.C. No. 83-10, 8 NJPER 438 (¶13206 1982).

In Piscataway I, the Commission specifically addressed the question of sick leave verification policies. Therein it held that:

3/ N.J.A.C. 19:14-2.1. et seq.

> ...the mere establishment of the Board's sick leave policy does not impinge on the Association's ability to negotiate sick leave benefits or an individual's ability to utilize sick leave for proper purposes. To the contrary, the policy serves a legitimate and non-negotiable management need to insure that employees do not abuse contractual sick leave benefits. 8 NJPER at 96-97.

Here, Policy #4100 is not unlike the policy considered in the Piscataway cases. The Commission has consistently held that such verification plans are within an employer's managerial prerogative and accordingly may be implemented without negotiation.

With regard to the Association's claim that the imposition of employee conferences is not within the purview of the verification policy, the Commission has dealt with this same issue in In re Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) where, the Commission stated:

> We next consider whether the Board had a non-negotiable managerial prerogative to require employees on sick leave for a certain number of days to attend conferences with supervisory personnel. We hold it did.
>
> There is no merit to the Union's claim that these conferences may not be imposed unilaterally where the Board does not suspect that an individual abused sick time. The dispositive fact is that the Board has made the managerial determination to apply this policy on a uniform basis and the Union is challenging the establishment of this policy. Accordingly, this policy decision to require conferences for all employees after a certain number of absences is part of the employer's prerogative to establish a sick leave verification program under Piscataway I. 10 NJPER at 547.

The same reasoning must be applied here. Conferences are uniformly held with all employees whose absences exceed 3.5%. As evidenced by the form used at the time of the conference (Exhibit "2" attached to the Charge), the reasons for the employee's absences are discussed and verification is made with regard to any stated mitigating factors. This policy and the policy reviewed in Newark appear indistinguishable.

Lastly, the Association argues that Policy #4100 imposes discipline and is therefore negotiable. The policy permits the Board to consider withholding an increment and/or other action if an employee's absences continue to exceed the 3.5% standard. Once again, an almost identical provision was considered by the Commission in Newark. In discussing this issue, the Commission stated:

> The Union has also objected to that portion of the Attendance Improvement Plan which indicates that after eight absences, the employee may be subjected to loss of increments, reduction of salary, or separation....The Union contends that by this provision the Board is disciplining employees who have exercised their statutory right to use sick leave. It notes that employees are guaranteed ten sick days in any school year, [See] N.J.S.A. 18A:30-2, and have the contractual right to 15 sick days. We reject this contention.
>
> This provision, as written, does not impose discipline. By its very terms, it only provides that after an employee reaches a certain number of absences, the Board may consider whether to institute disciplinary proceedings in the event it determines that sick leave is being abused. 10 NJPER at 547.

Accordingly, the Commission held that that provision of the policy was non-negotiable.

Here, the Board's unilateral implementation of the sick leave verification policy (#4100) and its requirement of employee conferences are within its managerial prerogative and as such are not negotiable.

Further, the Commissioner of Education's ruling in City of Burlington, 1985 SLD ___ (Comm. of Ed. 7/1/85, aff'd St. Bd. of Ed. 11/8/85), is not inconsistent with this decision.

In Burlington, supra, the attendance policy in issue provided that employees who exceeded 3.5% of occasional absence would automatically receive a "letter of warning" reminding them that occasional absences are against Board policy and asking them to improve their record. If attendance was not improved, a conference with the building principal was required. It was not until this conference that mitigating or aggravating circumstances were taken into account. Accordingly, the Commissioner and the State Board held that this policy was unreasonable and arbitrary because discipline in the form of the "letter of warning" was imposed accross the board, without first considering the reasons for any absences. It further held policy unlawfully discipline employees without any accounting for legitimate absences.

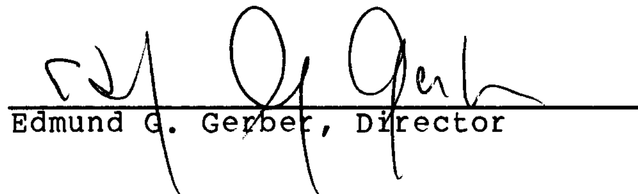
The attendance policy in the present case is clearly distinguishable. Here, if an employee's absences exceed 3.5%, a conference with his or her supervisor is required. During that conference, a written "Supervisory Report" is completed which lists the number of days absent and any "comments" on the attendance

record. Specifically, the "comment" section asks for "areas of commendation and/or concern; mitigating factors." This report is then placed in the employees' personnel file.

Under this policy, no arbitrary discipline is imposed. As stated above, the Commission has held that requiring employees to attend conferences after a certain number of absences is not discipline. In re Newark Board of Education, supra. Further, the written report that is issued at the time of the conference merely lists the number of absences[4/] and provides for comments. In that regard, it is specifically stated that commendation can be given for a good attendance record, or mitigating factors (such as legitimate excuses for absences) can be noted. Therefore, this policy clearly differs from the one in City of Burlington in that the employees do not automatically receive a "letter of warning" without due consideration of the individual circumstances involved.

Accordingly, for all of the reasons set forth above, I have determined that the Commission complaint issuance standard has not been met and I decline to issue a complaint in this matter.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICE PROCEEDINGS



Edmund G. Gerber, Director

DATED: April 11, 1986
Trenton, New Jersey

4/ The Appellate Division has held that statistical references to the number of absences and comments thereon may be included on formal evaluation forms. See, Hazlet Twp. Board of Education, App. Div. Dkt. No. A-2875-78 (March 27, 1980).