D.U.P. NO. 2004-7

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

In the Matter of

UPPER SADDLE RIVER BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2003-245

UPPER SADDLE RIVER EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint in a case alleging a Board of Education unilaterally implemented and refused mid-contract negotiations regarding a leave policy requiring Family and Medical Leave Act (FMLA) time off run concurrently with paid sick leave. The Director found that the majority representative knew of the Board's leave policy, did not object to its original adoption in 1998 or its subsequent consistent implementation, thereby waiving its ability to contest the Board's continued use of the policy or to compel mid-contract negotiations.

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Appearances:

For the Respondent,
Scarinci & Hollenbeck, attorneys
(Richard M. Salsberg, of counsel)

For the Charging Party,
Bucceri & Pincus, attorneys
(Sheldon H. Pincus, of counsel)

REFUSAL TO ISSUE COMPLAINT

On March 22, 2003 the Upper Saddle River Education Association filed an unfair practice charge alleging that the Upper Saddle River Board of Education unilaterally implemented, and has refused to negotiate, a leave policy requiring Family and Medical Leave Act (FMLA) time-off to run concurrently with other paid leave in violation of N.J.S.A. 34:13A-5.4a (1) and (5)[1/] of

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1/ These provisions prohibit public employers, their representatives and 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 (continued...)

the New Jersey Employer-Employee Relations Act (Act). Specifically, on or about January 1, 2003, the Board denied a unit member's request that certain leave she requested not be designated as family leave (consecutive leave); the Board refused the request and designated the leave as both paid (accumulated leave) and unpaid leave (Family and Medical Leave Act, 28 U.S.C. §2601 et seq.)(concurrent leave). The Association did not allege that the Board actually changed an existing practice. While the Board acknowledges that it has a general duty to negotiate over proposed new rules or modifications of existing rules, it contends that it has not violated the Act because the leave policy at issue was adopted in 1998 with the full knowledge of the Association and has been applied consistently since its adoption. The Board contends therefore, that since the Association has never since sought to negotiate the leave policy, the charge is untimely filed.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has

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1/ (...continued)
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."

delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. In correspondence dated April 13, 2004, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

FINDINGS OF FACT

The Education Association represents a broad-based negotiations unit of the Board's certificated and non-certificated employees, generally including teaching, clerical, custodial and related staff.

The parties submitted a collective agreement covering this negotiations unit for the period July 1, 1998 through June 30, 2002. The Association apparently has a current agreement with the Board covering the unit which continues in effect through June 30, 2004, presumably a July 1, 2002 - June 30, 2004 agreement.

On or about April 14, 1998 the Board sent all staff members, including the Association's officers, a superintendent's memo with an attached draft of a proposed Board policy. The memo stated: "[p]olicy #3431.1 will be adopted at the April 20, 1998

Board meeting. The policy has been reviewed extensively, but if you have any suggestions please submit them to my office in writing by Friday morning. Thank you."

On April 20, 1998, the Board adopted Policy Number 3431.1 and Regulation Number 3431.1R (policy and regulation) entitled "Family Leave" at a public meeting. The policy and regulation provide, in pertinent part, as follows:

Policy:

> Family Leave
>
> Employees are entitled to family leave pursuant to the state Family Leave Act, N.J.S.A. 34:11B-1 et seq., and the federal Family and Medical Leave Act, 29 U.S.C. 2601 et seq.
>
> An employee shall be eligible for state family leave once he or she has worked for at least twelve (12) months, for at least 1,000 hours. An employee shall be eligible for federal leave after he or she has worked for at least twelve (12) months, for at least 1,250 hours.
>
> An employee who takes leave pursuant to the state act is entitled to twelve (12) weeks of leave in a twenty-four (24) month period. An employee who takes leave pursuant to the federal act is entitled to twelve (12) weeks of leave in a twelve (12) month period. The leave pursuant to both acts shall be without pay, but, health benefits, if any, shall be continued.
>
> An employee on family leave shall not work full-time for another employer, unless he or she was so employed full-time prior to the commencement of family leave. No teacher on family leave shall, on the basis of such leave, be denied the opportunity to substitute in the Upper Saddle River School District.
>
> The Board hereby authorizes the Superintendent to develop regulations which are consistent with this policy.

Legal References: N.J.S.A. 34:11B-1 et seq.
N.J.A.C. 13:14-1.1 et seq.
29 U.S.C. 2601 et seq.
29 C.F.R. 825

[Policy Number 3431.1].
Regulation:

Family and Child Rearing Leave Regulation

An employee who desires to take a leave of absence to care for a child, an ill family member, or for the employee's own illness, shall set forth his/her request in writing to the Superintendent. The employee need not indicate the statute pursuant to which he/she will be taking the requested leave. However, the employee shall provide the Superintendent with enough information about the reason for the leave so that the Superintendent is able to determine under which statute, if any, the leave is taken. Once the Superintendent determines that the leave requested qualifies as family leave, the employee will be notified that the leave, if approved, will count against the employee's statutory family leave entitlement.

[Regulation File Code 3431.1].

* * *

Since their adoption, the policy and regulation have been applied in the following circumstances:

Margaret Donnelly

1999: Requested sick leave followed by FMLA leave. She was charged with FLMA leave for the entire period.

Marguerite Soojan

1999: Requested sick leave to be followed by FMLA. She was charged with FMLA for entire period.

Margaret Donnelly

2001: Requested sick leave followed by FMLA leave. She was charged with FMLA leave for the entire period.

John Farrow

2001: Requested sick leave only. He was charged with FMLA leave as well.

Ed Grafal

2001: Requested medical leave (sick leave). He was charged with 43 sick days and 2 holidays as well as FMLA leave for the entire period.

Cynthia Haas

2002: Requested accrued sick leave followed by FMLA leave. She was charged with FMLA leave for the entire period.

Kristen Martin

2003: Requested "maternity leave"; she was charged with FMLA leave.

[Board's November 10, 2003 letter](emphasis in original).

On or about January 1, 2003 an Association member requested the use of accumulated sick leave for the period December 20, 2002 through February 28, 2003. It is unclear from the parties' submissions whether the Association member at issue was one of the members referred to in the Board's November 10, 2003 letter statement supra. The member, nevertheless, requested that the leave not be designated as family leave during that period. On January 10, 2003, the member was advised by the superintendent

that the leave request was designated concurrently as family leave under the Family and Medical Leave Act and accumulated sick leave.

On or about January 13, 2003 and February 3, 2003, the Association demanded negotiations regarding the Board's policy to require concurrent use of FMLA and other accumulated leave time. The Board refused and continues to refuse to negotiate regarding the above policy during the current contract period.

The parties do not dispute that they have negotiated two agreements since the policy and regulation were adopted in 1998, are currently under contract through the end of the 2004 school year and will commence successor negotiations in early 2004.

ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Family and medical leave, whether paid or unpaid, are mandatorily negotiable terms and conditions of employment. See Lumberton Ed. Ass'n and Lumberton Tp. Bd. of Ed., 28 NJPER 427 (¶33156 App. Div. 2002) affirming P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001)(Board should have negotiated with union before enacting policy requiring employees to use paid leave concurrently with unpaid leave - charge filed within six months of Board's unilateral adoption of concurrent use policy).

Section 5.3 also defines an employer's duty to negotiate before changing working conditions, "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978).

The evidence submitted in connection with this matter demonstrates that while the Board may have unilaterally implemented a negotiable family leave policy in 1998, and refused to negotiate over the Association's mid-contract demand in early 2003, the 1998 policy was adopted with the full knowledge of the Association, was not objected to by the Association and has been implemented at least five times since its adoption. The Board has not changed its family leave policy since its enactment in 1998, and the Association has not sought to negotiate over that policy during the negotiations for the two successor collective negotiations agreements.

Since the Board has not actually changed its leave policy, the issue before me is whether the Board was obligated to negotiate mid-contract over the pre-existing leave practice after the Association failed to negotiate over this issue during negotiations for successor agreements.

The parties collective agreement expires on June 30, 2004. The Board's family/medical leave policy was implemented in April

1998, and the Association has not alleged - nor has the Board changed that policy. The Board's January 10, 2003 decision that the instant leave request run concurrently under the Family Medical Leave Act and accumulated sick leave was consistent with the practice established in, and implemented since, 1998. Although the Board would be obligated to negotiate over the Association's demand in negotiations for a successor collective agreement, based upon the above facts, I find that it was not obligated to negotiate over the leave practice mid-contract. See State of N.J. (Stockton State College), P.E.R.C. No. 90-91, 16 NJPER 260 (¶21109 1990); State of N.J. (State College Locals), P.E.R.C. No. 89-129, 15 NJPER 343 (¶20152 1989); see also Bor. Upper Saddle River, D.U.P. No. 99-9, 25 NJPER 80 (¶30032 1999).

Based upon the same pertinent facts and similar rationale, I find that the Association has waived its right to negotiate over the Board's family/medical leave policy until negotiations for a successor agreement.

A waiver will be found if the employee representative has expressly agreed to a contractual provision authorizing the change, or it impliedly accepted a past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12

NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987).

There has been no contention in this matter that the Association expressly agreed by a contractual provision to the Board's family leave policy or regulation. Rather, I have considered whether the Association waived its right during the life of the current contact to negotiate concurrent versus consecutive use of leave time because it acquiesced to the Board's implementation of that policy in 1998. I find that it did.

The initial waiver that occurred here was when the Association failed to contest the Board's 1998 apparent unilateral imposition of its leave policy. The Association waived its negotiations right again by not demanding to negotiate the issue in each round of negotiations for a successor agreement. By waiving its right to negotiate on this matter, the Board's policy and method of implementation became the parties' practice.

The Commission has, on several occasions, considered similar claims.

In Stockton State College, the Commission found that the employee representative waived its right to negotiate over compensation for a particular workshop by acquiescing to the

employer's unilateral decision to set compensation, or no compensation, for previous workshops.

In Monmouth Cty. Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992), the Commission found that the employer did not violate the Act when it assigned civilians to perform clerical work previously performed by corrections officers; the correction officers' representative had not objected to such assignments in the past.

In State of New Jersey (State College Locals), the Commission found that the employer regularly modified travel regulations and policies without negotiations; therefore, it did not have an obligation to negotiate before adopting more such policies.

In Phillipsburg Bd. of Ed., P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989), the Board was found not to have violated the Act by unilaterally increasing the number of instructional periods for some teachers. The Board had regularly increased the number of instructional periods without objection by the employee representative.

In South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987), the Board did not violate the Act when it unilaterally eliminated an assigned duty period and proportionately reduced the teacher's salary. The Board's actions conformed to conduct in prior

schedule reductions, which the Association had never sought to negotiate.

Under all the circumstances of this case, I find that the Board did not have an obligation in January 2003, or presently (mid-contract), to negotiate in good faith over changing its established accumulated leave time practice. The Association was aware that the Board had adopted a policy and regulation five years earlier requiring concurrent use of such leave. It knew or should have known that the policy and regulation had been applied to similar requests at least five times in the five years since its adoption. Yet, the Association did not seek to negotiate over the policy during negotiations for successor agreements.

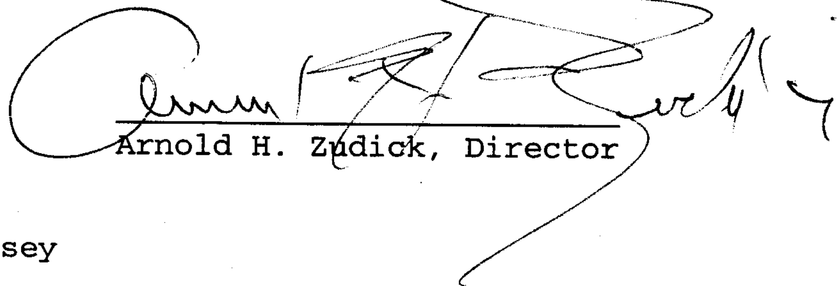
In this case, the Association has, therefore, waived the right to negotiate, mid-contract, concerning consecutive versus concurrent leave. See NLRB et. al. v. Roll and Hold Warehouse and Distrib. Corp., 162 F.3d 513, 518 (7th Cir. 1998), citing W.W Grainger v. NLRB, 860 F.2d 244, 248 (7th Cir. 1988); see also Hardin, The Developing Labor Law, 708-709 (3d ed. 1992).

Based upon the above, the Association had actual or constructive knowledge of the Board's family leave policy and regulation but waived its right to negotiate over consecutive versus concurrent use of leave. I find that the Board did not breach its obligation to negotiate in good faith, when it refused

the Association's January and February 2003 requests to negotiate, mid contract.

Accordingly, I find that the Commission's complaint issuance standard has not been met. The Association's 5.4a(1) and (5) allegations technically are timely filed because they reference an act (the refusal to negotiate in early 2003) that occurred within six months of the filing of the charge (March 2003), but based upon the above facts and analysis, the allegation, even if true, does not set forth a violation of the Act. I decline to issue a complaint on the allegations of this charge.[2]

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: May 17, 2004
Trenton, New Jersey

2/ N.J.A.C. 19:14-2.3.