I.R. NO. 2020-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ACADEMY URBAN LEADERSHIP
CHARTER HIGH SCHOOL,

Respondent,

-and- Docket No. CO-2020-169

ACADEMY URBAN LEADERSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon an unfair practice charge and amended charge alleging that a public employer unilaterally (re-)imposed accrual requirements in sick leave and personal leave provisions in 2019-2020 individual employment contracts during parties' collective negotiations for an initial agreement. The 2017-2018 and 2018-2019 contracts signed by individual unit employees and representatives of the employer omitted accrual requirements that were included in earlier employment contracts. The employer's conduct allegedly violated section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act.

The Designee determined that the majority representative demonstrated a substantial likelihood of success because the "mistaken" provision, in effect for two years, established a term and condition of employment. The Designee relied upon Barnegat Tp. Bd. of Ed. and Barnegat Fed. of Teachers, P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd. NJPER Supp. 2d 268 (¶221 App. Div. 1992).

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Appearances:

For the Respondent,
Lenox Law Firm
(Nicholas J. Repici, attorney)

For the Charging Party,
Oxfeld Cohen, PC
(Randi Doner April, attorney)

INTERLOCUTORY DECISION

On December 20, 2019 and January 6, 2020, Academy Urban Leadership Education Association (Association) filed an unfair practice charge and amended charge against Academy Urban Leadership Charter High School (Academy). The earlier filing was accompanied by an application for interim relief, a certification and exhibits. The charge, as amended, alleges that "up [to] and until the 2019-2020 school year," the Academy signed individual employment contracts with unit employees that provided ten sick days and three personal days but in the current school year, the contracts provided those days at an accrual rate of one day per

month. The charge alleges that the Association was certified as the majority representative of certain Academy employees in or about June, 2016 and the parties are in mediation for an initial collective negotiations agreement. The Academy's conduct allegedly violates section 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On December 23, 2019, I issued an Order to Show Cause, setting forth dates for service upon the Academy, receipt of the Academy's response and argument in a telephone conference call. Following a series of mutual and unchallenged postponement requests and the parties' efforts to informally resolve the matter, the parties argued their respective cases on February 4, 2020.

The Academy disputes that the accrual provisions in the 2019-2020 employment contracts changed the status quo for teaching staff members at the time the Association was certified by the Commission. Accrual provisions had been included in individual employment contracts.

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."

The following facts appear. On June 1, 2016, the Association was certified as the majority representative of a collective negotiations unit of certificated employees of the Academy, including teachers, nurses, guidance counselors, and child study team members (Dkt. No. RO-2016-041). On October 24, 2016, the Association filed a Notice of Impasse, seeking the assistance of a mediator for purposes of collective negotiations (Dkt. No. I-2017-051).[2/] On January 29, 2018, the Association was again certified as the majority representative of the unit described above, following an election (Dkt. No. RD-2018-001).

The Academy and all individual certificated employees negotiated multi-page "employment contracts" for each school year for several years. These contracts (on Academy letterhead) set forth job descriptions and duties and provisions covering work hours, salary, benefits, etc. In employment contracts signed by certificated staff, individually and Academy Board President and Lead Administrator for the 2015-2016 and 2016-2017 school years (i.e., before and after the Association was certified as majority representative), sick leave and personal leave were "accrued" at specified rates. For example:

2/ Mediation efforts were subsequently held in abeyance for a lengthy period pending an informal disposition of an unfair practice charge (Dkt. No. CO-2017-090). Other charges among these parties about conduct in the negotiations process have been resolved (D.U.P. No. 2020-4, 46 NJPER 138 (¶31 2019); D.U.P. No. 2020-5, 46 NJPER 140 (¶32 2019).

> B. Sick Leave
> You are entitled to seven (7) sick leave days during the term of your employment under this Employment Contract. Sick leave is accrued at the rate of .7 days per month . . .
>
> C. Personal Leave
> You are entitled to three (3) personal days during the term of your employment under this Employment Conract. Personal leave [is] accrued at the rate of .3 days per month . . . [Academy Exhibits A, C]

In employment contracts signed by certificated staff and the Academy's Chief School Administrator and Business Office Administrator for the 2017-2018 and 2018-2019 school years, sick leave and personal leave were not accrued. For example:

> B. Sick Leave
> You are entitled to ten (10) sick leave days during the term of your employment under this Employment Contract. Unused day(s) will roll over as sick days for the next school year (2018-2019, [2019-2020]) not to exceed a total of 20 days at any time . . .
>
> C. Personal Leave
> You are entitled to three (3) personal days during the term of your employment under this Employment Contract. Unused personal leave does not roll over. . . .
> [Academy Exhibit D]

In employment contracts signed (or unsigned) by certificated staff and Academy representative(s) for the 2019-2020 school year, sick leave and personal leave were again "accrued" at specified rates. For example:

> B. Sick Leave
> You are entitled to ten (10) sick leave days during the term of your employment under this Employment Contract. Sick leave is accrued at the rate 1.0 days per month. . . .

> C. Personal Leave
> You are entitled to three (3) personal days during the term of your employment under this Employment Contract. Personal leave is accrued at the rate of .3 days per month. . . .
> [Academy Exhibit B]

The parties are in negotiations for an initial collective negotiations agreement (Association certification). A mediation session is currently scheduled for March 4, 2020.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Section 5.3 of the Act provides:

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

To prove a violation of this section, a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

"Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012). Sick leave and personal leave have been found to be mandatorily negotiable. See, e.g., Board of Educ. of Piscataway Township v. Piscataway Maintenance & Custodial Assoc., 152 N.J. Super. 235 (App. Div 1977); State Op. School Dist. of City of Newark, P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999).

The Academy urges that the Association cannot demonstrate a substantial likelihood of success on the merits because changes made to the individual employment contracts, ". . . were to correct inadvertent mistakes in the employment contracts in order to restore the contracts to the language in place at the time the Association was formed in [June] 2016" (brief at 3). Specifically, the Academy contends that accrual provisions in the 2019-2020 employment contracts lawfully restored those provisions from the 2015-1016 and 2016-2017 contracts. It cites Grondorf, Field, Black & Co. v. NLRB, 107 F.3rd 882, 154 LRRM 2684 (D.C. Cir. 1997).

In Grondorf, two employers declared an impasse following negotiations with the union and announced that they would prepare a final offer, ". . . containing essentially the same provisions as their earlier proposal." The employers proposed a change in health insurance and retirement plans that the union rejected. The union then struck. One of the employers, advertising for replacement workers, invited unit employees and new applicants to a meeting where it distributed a letter advising that it was now an "open shop" and proposing new terms and conditions of employment. It ". . . listed eight paid holidays - one fewer than under the companies' final offer to the union - and overtime provisions varying from those previously proposed." Twelve striking employees promptly signed a union resignation form and the employer sent the form to the union. Over the next several days, six more striking workers resigned from the union and the eighteen returned to work. After realizing that its guidelines contained holiday and overtime provisions different from those in the companies' final offer, one employer "distributed new guidelines along with a letter acknowledging their earlier mistake."

The ALJ found that the companies had violated section 8(a)(5) by denying the union an opportunity to bargain over the changes from the union benefit plan to the employer-sponsored plan and then discontinuing contributions to the union plan. The ALJ also found that a company violated section 8(a)(1) by

renouncing and bypassing the union in the meeting and by soliciting employee resignations from the union. In a pertinent part, the ALJ dismissed the union's 8(a)(5) charge that an employer unilaterally implemented new holiday and overtime provisions, finding that the discrepancies between the guidelines distributed and its final offer, ". . . were inadvertent and promptly corrected" (the correction was made within about two weeks of the error).

The NLRB reversed the ALJ's dismissal, finding that the employer's subsequent correction of the guidelines was not an "effective repudiation" of its earlier conduct.

The Court reversed, explaining:

> [We] think an employer's unilateral change in terms or conditions of employment must, at a minimum, be deliberate. Where the change is a simple mistake, promptly corrected without harm to employees, an employer may not be reasonably found to have breached its statutory duty to bargain. Put another way, in order to impose liability under the Act, although the Board need not find that an employer intended to frustrate the bargaining process through a unilateral change in a term and condition of employment, the Board must at least determine that the employer either intended to make the unilateral change in the first instance or failed to remedy an otherwise inadvertent change once discovered. [Grondorf, 154 LRRM at 2689]

Unlike a "simple mistake" issued and corrected within a couple of weeks, the "mistakes" in this case were the deletion of two sentences from two benefit provisions in numerous annual individual employment contracts signed by two Academy

representatives for two consecutive years. The consecutive year omissions meant that unit employees received all available sick and personal leaves at the start of each respective school year, instead of graduated accruals over the course of those years. One must presume Academy "intent" from the signatures of its two representatives on the individual employment contracts. See, e.g., Paterson Bd. of Ed., P.E.R.C. No. 90-42, 15 NJPER 688, 691 (¶0279 1989).

A case of greater factual and legal relevance is Barnegat Tp. Bd. of Ed. and Barnegat Fed. of Teachers, P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd. NJPER Supp. 2d 268 (¶221 App. Div. 1992). There, the employer argued that its unilateral discontinuation of a two-year practice of permitting custodial and cafeteria employees to convert unused personal days into accumulative sick days was lawful, ". . . because it was simply correcting an unknown and unauthorized error by its payroll clerk." In finding a violation of section 5.4a(5) and derivatively a(1) of the Act, the Commission wrote that it is not concerned about ". . . how a longstanding practice came to exist, but that it did exist." Id., 16 NJPER at 485. It eschewed the notion that the error was "isolated" or "informal," writing that the board's business secretary and payroll clerk authorized the disputed forms to employees that set forth calculations and conversions of personal days into sick days. The Commission concluded that the business secretary and clerk should have known

their error and the employer, ". . . cannot now disown any duty to negotiate before correcting an error its agents created and should have detected." Id. at 485.

The Commission's rationale applies here, also. For two consecutive years, highly placed Academy representatives authorized (by signing numerous annual individual employment contracts) certificated unit employees' receipt of the allotted number of sick and personal days at the start of each school year. The subject 2017-2018 and 2018-2019 employment contract provisions are clear; they simply and directly provide what the Association claims is the status quo that the Academy impermissibly seeks to disown in negotiations for an initial collective negotiations agreement. Inasmuch as the "mistakes" are apparently not mutual, I find that the Association has demonstrated a substantial likelihood of success on the merits. See Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 609 (1989); Springfield Tp. Bd. of Ed., H.E. No. 2002-16, 28 NJPER 271 (¶33104 2002).

The Academy notes that the accrual provisions, ". . . are used only for accounting purposes for employees hired after the start of the school year (e.g., an employee hired in January will be prorated five days) and [those who] leave the Academy before the end of the school year" (brief at 7). The Academy avers that a teaching staff member hired at the start of a school year isn't precluded from using all ten allotted sick days at the outset of

that year, provided that the leave is used ". . . for legitimate purposes."

The Academy's purportedly liberal application of the accrual provisions are of no consequence in the context of this interim relief matter because the Association is contesting the unilateral reinstatement of those provisions and has demonstrated a legally sufficient status quo without them.

A public employer's unilateral change of terms and conditions of employment during collective negotiations has a chilling effect and undermines labor stability. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25, 49 (1978). The Commission has granted injunctive relief in various circumstances when terms and conditions were unilaterally changed during negotiations. See, e.g., Nutley Tp., I.R. No. 99-19, 25 NJPER 262 (¶303109 1999)(unilateral change in starting salaries); Cherry Hill Tp., I.R. No. 96-30, 25 NJPER 212 (¶30096 1996)(health benefit payments); Harrison Tp., I.R. No. 83-3, 8 NJPER 462 (¶13217 1982)(work schedules). Applying the tenets of Galloway and its progeny to this matter, I find that the Association will suffer irreparable harm as a consequence of the Academy's unilateral change of employment contract provisions (that eliminated accrual of sick and personal leave) during negotiations for a collective negotiations agreement.

The chilling effect resulting from the Academy's unilateral change during negotiations outweighs any harm suffered by the

Academy by maintaining contract provisions that do not mandate unit employee accrual of sick and personal leave time off. Finally, the public interest is not harmed by requiring the Academy to maintain certain mandatorily negotiable terms and conditions of employment during negotiations for an agreement.

ORDER

The Academy shall rescind and give no effect to sentences in 2019-2020 unit employees' individual employment contracts that prescribe accrual of sick leave and personal leave. The Academy shall reinstate such provisions without the accrual sentences. This order shall remain in effect during the pendency of this charge or until the parties' agree to leave provisions as part of mutually signed collective negotiations agreement.

This case shall be returned to processing in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: February 7, 2020
Trenton, New Jersey