

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF NEWARK,
COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-83-159

NEWARK TEACHERS UNION, LOCAL 481
AFT, AFL-CIO,

Charging Party.

SYNOPSIS

In a petition for interim relief brought by the Newark Teachers Union the Commission's designee declines to restrain the Newark Board of Education from implementing its "Attendance Improvement Plan" since the plan is an effort to verify the proper use of sick leave.

The Commission's designee did restrain the Newark Board of Education from implementing one provision of the plan which unilaterally altered a sick leave provision. The provision granted additional non-cumulative days of sick leave to all employees with 25 years seniority. The sick leave was to be used only upon the exhaustion of all of an employee's accumulated sick leave. The Board claimed that this provision constituted an extended sick leave provision. The designee however determined that said language did not constitute an extended sick leave provision and was in fact valid.

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Appearances:

For the Respondent
Louis Charles Rosen, General Counsel

For the Charging Party
Tomar, Gelade, Kamensky, Klein, Smith & Lehmann, P.A.
(Sidney H. Lehmann, Esq.)

INTERLOCUTORY DECISION

On December 30, 1982, the Newark Teachers Union Local 481 AFT, AFL-CIO ("NTU") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Board of Education of the City of Newark ("Board") committed an unfair practice in unilaterally altering terms and conditions of employment as they relate to sick leave and related policies. It was specifically alleged that said conduct was violative of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5). ^{1/}

^{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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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 employees in that unit, or refusing to process grievances presented by the majority representative."

On January 19, 1983, the Union filed a request for interim relief and further petitioned for a Temporary Restraining Order. The petition for the restraints was denied at a hearing conducted on January 21. An Order to Show Cause was signed and ultimately made returnable on February 10, 1983.

Both parties have submitted briefs, affidavits, certifications, documentary exhibits and argued orally. It is upon that record that the undersigned renders the instant decision.

The Union and Board are parties to a collective negotiations agreement for the period July 1, 1982 to June 30, 1985. This agreement, the most recent successor contract between the parties, was adopted in September 1982.

On or about November 29, 1982, the Board announced it was instituting an Attendance Improvement Program (or "AIP") which, according to the Board, was designed to improve the absentee rate of all employees of the Board including but not limited to those employees represented by the Union.

The Union claimed that the adoption of the AIP unilaterally revokes and modifies existing terms and conditions of employment and was implemented without prior negotiations with the Union and establishes new working conditions.

It is specifically alleged that the AIP altered personal leave, sick leave, funeral leave and administrative leave for attend-

1/ On February 14, counsel for the Respondent served certain documentary evidence on the undersigned. This material was filed out of time and was not considered in rendering this decision.

ance to union business and unilaterally establishes the conditions for receipt of accumulated sick leave reimbursement.

Further, the AIP unilaterally eliminates a provision of the contract which provided that

Teachers with twenty-five (25) years' experience in the system shall receive ten (10) additional non-cumulative days per year after accumulated leave has been exhausted.

The charge goes on to list a number of other alleged violations which are not the subject of the request for interim relief.

The Respondent Board argues that the cost of absences to the Board were indicative of a "systemic abuse of the leave policies of the Board and a system was needed to control and monitor sick leave." Therefore the AIP was implemented.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are similar to those applied by the courts when confronted with similar applications. The test is twofold: The substantial likelihood of success on the legal and factual allegations in the final Commission decision and the irreparable nature of the harm that will occur if the requested relief is not granted. Harrison Twp. & P.B.A. Local #178, I.R. No. 83-3, 8 NJPER 462 (¶13217 1982); New Jersey Dept. of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425 (¶13197 1982).

The AIP requires that everytime an employee is absent he or she must sign a form, "I hereby certify that my absence on _____ was due to personal illness." After three absences

in a calendar year one must have an informal meeting with their supervisor, after five absences there will be a formal conference in an administrator's office. After eight absence days the administrator will schedule and conduct another formal conference in his or her office. Upon the reaching of eight absences the "individual may be subject to loss of increment or reduction in salary or if the two full years of prior history of absences, plus the current year's history warrants such, separation from the district. Those days that an employee brings in a doctor's note will not be counted toward the eight days."

The Charging Party acknowledges that in Piscataway Twp. Bd/Ed, P.E.R.C. No. 82-64, 8 NJPER 94 (¶13039 1982) the Commission upheld the establishment of a verification policy to investigate employees suspected of abusing sick leave. The Newark Teachers Union argues that the AIP reveals that it is far more than the establishment of a verification policy with respect to abuses of sick leave. It is claimed that its very term, and certainly its application, constitute the unilateral alteration of sick and other leave benefits negotiated by the NTU.

The NTU is, however, not persuasive in this argument at least for the purpose of granting interim relief.

Piscataway is controlling here. The Commission expressly stated that the Board has a managerial right to implement measures to control abuse of sick leave by employees. The NTU claims that the signing of the certification for each absence creates an undue burden on the individual employees. There is far less of an imposition than calls or visits to one's home as was authorized in

Piscataway.

It is further argued that the required conferences and the recording of all absences and meetings in an employee's personnel file constitute, in and of itself, discipline. This argument is rejected. It cannot be said that there is a substantial likelihood of success that the Commission will find that such conduct when uniformly applied to all employees in all cases will be, by itself, construed as discipline.

The key here is that the meetings with supervisors after three, five and eight absences due to illness will not automatically trigger discipline. Such meetings to verify sick leave claims are a managerial prerogative. See Piscataway and Freehold Reg. H.S. Dist., P.E.R.C. No. 83-10, 8 NJPER 438 (¶13206 1982).

However the result of such review procedures are subject to being contested by the employees.

[W]hen...a board may adopt generally applicable verification procedures designed to control sick leave abuses, the balance shifts in favor of finding a managerial prerogative, but when the question is merely whether a particular employee was actually sick on a particular day, the balance shifts in favor of permitting arbitration. The latter question presents no issue of educational policy or judgment; all an arbitrator must do is assess the parties' competing proofs on the employee's claimed disability. PiscatawaTwp. Bd/Ed, P.E.R.C. No. 83-111, 9 NJPER _____ (¶ 1983).

The NTU attempted to distinguish the instant matter from Piscataway by pointing out that in Piscataway the contract expressly provided that employees could be called on to provide doctors' notes. However N.J.S.A. 18A:30-4 states that a board of education

may require the filing of a physician's certificate in order to obtain sick leave. Accordingly this argument too must fall. It is noted that an employee may avoid the meeting after using eight days of sick leave by submitting a physician's certificate for each absence.

The NTU maintains that the AIP alters the taking of funeral leave. The plan does provide for verification, as with sick leave, but otherwise does not limit contract rights.

The Board however violated the Act via the AIP when it unilaterally struck a provision of the contract's sick leave provision which provides:

Teachers with twenty-five (25) years' experience in the system shall receive ten (10) additional non-cumulative days per year after accumulated leave has been exhausted.

The Board claims that this provision is an extended sick leave provision pursuant to 18A:30-6 and 7 and is therefore an unlawful subject of negotiations as per B/E of the Twp. of Piscataway v. Piscataway Maint. and Cust. Assn., 152 N.J.Super. 235 (App. Div. 1977).

Their position is based on the operation of the disputed provision wherein these additional ten days of sick leave cannot be taken until accumulated leave has been exhausted.

However the Commission reviewed this very question as to whether the operation of accumulated sick leave is affected by 18A:30-6 and 7 in Hoboken Bd/Ed and Hoboken Teachers Assn., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12088 1981), affirmed App. Div. No. A-3379-80T2, Pet. for Certif. granted 91 N.J. 242 (1982), appeal dismissed ___ N.J. ___ (1/27/83), Supreme Court Docket No. A-62.

The Commission held

[P]arties [are] free to negotiate that non-accumulative days be used first, or vice-versa...What the statutes do mandate is that no more than 15 days per year be 'banked.'

We thus conclude that N.J.S.A. 18A:30-6 and 18A:30-7 do not mandate or even suggest a "set" procedure requiring the exhaustion of accumulated before non-accumulated sick days.

Accordingly, there is a substantial likelihood that the Commission would find that the Board unlawfully altered a term and condition of employment by unilaterally rescinding ten days of non-cumulative sick leave for employees with 25 years of seniority.

Further, the benefit in question is non-cumulative in nature and if not exercised in the current year it cannot be re-instituted. Given the nature of sick leave that it can only be used in times of illness, the loss of same is irreparable. Accordingly it is hereby ordered that pending a full plenary hearing and decision by the full Commission, the Newark Board of Education is restrained from deleting Article X, Sec. 2(B) from the contract.

The original AIP document provided for alteration of a number of provisions in the contract.

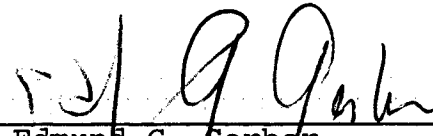
In the pleadings of the Board and at oral argument the Board clarified, withdrew and otherwise abandoned these proposals. These are specifically:

- 1) The application of the AIP to personal days and the demand for an explanation for the use of personal days.
- 2) The requirement to certify a death in an employee's immediate family to take a funeral day.
- 3) The requirement for attending evening meetings.

4) The application of AIP to leave for Union duties and the counting of such leave as absences under the program.

5) The incentive for not taking sick leave created by the plan.

To the extent that these matters have been abandoned by the Board no immediate remedies are required. However, the undersigned is retaining jurisdiction of this action and should the Board in fact enforce these proposals the NTU may make immediate application to have restraints issued against the Board.



Edmund G. Gerber
Hearing Examiner

Dated: February 23, 1983
Trenton, New Jersey