H.E. NO. 2012-9

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LINDEN BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-041

LINDEN EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner denies cross motions by the Linden Board of Education and Linden Education Association for summary judgment, finding that there are material disputes of fact. The Association alleged that the Board unilaterally changed a longstanding past practice of applying federal Family Medical Leave Act (FMLA) and New Jersey Family Leave Act (FLA) consecutively with accrued paid leave time and not requiring employees to take family leave involuntarily. The Board asserted that its policy had existed since at least 2002, the Association had actual or constructive notice of the policy, that its actions complied with the applicable law and that it always gave employees the option of utilizing paid leave. The Hearing Examiner found material factual disputes concerning what the Board's FMLA/FLA policy was prior to the date alleged in the charge, and whether and when the Association became aware of the way in which the Board applied that policy. The Hearing Examiner finds those factual issues can only be resolved at a hearing.

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Appearances:

For the Respondent,
Weiner Lesniak, attorneys
(Mark A. Tabakin, of counsel)

For the Charging Party,
Bucceri and Pincus, attorneys
(Sheldon Pincus, of counsel)

DECISION ON MOTION FOR SUMMARY JUDGEMENT

On July 31, 2008, the Linden Education Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission. The charge alleged that the Linden Board of Education ("Board") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), by unilaterally altering a long standing practice regarding family leave for unit members, without negotiations with the Association, in violation of 5.4a(1) and (5).[1/]

1/ These subsections prohibit public employers, their
(continued...)

Specifically, the Association alleges, on February 28, 2008, the Board began involuntarily placing employees on leave under the federal Family Medical Leave Act ("FMLA"), and/or the New Jersey Family Leave Act("FLA") [2/], and to apply the leave concurrently with the use of accumulated sick leave days by a unit employee, rather than consecutively, as had been the past practice. Additionally, the Association alleged, members who only requested the use of sick leave had not formerly been placed on involuntary FMLA or FLA leave.

A Complaint and Notice of Hearing was issued on June 15, 2009. The Board filed an Answer to the Complaint on June 24, 2009.

The Board denies the charge. It asserts that there was no unilateral change to the Board's policy regarding leave pursuant to FMLA and FLA; its practice or policy concerning FMLA or FLA leave for Association members has existed since at least 2002; its policy of permitting employees to utilize paid leave during

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1/ (...continued)
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/ 29 USC §§ 2601 et seq. and N.J.S.A. 34:11-B-1 et seq., respectively.

leave pursuant to FMLA and or FLA appropriately complies with applicable law; and the Board's policy regarding the designation of leave for an FMLA and/or FLA qualifying event or illness complies with applicable law. The Board further asserts that the Association has waived its right to negotiate, thus it had no obligation to negotiate with the Association mid-contract.

On July 28, 2009, the Board filed a Motion for Summary Judgment. Hearing dates set for October 20 and 21, 2009 were adjourned pending the disposition of the Motion before the Commission. The Association filed a Cross-Motion for Summary Judgment on August 21, 2009. On August 31, 2009, the Board filed a letter brief in further support of its Motion and in response to the Association's Cross-Motion. The record on the Motion closed on that date. On January 14, 2010, the motion was assigned to me for consideration pursuant to N.J.A.C. 19:14-4.8(a). Based upon the entire record, I make the following:

FINDINGS OF FACT

I have reviewed both parties' briefs and supporting exhibits on the cross Motions. The Board filed the Certification of its counsel, Mark Tabakin. The Association filed the Certifications of its counsel, Sheldon Pincus, and Association President, Cynthia Apalinski. From those submissions, the following facts are not disputed.

1. The Linden Education Association ("Association") is an employee representative within the meaning of the Act and is the exclusive and sole representative for collective negotiations for designated full and part-time personnel.[3/]

2. The Association is an employee representative within the meaning of N.J.S.A. 34:13A-1 et seq. The Board is an employer within the meaning of N.J.S.A. 34:13A-1 et seq.

3. The Association and Board are parties to a collective negotiations agreement for the period July 1, 2007 through June 30, 2010.

4. The Board currently has a policy or practice whereby it informs, by letter, employees requesting leave whether their leave triggers FMLA or FLA and advises that accrued time may be used in place of any unpaid leave at the employee's option. If the employee does not exercise this option, any accrued leave time runs concurrent to unpaid FMLA/FLA leave time. Through this policy, the Board places unit employees on involuntary, designated FMLA or FLA leave if it deems the employee's leave

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3/ The unit includes "all positions requiring a valid instructional certificate; all positions requiring a valid educational services certificate, educational media personnel, technology technicians; all full time and part-time secretarial and clerical employee, excluding those designated "confidential" by the parties; all full-time personnel assigned as paraprofessionals and all part time instructional and non-instructional school aides, hall monitors, attendance officers; crisis intervention aides," and excludes certain other titles.

request to qualify for either such leave, without regard to whether such leave was requested by the employee. (Tabakin certification at 6 through 19.)

5. On various occasions between November 2002 and March 2008, the Board sent such letters to fourteen unit employees. The letters were typically copied to the superintendent, the Board president, and/or the Board business administrator. Redacted copies are attached to the Board's certification. (Tabakin certification at 6 through 19, attachments 2 through 15).

6. At least one unit employee's leave request was addressed in the Board of Education public meeting minutes on November 17, 2004, as follows:

> BE IT RESOLVED that the Board of Education, in accordance with the recommendation of the Superintendent, hereby retroactively approves George Clarke's request for leave from the beginning of the school year until January 2005, subject to proper verification; and
>
> BE IT RESOLVED that said leave is to run concurrent with any state and federal Family Leave George Clark (sic) may be entitled to under the circumstances.

(Tabakin cert., Exhibit 16).

7. On January 9, 2008, the Board sent such a letter to an unit employee and in addition to the superintendent, Board president, and administrator, copied Association President Cynthia Apalinski.

8. On February 11, 2008, Apalinski wrote to Superintendent of Schools Joseph Martino. The letter provides in pertinent part:

> Please be advised that it has come to our attention that the Board of Education is now counting the use of accumulated sick time as part of an employee's "family leave" under the FMLA (Federal Family Leave Act) or FLA (NJ Family Leave Act). The Association views this as a change in the conditions of employment and as such demands to bargain the issue. Please contact me as soon as possible to arrange dates to bargain this change in conditions.

9. The Board, through counsel, denied the Association's request for bargaining on February 25 and June 10, 2008.

10. On July 2, 2008, the Association filed a group grievance pursuant to the parties' negotiated agreement. The Board denied the grievance on July 9, 2008.

11. On July 31, 2008, the Association filed this unfair practice charge.

ANALYSIS

N.J.A.C. 19:14-4.8(d) provides that a motion for summary judgment will be granted:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court enunciated the standard

to determine whether a genuine issue of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. "While 'genuine' issues of material fact preclude the granting of summary judgment, . . . those that are 'of an insubstantial nature' do not." Id. at 530. If the disputed issue of fact can be resolved in only one way, it is not a "genuine issue" of material fact. Id. at 540.

Nevertheless, a motion for summary judgment should be granted cautiously. The procedure should not be used as a substitute for plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981) and N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

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).

I deny the Motion and Cross-Motion. The record before me shows that several genuine issues of material fact still exist, precluding a decision on summary judgment. The certification and documents filed in this matter reveal a dispute over whether and when the Association became aware of the way in which the Board applied its FMLA/FLA policy prior to February 20, 2008.

The Board asserts that since at least 2002, it has informed employees by letter whether their leave request qualifies for FMLA or FLA; involuntarily placed such employees on FMLA or FLA leave; and informed employees that any paid leave they take will run concurrently with FMLA or FLA leave unless they exercise their option to exhaust accrued paid leave prior to unpaid leave. The Board also states that as leaves were discussed at Board meetings at which Association representatives were present, the

Association had at least constructive notice of the Board's practice.

Moreover, the Board asserts, since the practice has existed for at least two successive collective agreements, the Association has waived its right to negotiate concerning the issue, and the practice has become binding, citing Upper Saddle River, D.U.P. No. 2004-7, 30 NJPER 263 (¶91 2004).

In Upper Saddle River, the Director of Unfair Practices dismissed an unfair practice charge filed in 2003 by the Upper Saddle River Education Association which alleged that the Board unilaterally implemented and refused mid-contract negotiations regarding a leave policy requiring FMLA leave to run concurrently with paid sick leave. The Director found that the Association knew of the policy, but 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. The Director found that the Association had waived its right to negotiate until negotiations for a successor agreement.

The Association contends that it was not aware of the Board's FMLA/FLA policy or practice until it was copied on pertinent correspondence in February 2008, after which its President promptly wrote to the Board to demand negotiations, which the Board denied. The Association asserts that the Board

has failed to produce any documents evidencing a "policy" adopted in 2002, supporting a conclusion that the Board was engaged in a practice which it unilaterally altered; and that none of the individual letters to unit members issued prior to January 9, 2008, nor Board meeting agendas or minutes, suffice to constitute notice to the Association of a change in working conditions. Since the minutes do not disclose any parameters concerning the leave request, "the minutes simply reflect that a staff member may have received that which he/she had actually requested." (Charging Party's Brief at 13).

Moreover, the Association argues, since none of the fourteen individuals identified in the fourteen letters was an Association representative, "knowledge may not reasonably be imputed to the Association leadership of these staff members' interactions with the school administration, or its counsel, regarding leave." The Association argues that Saddle River is distinguishable because in this case, it was never informed of the type of leave requested by those unit employees identified in Board counsel's Certification.

I find that the determination of whether or when the Association became or should have become aware of the Board's FMLA/FLA policy or practice is a disputed material fact bearing upon whether the Association has waived its right to negotiate the policy. See Brill, Upper Saddle River. If, as in Upper

Saddle River, the record ultimately reflects that the Association was aware of the Board's policy prior to February 20, 2008, the Board may not have had a mid-contract negotiations obligation. See also, Bridgeton Board of Education, P.E.R.C. No 2011-64, 37 NJPER 72 (¶27 2011) (Association's refusal of Board's request to negotiate Board's FMLA policy constituted waiver of Association's right to negotiate). These factual disputes can only be resolved at hearing.

The Association cites Lumberton Ed. Assn. and Lumberton Tp. Bd. of Ed., 28 NJPER 427 (¶33156 App. Div. 2002), aff'g P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001). In Lumberton, the Commission held that the Board should have negotiated with the union before enacting a new policy requiring employees to use paid leave concurrently with FMLA/FLA unpaid leave. In Lumberton, the parties stipulated before the Commission that the Board had instituted a new policy on a date certain without prior negotiations. Here, the parties disagree as to what the Board's policy was prior to February 20, 2008. This factual dispute alone precludes the grant of summary judgment.

CONCLUSION

Accordingly, the Board's Motion for summary judgment and the Association's cross-motion for summary judgment are denied.

Patricia T. Todd
Hearing Examiner

Dated: April 13, 2012
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by April 23, 2012.