P.E.R.C. NO. 2006-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSBOROUGH TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2003-321

HILLSBOROUGH EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants, in part, a cross-motion for summary judgment filed by the Hillsborough Board of Education on a Complaint based on an unfair practice charge filed by the Hillsborough Education Association. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it did not negotiate with the Association over requiring employees who took leaves under the New Jersey Family Leave Act or the federal Family and Medical Leave Act (FMLA) to reimburse it for health care premiums if they did not return to work and when it dealt directly with individual employees over the reimbursement requirement. The Commission holds that neither statutory scheme mandates reimbursement and that any discretion the Board has to seek reimbursement must be exercised consistent with its negotiations obligation under the New Jersey Employer-Employee Relations Act. As for the unfair practice allegations, the Commission dismisses the allegations that the Board violated N.J.S.A. 34:13A-5.4a(2) and (3). The Commission concludes that the Association did not cite any facts, arguments or precedents pertinent to those allegations. In addition, the Commission concludes that at this juncture it cannot definitively answer whether the Board violated N.J.S.A. 34:13A-5.4a(1)and (5) and denies the parties' cross-motions for summary judgment.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2006-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSBOROUGH TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2003-321

HILLSBOROUGH
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Fogarty & Hara, attorneys (Stephen R. Fogarty, of counsel; Stephen R. Fogarty and Vittorio S. LaPira, on the briefs)

For the Charging Party, Selikoff & Cohen, attorneys, (Keith Waldman and Carol H. Alling, of counsel and on the briefs)

DECISION

This case comes to us by way of a motion and cross-motion for summary judgment concerning an unfair practice charge filed by the Hillsborough Education Association against the Hillsborough Township Board of Education. The Association alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3) and (5),[1/] when it did not negotiate with the

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

Association over requiring employees who took leaves under the New Jersey Family Leave Act (FLA), N.J.S.A. 34:11B-1 et seq., or the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., to reimburse it for health care premiums if they did not return to work and when it dealt directly with individual employees over the reimbursement requirement.[2/]

The Association's charge was filed on June 19, 2003 and was amended on November 7, 2003 and May 5, 2004. A Complaint and Notice of Hearing was issued on April 13, 2005. The Board filed an Answer on April 22, 2005. The Board contended that a reimbursement requirement is not mandatorily negotiable.

The parties have submitted a joint stipulation of facts, exhibits, and briefs. The facts set forth in the following numbered paragraphs have been stipulated and the facts set forth

---

1/ (...continued)
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 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. . . ."

2/ On April 13, 2005, a Complaint and Notice of Hearing issued. The Director of Unfair Practices, however, declined to issue a Complaint on Count I of the charge alleging that the Board illegally required concurrent use of FLA and FMLA leaves. The Director held that N.J.A.C. 13:14-1.6(a) preempted negotiations over that issue.

in the accompanying footnotes have been added by us to describe the contents of the exhibits cited in the stipulations.

1. The Board is a "public employer" within the meaning of N.J.S.A. 34:13A-3(c), is subject to the provisions of the Employer-Employee Relations Act (hereinafter referred to as "the Act") and is the employer of all the employees involved in these proceedings.

2. The Hillsborough Education Association (hereinafter referred to as "the Association") is the exclusive majority representative of a bargaining unit consisting of all personnel, whether on contract or on leave, as specified in the collectively negotiated agreement between the Board and the Association (hereinafter referred to as "the CNA"). As such, it is an employee "representative" within the meaning of N.J.S.A. 34:13A-3(e).

3. The Board and the Association were parties to a CNA in effect from July 1, 2002 through June 30, 2005. A true copy of the CNA is annexed hereto as Exhibit 1.

4. The Board has, on at least three occasions, instituted legal proceedings against employees seeking repayment of health insurance premiums paid on their behalf by the Board because they failed to return to work following an approved leave of absence pursuant to either the Family and Medical Leave Act (hereinafter referred to as the "FMLA") and/or New Jersey's Family Leave Act (hereinafter referred to as the "FLA").

5. Elane Janz (hereinafter referred to as "Janz") was employed by the Board as a science teacher during the 2000-2001 school year and was an "employee" within the meaning of N.J.S.A. 34:13A-3(d).

6. On or about January 12, 2001, Janz requested that she be granted a leave of absence for the remainder of the 2000-2001 school year, including, among other leaves, leave under the FMLA and FLA. A true copy of Janz's letter of January 12, 2001 is annexed hereto as Exhibit 2.[3/]

3/ In this letter, Janz states her understanding that her medical benefits will remain intact during her FMLA leave. She also states: "I expect to return to work for the September 2001 school year."

7. Dr. Virginia Gittelman (hereinafter referred to as "Gittelman"), the Board's Assistant Superintendent for Curriculum and Instruction, wrote to Janz on or about January 23, 2001, confirming information relative to Janz's leave request. A true copy of Gittelman's letter dated January 23, 2001 is annexed hereto as Exhibit 3.

8. On or about February 27, 2001, Janz wrote to Gittelman requesting a modification to her leave request. A true copy of Janz's February 27, 2001 letter (incorrectly dated February 27, 2000) is annexed hereto as Exhibit 4.

9. Gittelman responded to Janz's letter on or about March 20, 2001 to confirm additional information relative to Janz's modified leave request. A true copy of Gittelman's March 20, 2001 letter is annexed hereto as Exhibit 5.[4/]

10. On or about May 12, 2001, Janz wrote to Gittelman to confirm additional information relative to her leave of absence. A true copy of Janz's May 12, 2001 letter is annexed hereto as Exhibit 6.[5/]

11. Gittelman responded to Janz's letter regarding her Family Leave for the remainder of the 2000-2001 school year on or about June 1, 2001. A true copy of Gittelman's June 1, 2001 letter is annexed hereto as Exhibit 7.[6/]

12. On or about July 6, 2001, Janz wrote to Gittelman to indicate that she was resigning from her employment with the

---

4/ The letter states that Janz had been granted "Federal and New Jersey Family Leave without pay but with full benefits from March 6, 2001 through June 30, 2001." The minutes of the Board meeting state that Janz had been granted "disability/family leave" for that period.

5/ This letter states that Janz will be using FLA leave rather than FMLA leave from May 8 to the end of the school year and asks for written confirmation that her medical benefits will be continued during the summer of 2001.

6/ Gittleman's letter confirms that medical benefits will be provided during the summer, but adds that the benefits will be paid with the express understanding that Janz would report to work in September and the warning that if she did not, the Board had a right to recover the health insurance premiums and would make every effort to do so.

Board effective September 6, 2001. A true copy of Janz's July 6, 2001 letter is annexed hereto as Exhibit 8.[7/]

13. The Board, by and through its attorneys, wrote to Janz on or about November 8, 2001 seeking reimbursement for the health insurance premiums paid by the Board on Janz's behalf due to her failure to return to work after her leave. A true copy of the November 8, 2001 letter is annexed hereto as Exhibit 9.

14. The Board and the Association did not have any written agreement concerning the issue of reimbursement, the Board did not have any established policy on the issue of reimbursement, and this was the first time that the Board attempted to require an employee to reimburse it for such costs.

15. As of September 9, 2002, Janz had not repaid the Board the sums it was seeking, and, therefore, on or about that date, the Board filed a civil action against Janz in the Superior Court of New Jersey, Somerset County Vicinage, Law Division, Special Civil Part, seeking reimbursement of the health insurance premiums paid by the Board on Janz's behalf during her period of FMLA/FLA leave. A true copy of the Complaint is annexed hereto as Exhibit 10.

16. Janz filed an Answer and Counterclaim on or about October 4, 2002. A true copy of Janz's Answer and Counterclaim is annexed hereto as Exhibit 11.

17. On or about January 23, 2003, the Board and Janz executed a settlement agreement wherein Janz agreed to pay $1,600 of the insurance premiums paid by the Board on Janz's behalf during her period of leave and the Board agreed to pay $1,342.49 of the premiums and to waive its attorneys' fees and costs in the collection action. A true copy of the settlement agreement is annexed hereto as Exhibit 12. The parties further agreed that the settlement agreement would have no precedential effect. The Association was not a party to the settlement and was not a signatory to the settlement agreement.

18. Karen Samano (hereinafter referred to as "Samano") was employed by the Board as a teacher during the 2001-2002

7/ Janz' letter states: "However, due to circumstances, I will be unable to return to my teaching duties this fall."

school year and was an "employee" within the meaning of N.J.S.A. 34:13A-3(d).

19. On or about April 18, 2002, Samano requested that she be granted a leave of absence for the 2002-2003 school year, including, among other leaves, leave under the FMLA and FLA. A true copy of Samano's April 18, 2002 letter is annexed hereto as Exhibit 13.

20. Gittelman wrote to Samano on or about June 3, 2002, to confirm information relative to Samano's leave request. A true copy of Gittelman's June 3, 2002 letter is annexed hereto as Exhibit 14.[8/]

21. On or about February 18, 2003, Samano wrote to Dr. Robert Gulick, the Superintendent of Schools (hereinafter referred to as "Gulick"), resigning from her teaching position with the Board. A true copy of Samano's February 18, 2003 letter is annexed hereto as Exhibit 15.

22. On or about March 10, 2003, Thomas M. Venanzi, the Board's Assistant Superintendent of Business/Board Secretary (hereinafter referred to as "Venanzi"), wrote to Samano and requested reimbursement of the health insurance premiums paid by the Board on Samano's behalf during her period of FMLA/FLA leave. A true copy of Venanzi's March 10, 2003 correspondence is annexed hereto as Exhibit 16.

23. Samano wrote to Gulick on or about April 22, 2003, indicating that she would repay the Board the cost of the health insurance premiums paid by the Board during her period of FMLA/FLA leave. A true copy of Samano's April 22, 2003 letter is annexed hereto as Exhibit 17.[9/]

8/ This letter states that Samano will be granted paid disability leave from May 6 through June 30; 12 weeks of family leave without pay but with benefits through September 30; and child care leave without pay or benefits through June 30, 2003. The letter adds the understanding and warning contained in Gittelman's June 1 letter to Janz. See footnote 6.

9/ Samano's letter expresses vigorous disagreement with the decision to seek recoupment despite her seven years of excellent service. She writes, however, that she does not have the stamina to fight over this issue because of "the

(continued...)

24. On or about May 7, 2003, the Board, by and through its attorneys, wrote to Samano to indicate the Board's willingness to accept a lower amount than that originally sought as payment in full (the Board's original calculations incorrectly charged Samano for three months instead of one month). A true copy of the May 7, 2003 letter is annexed hereto as Exhibit 18.

25. Samano ultimately repaid the Board the amount sought in the May 7, 2003 letter on or about June 19, 2003. The Association was not a party to settlement negotiations between Samano and the Board and was not a signatory to any settlement agreement reached between Samano and the Board.

26. Lynn Powers (hereinafter referred to as "Powers") was employed by the Board as a science teacher during the 2001-2002 school year and was an "employee" within the meaning of N.J.S.A. 34:13A-3(d).

27. Powers requested that she be granted a leave of absence for the 2002-2003 school year, including, among other leaves, leave under the FMLA and FLA. A true copy of Powers' letter of May 29, 2002 is annexed hereto as Exhibit 19.

28. Gittelman wrote to Powers on June 18, 2002 to confirm information relative to Powers' leave request. A true copy of Gittelman's June 18, 2002 correspondence is annexed hereto as Exhibit 20.[10/]

29. On or about February 19, 2003, Powers wrote to the Board and resigned from her position in order to stay home and raise

---

9/ (...continued)
stress of my medical condition and our baby's severe milk anaphalaxia." The letter further states that she resigned so she could ameliorate these family concerns.

10/ This letter states that Powers will be granted paid sick leave from September 3 through October 25; concurrent FMLA and FLA leaves from October 28 through November 22; FLA leave from November 25 through January 25, 2003; and child-rearing leave without pay or benefits from January 28 through June 30, 2003. The letter warns Powers that the Board would require her to repay the costs of benefits if she did not return to work, regardless of whether she took an FMLA or FLA leave.

her son. A true copy of Powers' February 19, 2003 correspondence is annexed hereto as Exhibit 21.

30. Venanzi wrote to Powers on or about February 28, 2003 and requested reimbursement of the health insurance premiums paid by the Board during her period of FMLA/FLA leave. A true copy of Venanzi's February 28, 2003 correspondence is annexed hereto as Exhibit 22.

31. On or about May 13, 2003, the Board filed a civil action against Powers in the Superior Court of New Jersey, Mercer County Vicinage, Law Division, Special Civil Part, seeking reimbursement of the health insurance premiums paid by the Board for Powers during her period of FMLA/FLA leave. A true copy of the Board's Complaint is annexed hereto as Exhibit 23.[11/]

32. Powers answered the Complaint on June 2, 2003. The civil action has been stayed pending the resolution of the instant unfair labor practice charge. A true copy of Powers' Answer is annexed hereto as exhibit 24.[12/]

33. The Board has, in confirming other employees' leaves of absence, required said employees to sign letters issued by Gittelman advising employees that if they did not return to work, they would be responsible for reimbursing the Board for health insurance premiums paid by the Board for them during their period of FMLA/FLA leave. A true copy of correspondence from Gittelman to Suzette Foster dated July 7, 2003, which is a sample of Board correspondence to employees, is annexed hereto as Exhibit 25.

34. Association members have reserved their rights in responding to such letters. A true copy of a sample reservation of rights letter from Association President Barbara Parker (hereinafter referred to as "Parker") to Gulick, dated July 28, 2003 is annexed hereto as Exhibit 26 (hereinafter referred to "Parker letter")

11/ Count II of the Complaint alleges that Powers breached a contract with the Board in which the Board promised to provide paid medical insurance during her leave and she in turn promised to return to work.

12/ Powers' Answer denies that she entered into any reimbursement agreement.

35. The Association has requested that the Board cease meeting with its members without Association representation concerning the Board's ability to recover health insurance premiums paid by the Board for employees during their period of FMLA/FLA leave when employees fail to return to work. See Parker Letter, Exhibit 26.[13/]

36. The Board has denied that it engaged in any unfair labor practices as detailed in Parker's letter of July 28, 2003 and has taken the position that it does not believe discussions with members regarding family medical leave require advance notice of the same to the Association, nor does it believe that the Association is entitled to copies of documentation relating to the same.

37. The parties recognize that a series of discussions and meetings occurred between representatives of the Board and Association members concerning leaves. The parties do not stipulate as to the contents of the discussions and meetings and the parties acknowledge that this stipulation does not preclude the submission of certifications or live testimony on this factual issue.

I. The Duty to Negotiate Over Reimbursing Health Care Premiums

N.J.S.A. 34:13A-5.3 requires negotiations over "[p]roposed new rules or modifications of existing rules governing working conditions." In general, paid and unpaid leaves of absence are considered working conditions under section 5.3 unless a statute or regulation preempts negotiations over a specific aspect of such leaves. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973). The terms of such leaves are also generally negotiable, including whether employees on leave

---

13/ This letter also demands that the Association be given advance notice of all communications concerning family leave rights and that it be copied on all related documents. It asserts that not meeting these conditions would constitute direct dealing and thus be an unfair practice.

will receive paid health insurance coverage. South Orange-Maplewood Ed. Ass'n v. South Orange Bd. of Ed., 146 N.J. Super. 457 (App. Div. 1977) (paid sabbatical leave); Hopewell Valley Reg. Bd. of Ed., P.E.R.C. NO. 97-91, 23 NJPER 133 (¶28065 1997) (continuation of health insurance during unpaid leave of absence); West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993) (sick leave laws do not preempt an alleged agreement to continue paid health insurance during unpaid leaves).

The main issue is whether the Board's policy of demanding reimbursement of health care premiums from employees who do not return from FLA or FMLA leaves is a mandatorily negotiable employment condition. A subject is mandatorily negotiable if it is not preempted by any statute or regulation, it intimately and directly affects employee work and welfare, and a negotiated agreement would not significantly interfere with the determination of governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982).

A. The Board's Preemption Claims

The Board asserts that the FMLA and the FLA preempt negotiations over the reimbursement policy it implemented. The standards for analyzing its preemption claims are settled by several Supreme Court cases. Negotiations over an employment condition will not be preempted unless a statute or regulation

speaks in the imperative and eliminates the parties' discretion to vary that condition in a negotiated agreement. See, e.g., State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). An allegedly preemptive statute must be examined to see if it expressly, specifically, and comprehensively fixes an employment condition so firmly that it cannot be changed through negotiations. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). A statute will preempt negotiations "only if it leaves no room for discussion as to what is required of both the employer and the employee. Hence, a preempting [statute] must be complete; it must say all there is to be said." Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); Council of New Jersey State College Locals and State, 336 N.J. Super. 167, 170 (App. Div. 2001). If a statute or regulation mandates a minimum level of benefits, but does not bar the employer from affording greater protection, employees may seek that greater protection through a negotiated agreement. State Supervisory at 81; see also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112, 119 (1985); Local 195.

1. The FMLA

The FMLA entitles eligible employees to 12 weeks of leave in any 12-month period to care for seriously ill family members, an

employee's own serious health condition, or a child's birth, adoption, or foster care. 29 U.S.C. §2612(a)(1). Those weeks may be paid or unpaid, depending on what benefits have been negotiated or extended. But an employer must generally maintain the employee's health insurance coverage during the leave and restore the employee to the same or equivalent employment after the leave. 29 U.S.C. §2614(c)(1). These obligations, however, cease if and when the employment relationship would have terminated if the employee had not taken an FMLA leave (e.g., if the employee is legally laid off); an employee informs the employer that he or she intends not to return to work from the leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA entitlement. 29 C.F.R. §825.209(f).

The FMLA permits but does not require an employer to seek reimbursement of health care premiums in some instances when an employee does not return to work. 29 U.S.C. §2614(c)(2) provides:

> The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 [29 USCS §2612] if-
>
> > (A) the employee fails to return from leave under section 102 [29 USCS §2612] after the period of

> leave to which the employee is entitled has expired; and
>
> (B) the employee fails to return to work for a reason other than-
>
> (i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS §2612(a)(1)]; or
>
> (ii) other circumstances beyond the control of the employee. [Emphasis supplied]

This provision prohibits seeking reimbursement in some circumstances, but does not mandate seeking reimbursement in other circumstances. As indicated by the word "may," the employer may choose not to seek reimbursement at all. This statute does not meet our Supreme Court's stringent requirements for finding preemption.

29 C.F.R. §825.213 is a regulation implementing 29 U.S.C. §2614(c)(2). It asks this question:

> May an employer recover costs it incurred for maintaining "group health plan" or other non-health benefits coverage during FMLA leave?

And it provides this answer:

> (a) [A]n employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been

> exhausted or expires, unless the reason the employee does not return is due to:
>
> (1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or
>
> (2) Other circumstances beyond the employee's control.[14/]

29 C.F.R. §825.213(c) provides that an employee who returns to work for 30 days or who retires either immediately or during the first 30 days at work after the leave is deemed to have "returned to work" and is not subject to a reimbursement demand. Section (d) directs that when an employee elects, or an employer requires, paid leave to be substituted for FMLA leave, the employer may not recover health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave.[15/]

29 C.F.R. §825.213(f) addresses the mechanics of recoupment:

> (f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the

---

14/ The regulation provides that this category is "necessarily broad" and lists examples. One example is where a parent stays at home with a newborn child who has a serious health condition. A circumstance that is not beyond the employee's control is staying at home to care for a well, newborn child.

15/ Special regulations address how the summer factors into FMLA leaves for education employees. 29 C.F.R. §825.600 et seq.

> non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

Consistent with the FMLA's provisions, these regulations confer rather than eliminate discretion. Under our Supreme Court's stringent preemption standards, that discretion may be exercised through the negotiations process.

The employer argues that even if the FMLA's provisions and the accompanying regulations do not satisfy the preemption standards, the public policy behind the FMLA warrants preempting negotiations over reimbursement. It relies on Hackensack Bd. of Ed. v. Hackensack Ed. Ass'n, 184 N.J. Super. 311 (App. Div. 1982), certif. den. 91 N.J. 217 (1982), and Newark State-Operated School Dist. and CASA, 28 NJPER 154 (¶33054 App. Div. 2001). Neither case expands the preemption tests or justifies a finding of preemption in this case.

Hackensack and Newark both applied the traditional preemption tests set forth in State Supervisory and held that New Jersey education laws imperatively and specifically eliminate any

discretion to allow sick leave for any purposes beyond those specified by the definition of sick leave contained in N.J.S.A. 18A:30-1. Unlike the FMLA statutes and regulations in this case, the preemptive laws at issue in Hackensack and Newark prohibited the employer from exercising its discretion in the manner proposed by the majority representatives. The opinions cited additional policy reasons for reaching the conclusion "that the Legislature intended that sick leave be used only for the specific use provided in N.J.S.A. 18A:30-1"; but at no point did either opinion suggest that these policy considerations would warrant preempting negotiations even if the education statutes did not strictly prohibit the employer from granting sick leave for reasons besides personal sickness.[16/] The traditional preemption tests remain unchanged by these cases and must be applied to this case.

The policy reasons asserted by the Board do not warrant a holding of preemption under the traditional tests. As noted, the pertinent FMLA provisions and regulations state that an employer "may" seek reimbursement, not that the employer "shall" seek reimbursement. In Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd 28 NJPER 427 (¶33156 App.

16/ Other statutory schemes permit sick leave to be used for serious family illness. See N.J.A.C. 4A:6-1.3(g) (sick leave may be used for care of a seriously ill family member or death in the immediate family).

Div. 2002), an Appellate Division panel held that the FMLA does not preempt negotiations over requiring employees to take accumulated paid leave as part of their total FMLA leave because the statutory provision relied upon, 29 U.S.C. §2653, states only that the employer "may" require stacking (taking paid leave simultaneously with FMLA leave). Therefore, "the FMLA does not speak in the imperative and does not eliminate all employer discretion as to the stacking of the leaves." 28 NJPER at 428. The Court added:

> The FMLA expressly states that nothing in the FMLA "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement . . . that provides greater family and medical leave rights to employees than the rights established under this Act. . . ." 29 U.S.C.A. §2652(a). The FMLA also states "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act." 29 U.S.C.A. §2653. These two provisions evince an intent on the part of Congress that the exact nature of the implementation of the FMLA would be the subject of negotiations when employees are covered by a CBA. [28 NJPER at 427-428]

See also Solovey v. Wyo. Valley Health Care System - Hospital, 396 F. Supp.2d. 534, 538 (M.D. Pa 2005) (collective bargaining agreement may grant but not diminish FMLA rights). Further, while the FMLA entitles employees to the job security of knowing they can return to work, 29 U.S.C.A. §2601(a)(4)and 29 C.F.R.

825.101(b), it does not compel employees to return to work or state that an employee's return is a condition of being considered "on leave." An employee who does not return to work does not lose the status of having been on an FMLA leave or having been entitled to health insurance coverage. Nor does an employee who decides not to return to work automatically lose a right to paid health insurance benefits; the FMLA specifies several instances in which the employer cannot seek recoupment.[17/]

The Board asserts that requiring negotiations over recoupment creates a severance benefit that Congress did not intend. We agree with the Board that the FMLA does not statutorily entitle employees to severance pay or to avoid recoupment in all circumstances. But the absence of a statutory right to an employment condition does not preempt negotiations over that employment condition. To the contrary, the FMLA contemplates that an employer granting a required leave may elect to seek recoupment under the circumstances permitted by the statute and regulations or may elect not to seek recoupment at all. We are simply holding that the Board's discretion

---

17/ We note that the employer's letters to Janz, Samano, and Powers, as well as its subsequent letters to other employees requiring a signed acknowledgment of their responsibility for reimbursement, state unconditionally that recoupment would be sought if the employee did not return to work. The policy as announced to the employees did not contain the limits on recoupment required by the FMLA and discussed in the Board's briefs.

concerning a permissible recoupment policy must be exercised consistent with its negotiations obligations under our Act.

For all these reasons, we conclude that the FMLA does not preempt negotiations over the reimbursement policy established by the Board.

2. The FLA

The FLA entitles eligible employees to 12 weeks of leave in any 24-month period to care for seriously ill family members or a child's birth, adoption or foster care. N.J.S.A. 34:11B-4. Those weeks may be paid or unpaid, depending on what benefits have been negotiated or extended. But an employer must maintain the employee's health insurance coverage during the leave and restore the employee to his or her position. N.J.S.A. 34:11B-8; N.J.A.C. 13:14-1.11. The employer need not reinstate an employee whose job was eliminated by layoffs during the leave. N.J.A.C. 13:14-1.11.

Unlike the FMLA, the FLA and its implementing regulations, N.J.A.C. 13:14-1.1 et seq., do not address an employer's ability to recoup health insurance premiums if an employee does not return from a leave. Thus, there is no basis for holding that a statute or regulation specifically grants the Board a right to recoup. For the reasons discussed in analyzing the FMLA preemption issue, we also reject the Board's preemption arguments based on policy considerations.

B. The Board's Managerial Prerogative Claim

The Board asserts that even if the FMLA and FLA do not preempt negotiations, it has a managerial prerogative to establish a reimbursement policy without negotiations. Determining whether a prerogative exists requires us to balance the employees' interests in negotiating over a subject against the employer's interests in acting without negotiations. Because nearly every managerial decision will implicate some governmental policymaking function, "significant" interference with a managerial prerogative must be shown before negotiations over an employment condition will be precluded. Local 195 at 404. Balancing the parties' interests, we do not find significant interference in this case.

As we have discussed, leaves of absence and paid health insurance are traditionally negotiable issues. Employees have substantial interests in receiving paid health insurance during a leave and retaining their freedom during that leave to decide whether they want to return to work in light of changed circumstances. The reimbursement provision in this case has the same intimate and direct effect on employees as the reimbursement policy held to be negotiable in New Jersey Transit Auth. v. New Jersey Transit PBA, Local 304, 314 N.J. Super. 129 (App. Div. 1998). That policy required employees to reimburse the employer for training costs if they left employment within the first two

years. The Court found that the imposed reimbursement provision intimately and directly affected the employees because it restricted their freedom to leave employment and effectively reduced their compensation.

The Board argues that it has a compelling governmental policy interest in eliminating what it characterizes as the abuse of an employee receiving paid insurance during an FMLA or FLA leave, but choosing not to return to work for a reason that is not one of those exempting the individual from having to reimburse an employer for medical premiums. It maintains that the only way to prevent such alleged abuse is to require reimbursement from all employees who do not return to work and who cannot cite a reason precluding reimbursement under the FMLA. The Board relies on case law establishing an employer's prerogative to verify illness to prevent sick leave abuse. However, in those sick leave cases, employees may challenge an allegation of abuse through negotiated grievance procedures. See, e.g., City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). Here, by contrast, the employer asserts a right to act unilaterally and outside the collective negotiations process.

In addition, the Board should not presume that a negotiated agreement would eliminate its ability to seek reimbursement. In

New Jersey Transit, the Court rejected a similar argument that negotiations would necessarily preclude reimbursement and reasoned that an employer could negotiate for a reimbursement requirement enforceable in court. Id. at 139-140. Finally, to the extent not seeking reimbursement would, in a sense, create a severance or terminal leave benefit, we note that an employer may agree to provide such leave with paid health insurance benefits. Cf. New Jersey Transit (health benefits upon retirement are negotiable); In re Maywood Bd. of Ed., 168 N.J. Super. 45, 52 (App. Div. 1979), certif. denied 81 N.J. 292 (1979) (severance pay for laid off employees is negotiable).

On balance, we conclude that the employees' interests in negotiating over a reimbursement policy outweigh the employer's interests in imposing one without negotiations. The employer may seek to protect its asserted interests through the negotiations process. Hunterdon.

II. The 5.4a(1) and (5) allegations

Summary judgment will be granted in an unfair practice case if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). The stipulations set forth the undisputed and material facts concerning the Association's charge. However, the

stipulations do not permit us to resolve the unfair practice allegations at this juncture. Our analysis of the duty to negotiate over reimbursing health care premiums should guide the parties' future conduct. To the extent the parties continue to need a determination as to whether the Board's past conduct violated the Act, those allegations may proceed to hearing.

An employer violates 5.4a(1) and (5) if it refuses to negotiate with a majority representative concerning mandatorily negotiable terms and conditions of employment. It also violates those provisions if it negotiates directly with individual employees rather than with their majority representative over employment conditions and enters into agreements with them setting employment conditions. See Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005); Matawan-Aberdeen Reg. School Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989). Such actions strike at the heart of the Act's cornerstone: the exclusivity principle. Troy v. Rutgers, 168 N.J. 354 (2001); Lullo v. IAFF, 55 N.J. 409 (1970).

At this juncture, the facts in the record do not definitively answer whether the Board has or has not committed the unfair practices alleged. That administrators wrote letters to individual employees concerning their FMLA and FLA leaves does not by itself prove a violation. See, e.g., Rumson-Fair Haven Reg. H.S. Bd. of Ed., P.E.R.C. No. 87-46, 12 NJPER 831 (¶17319

1986). FMLA regulations require that an employer answer questions from employees concerning their rights and responsibilities, C.F.R. 825.301(d), and notify them of its expectations and obligations, specifically including an employee's potential liability for reimbursement of premiums if the employee does not return to work, 29 C.F.R. 825.301(b)(1)(viii). The letters sent to employees responded to employee inquiries and set forth the employer's expectations. Moreover, simply requiring employees to acknowledge receipt of such letters does not trespass over the line between permitted communication and prohibited negotiations. However, administrators, Association representatives, and individual employees also had discussions and meetings and the parties have elected not to stipulate any facts concerning the contents of those discussions and meetings. A hearing will allow us to determine whether the Board refused to negotiate with the Association or actually negotiated with individual employees. We note that the direct dealing issue encompasses the Association's claims that the Board was required to notify it of meetings with employees concerning family leave and give it copies of related documents; we will assess these claims after the hearing.

For these reasons, we deny the parties' cross-motions for summary judgment concerning the 5.4a(1) and (5) allegations.

III. The 5.4a(2) and (3) allegations

The Association also alleges that the Board violated N.J.S.A. 34:13A-5.4a(2) and (3). However, the stipulations do not appear to support finding such violations and the Association's briefs do not cite any facts, arguments, or precedents pertinent to these allegations. We accordingly dismiss them.

ORDER

The cross-motion for summary judgment of the Hillsborough Board of Education is granted to the extent the Complaint alleges that the Board violated N.J.S.A. 34:13A-5.4a(2) and (3). Those allegations are dismissed. The motion and cross-motion are otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Katz was not present.

ISSUED: June 29, 2006

Trenton, New Jersey