P.E.R.C. NO. 2016-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PISCATAWAY TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2012-271

PISCATAWAY TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision and order in an unfair practice case filed by the Piscataway Township Education Association against the Piscataway Township Board of Education. That decision recommended that the Commission find that the Board violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when it unilaterally changed existing terms and conditions of employment by requiring Association members to use paid leaves concurrently with unpaid Family and Medical Leave Act (FMLA) leave when unit members had previously for many years had consecutive leaves approved despite a written board policy for concurrent use. The Commission rejects the Board's exceptions, finding that the Hearing Examiner's findings of fact were supported by witness testimony and documentary evidence, and that the Board had not demonstrated the Association ever acquiesced to the change in leave benefit or had waived negotiations over the issue.

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.

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Charging Party.

Appearances:

For the Respondent, David B. Rubin, P.C., attorneys (David B. Rubin, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Nancy I. Oxfeld, of counsel)

DECISION

On November 12, 2014, the Piscataway Township Board of Education (Board) filed exceptions to a Hearing Examiner's Report and Recommended Decision. H.E. No. 2015-4, 41 NJPER 195 (¶66 2014). In that decision, Hearing Examiner Jonathan Roth found that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] when it unilaterally changed terms and conditions of

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 (continued...)

employment for unit employees represented by the Association by requiring them to use paid sick and other leaves concurrently with unpaid leave pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq. (FMLA). After an independent review of the record, we adopt the Hearing Examiner's recommendation.

The Piscataway Township Education Association (Association) filed an unfair practice charge against the Board on March 30, 2012. On April 24, 2013, a Complaint and Notice of Hearing issued on allegations that the employer violated 5.4a(1) and (5) of the Act. On March 31, 2014 and May 13, 2014, the Hearing Examiner conducted a hearing. The parties examined witnesses, presented exhibits, and filed post-hearing briefs.

This case involves the distinction between:

1. a claim that a past practice was contractually binding for the life of a contract; and

2. a claim that an existing employment condition could not be changed without prior negotiations.

The Association argued before the Hearing Examiner that this case presents the first type of claim (contractually binding past practice); the Board argued that the Association has not proven either type of claim; and we and the Hearing Examiner find that

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1/ (...continued)
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. "

this case involves the second type of claim (a change to an existing employment condition without negotiations).

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact which are supported by citations to the record (H.E. at 2-12). We offer a brief summary of the essential facts.

FACTS

None of the collective negotiations agreements between the Board and Association over the past twenty years have specified whether sick leave runs consecutively or concurrently with any other leave, and neither party proposed any provisions regarding the sequencing of sick leave and family leave. Since March 18, 2004, the Board has had a written "sick leave" policy providing that paid sick leave and other leaves are to run concurrently with unpaid FMLA leave. NJEA UniServ Field Representative Nancy Grbelja testified that she had understood that employees used paid sick leave and other leaves prior to using FMLA leave, and had been unaware of the Board's written policy until fall 2011.

The Board's Director of Human Resources from 2004-2010, Peter Pitucco, was responsible for recommending FMLA leaves to the Board for approval. Pitucco testified that unit employees first used paid leave and then, after approval by the Board, used unpaid FMLA leave. He testified that he never applied the leaves concurrently as specified by the 2004 policy, and during his

employment he never realized his department was acting at odds with Board policy. The Board's Superintendent from 2002-2012, Robert Copeland, testified to having no independent recollection of the 2004 sick leave policy or whether it was being followed.

In September 2008, the Board produced an "employee handbook" with a FMLA section directing employees seeking complete FMLA details to refer to the Board's sick leave policies. Shortly after becoming the Board's Director of Human Resources in November 2010, Catherine Sousa (Pitucco's successor) familiarized herself with the Board's sick leave policy. In fall 2011, Sousa applied the Board's written sick leave policy when unit member Rick Orozco sought approval for FMLA leave to run consecutively with his paid sick leave. On November 10, 2011, the Board approved Orozco's sick and FMLA leave to run concurrently, which he and the Association objected to by filing the instant unfair practice charge (Exhibit C-1).

In response to Pitucco's testimony about applying leaves consecutively and not implementing the Board's written sick leave policy from 2004-2010, Sousa could not identify any employee leaves during that period which showed that paid leave and FMLA leave were taken concurrently. Sousa testified that records for leaves totaling sixty (60) days or less do not distinguish between consecutive or concurrent use of paid leave with FMLA leave because 60 days is the max FMLA leave allotment. For those

leave records showing combined sick and FMLA leaves exceeding 60 days, Sousa, reviewing a spreadsheet which she prepared (Exhibit R-1), attributed the granting of paid sick leave prior to FMLA leave to clerical errors or other mistakes by HR which made them inconsistent with the Board's written sick leave policy.

The Hearing Examiner found that the record, supported by the testimony of then-HR Director Pitucco and NJEA Rep. Grbelja, shows that for more than six years the Board implemented consecutive leaves despite its written policy of concurrent leave, and that the Board, through the testimony of HR Director Sousa, was unsuccessful in refuting the practice. The Hearing Examiner found that whether or not the issuance or approval of concurrent paid leave and FMLA was due to errors in computation or in policy/law interpretation and application has no legal significance. Quoting our decision in Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484, 485 (¶21210 1990), aff'd. NJPER Supp.2d 268 (¶221 App. Div. 1992), the Hearing Examiner noted that the Commission is not concerned about "...how a longstanding practice came to exist, but that it did exist."

The Hearing Examiner rejected both the Board's contention that the Association acquiesced to the change in sick leave practice, and the Association's contention that the Board's provision of the consecutive leave benefit constituted an implied contractual commitment which the Board must maintain through the

life of the contract. Relying on Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000) and Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983), recon. den. P.E.R.C. No. 83-120, 9 NJPER 208 (¶14096 1983), he found that this type of case involves an alleged change in an existing working condition which triggers a duty to negotiate. The Association has not shown a contractual right to prevent the change, nor does the Board claim a contractual right to impose the change; therefore, if a violation is found, the employer is obligated to negotiate in good faith before changing the employment condition again, but is not obligated to maintain the employment condition until the end of the contract. Accordingly, finding that the Board failed to negotiate prior to changing the consecutive leave practice, the Hearing Examiner ordered the Board to restore the consecutive leave benefits, and then negotiate with the Association in good faith over any proposed change to that restored condition of employment.

ANALYSIS

Whether an employer runs an employee's FMLA leave and accrued paid leave concurrently or consecutively is a mandatorily negotiable term and condition of employment. See Lumberton Ed. Ass'n and Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd 28 NJPER 427 (¶33156 App. Div.

2002). 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. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

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

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978); Middletown Tp., supra; see also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).

In Middletown Tp., P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd 34 NJPER 228(¶79 2008), we found that the Township violated the Act by failing to negotiate with the PBA over the elimination of a reasonable period of shape-up/travel time for officers called in for emergent overtime. As here, the contract was silent on the issue and the responsible administrative leader (Township administrator in Middletown, Superintendent Copeland in the instant case) was not aware of the practice. We and the Appellate Division rejected the Township's argument that the past practice was invalid because it had not been negotiated by the administrator and approved by the governing body. 32 NJPER at 326; 34 NJPER at 231. The Appellate Division held:

> N.J.S.A. 34:13A-5.3 requires a public employer to negotiate conditions established by past workplace practices prior to changing any non-contractual employment conditions. This duty prohibits an employer from

> instituting unilateral, mid-contract changes in any conditions established by such past practices. The remedy for a failure to negotiate prior to instituting a mid-contract change is to restore and maintain the status quo until negotiations have been held and an agreement reached.
>
> [34 NJPER at 231; internal citations omitted]

In analyzing the Board's exceptions, we cannot review the Hearing Examiner's Findings of Fact de novo. Our review is constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due to fact-finder's credibility determinations and "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

We consider the Board's first and third exceptions together. In its first exception, the Board argues that the Hearing Examiner "mischaracterized Pitucco's testimony and placed undue weight on it" by finding that Pitucco did not recall having read or known about any Board policy requiring leaves to run concurrently. In its third exception, the Board argues that the

Hearing Examiner "erroneously found that the Board consistently implemented consecutive sick leaves for six years after adoption of the Policy." We reject the first exception, as the testimony cited by the Board does not refute the Hearing Examiner's finding of fact on this issue. Pitucco, although speculating that he probably saw the Board's 2004 sick leave policy at some time during his employment, at all times testified that he did not recall or could not remember specifically seeing the policy (H.E. at 6; 1T21; 1T24; 1T47; 1T48). In any event, and in response to the third exception, whether Pitucco had knowledge or comprehension of the written sick leave policy is irrelevant because he never applied the concurrent part of the policy and always applied leaves consecutively (H.E. at 5-6).

As recounted in the summary of the facts above, Sousa could not identify any employee leaves from 2004-2010 which showed that paid leave and FMLA leave were taken concurrently, and characterized the incidents of consecutive leaves during that period as errors. Our review of the record does not find that the Hearing Examiner's decision to rely on Pitucco's unequivocal testimony about the sick leave/FMLA policy he actually applied during his tenure, over the inconclusive testimony of Sousa based on her own review of leaves granted under Pitucco, was arbitrary, capricious or unreasonable or was not supported by sufficient, competent, and credible evidence. Not only was Sousa unable to

refute Pitucco's testimony through review of the Board's employee leave spreadsheets (R-1; R-2), but the Hearing Examiner's conclusion that "Board records of employee leaves of more than 60 days amply show that paid leave was used before FMLA leave" was further supported by documentary evidence supplied by the Association indicating multiple instances of explicit employee requests for, and Board approval of, the granting of consecutive leaves whereby paid leave was utilized prior to starting unpaid statutory FMLA or NJ FLA leaves (CP-3; CP-5; CP-7; CP-9; CP-11).

In its second exception, the Board argues that the Hearing Examiner "erroneously found that there was no evidence that the Association should have known about the Policy." We reject this exception, and accept the Hearing Examiner's determinations that Grbelja was unaware of the 2004 policy prior to 2011, that Association leadership was likely unaware, and that the Board produced no evidence demonstrating that the Association should have known of the policy (H.E. at 5, 13). The Board argues that Grbelja's testimony is entitled little weight because she was not a member of Association leadership, not employed by the District, and would not have known firsthand what the Association leadership was aware of. We reject that argument because Grbelja has handled the Association's labor issues and bargained its contract since 1993 (1T65).

The Board further argues that the 2008 Employee Handbook, required to be signed for receipt by every Board employee, notified employees of the existence of sick leave/FMLA policy, and therefore Association leadership should have been aware of it and failure to demand negotiations then constituted waiver of its right to negotiate the change. The employee handbook referred to the policy but did not actually contain the language of the policy. Although we believe it is likely that some members of the Association's leadership knew of the Board's 2004 policy change and some unit members may have become aware of the written policy when seeking information in anticipation of taking family leave, we accept the Hearing Examiner's finding of fact and conclusion that the Board did not present any rebuttal witnesses or contrary evidence sufficient to dispute the finding that the Association did not have knowledge of the 2004 policy until 2011 when it filed a charge in response to its implementation.

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). Here, there is no contention that the Association

expressly agreed to the 2004 policy via a contractual provision, and the facts adduced at hearing do not support acceptance of a past practice because the policy has not been shown to have been put into practice until 2011, let alone known or understood by the Association or the Board's HR Director from 2004-2010. In Middletown Tp., P.E.R.C. 98-77, supra, aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), the Commission, in finding that the Township violated the act by unilaterally changing a non-contractual practice of placing new police officers with certain experience at a particular step of the salary guide, rejected the Township's argument that the PBA had waived its right to negotiate. We found:

> Even if those placements could be viewed as deviations from a past practice, the record does not show that the PBA acquiesced in those deviations and thereby waived its right to negotiate. Two PBA representatives testified that they had no knowledge of any deviation from the alleged practice. The Township presented no contrary evidence. Contrary to the Township's suggestion, the PBA was not obligated to call as witnesses the PBA presidents from 1987 through 1992. If the Township wanted to rebut the current officers' testimony that the PBA had no knowledge of any deviations from the established practice, the Township should have called those earlier officers or other Township witnesses with first-hand knowledge of the facts.
>
> [24 NJPER 28, 30]

Similarly, in the instant case, the Board did not present any contrary evidence or testimony by which the Hearing Examiner

could find knowledge of and acquiescence to the Board's 2004 sick leave/FMLA policy in refutation of Grbelja's testimony.

The cases cited by the Board in support of this exception are distinguishable. In Bridgeton Bd. of Ed., P.E.R.C. No. 2011-64, 37 NJPER 72 (¶27 2011), the Commission did not make a determination on whether the union waived its right to negotiate a policy that had been in effect for fifteen years, but found that the union waived its right to negotiate a change in sick/FMLA leave policy "once it had notice of the policy" and subsequently refused to negotiate. Here, the implementation of the policy in 2011 due to the new HR Director's knowledge and understanding of it provided notice to the Association, and the Association filed the instant unfair practice charge rather than acquiescing. Here, unlike in Bridgeton, the Board did not offer to negotiate the changed policy once the Association became aware of it. Linden Bd. of Ed., H.E. No. 2012-9, 38 NJPER 384 (¶129 2012) was a pre-hearing decision in which the Hearing Examiner denied motions for summary judgment because she found that whether or when the Association became aware of the Board's FMLA/FLA policy was a disputed material fact. Here, that disputed material fact has already been fully considered, to the extent the parties' chose to present relevant evidence and testimony, through the hearing process. In Upper Saddle River Bd. of Ed., D.U.P. No. 2004-7, 30 NJPER 263 (¶91 2004), the Board

unilaterally adopted a family leave policy in 1998 and implemented it multiple times until the Association objected in 2003. Contrary to the instant case, the Association had full knowledge of the policy at inception and knew or should have known that it had been applied numerous times, so it waived its right to negotiate the issue mid-contract.

The Board's fourth and final exception is that "The Hearing Examiner failed to limit the scope of his recommended remedy to events occurring within six months of the filing of the unfair practice charge." The unfair practice charge was filed on March 30, 2012, which was within six months of the Board's decision to grant Orozco's leave concurrently, and thus within the statute of limitations. N.J.S.A. 34:13A-5.4(c). We do not understand the Recommended Order to contemplate any remedy for violations of the Act occurring prior to the six month period, nor has the Board suggested any legal authority for why the remedy would not apply prospectively to any other unit employees who have since been denied concurrent leaves. We therefore reject this exception.

In adopting the Hearing Examiner's Recommended Order, we emphasize that we are not holding that the Association has a contractual right to have the consecutive leave benefit maintained. We simply hold that if the Board wished to make a change, it had to first negotiate with the Association in good faith. See, e.g., Middletown Tp., P.E.R.C. No. 2007-18, supra;

Middletown Tp., P.E.R.C. 98-77, supra. Unlike an arbitrator, we cannot find a breach of an allegedly binding past practice and order restoration of the status quo for the life of the contract. Our jurisdiction here is limited to enforcing an employer's statutory obligation under section 5.3 to negotiate before modifying existing employment conditions and our remedial authority is limited to restoring the status quo before the change and ordering negotiations before any further changes.

We further note that neither our Act nor the School Act (L. 2003, c. 126) requires the Board to exhaust impasse procedures before implementing a mid-contract change to a non-contractual term and condition of employment. In University of Medicine and Dentistry, P.E.R.C. No. 2010-98, 36 NJPER 245 (¶90 2010), we ordered the parties to negotiate over UMDNJ's unilateral mid-contract change to non-contractual hour and salary terms for faculty practice/clinical components. We clarified:

> Our impasse rules, N.J.A.C. 19:12 et seq.,...provide for mediation and fact-finding during successor contract negotiations or agreed-upon reopener negotiations. N.J.A.C. 19:12-2.1. Those rules do not impose and never have imposed an obligation on a public employer to exhaust impasse procedures when negotiating over a mid-contract change in a non-contractual term and condition of employment.
>
> In addition, the School Act does not require agreement from an exclusive representative before a school employer can implement a mid-contract change in a non-contractual term and condition of employment.

[36 NJPER at 246-247]

See also Kean University, P.E.R.C. No. 2013-64, 39 NJPER 449 (¶143 2013)(University ordered to negotiate over mid-contract change in faculty's mandatory office hours).

ORDER

The Piscataway Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a term and condition of employment without negotiations; specifically, the consecutive taking of sick and other paid leaves, followed by the taking of family leave, pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq.

2. 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, particularly by unilaterally changing the consecutive taking of sick and other paid leaves, followed by the taking of family leave, pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq.

B. Take this action:

1. Rescind the unilaterally implemented rule requiring unit employees to use paid leaves and family leave

pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq. concurrently.

2. Restore the term and condition of employment enabling unit employees to use paid leaves and leave pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq. consecutively.

3. Make whole any unit employees who have been denied the consecutive use of paid leaves and family leave, pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq.

4. Negotiate in good faith with the majority representative over any proposed change in the restored term and condition of employment.

5. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

6. Within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: August 13, 2015

Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a term and condition of employment without negotiations; specifically, the consecutive taking of sick and other paid leaves, followed by the taking of family leave, pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq.

WE WILL cease and desist from 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, particularly by unilaterally changing the consecutive taking of sick and other paid leaves, followed by the taking of family leave, pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq.

WE WILL rescind the unilaterally implemented rule requiring unit employees to use paid leaves and family leave pursuant to the Family and Medical Leave Act, 29 U.S.C.A., §2601 et seq. concurrently.

WE WILL restore the term and condition of employment enabling unit employees to use paid leaves and leave pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq. consecutively.

WE WILL make whole any unit employees who have been denied the consecutive use of paid leaves and family leave, pursuant to the Family and Medical Leave Act, 29 U.S.C.A. §2601 et seq.

WE WILL negotiate in good faith with the majority representative over any proposed change in the restored term and condition of employment.

Docket No. CO-2012-271 PISCATAWAY TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"