H.E. NO. 2023-3

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

In the Matter of

DEERFIELD TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-2019-106

DEERFIELD TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party,

-and-

DEERFIELD TOWNSHIP SUPPORTIVE
STAFF ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a motion for summary judgment filed by the Respondent Deerfield Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1) and (5), when it unilaterally revised its policy regarding employee use of sick leave pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., from consecutive to concurrent exhaustion of available sick leave with the use of FMLA leave and unilaterally revised its sick leave verification policy without negotiating with the Associations the impact of the costs on the employees. The Hearing Examiner finds that material factual issues preclude granting the motion. The case shall proceed to a plenary hearing.

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Appearances:

For the Respondent,
Comegno Law Group, P.C., attorneys
(Mark G. Toscano, of counsel)

For the Charging Parties,
Selikoff & Cohen, P.A., attorneys
(Keith Waldman, of counsel)

HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGEMENT

On October 22, 2018, the Deerfield Township Teachers' Association ("DTTA") and the Deerfield Township Supportive Staff Association ("DTSSA")(collectively "Associations") filed an unfair practice charge against the Deerfield Township Board of Education (Board). The charge alleges in Count I that the Board

violated the New Jersey Employer-Employee Relations Act (the "Act") N.J.S.A. 34:13A-1 et seq., specifically N.J.S.A. 34:13A-5.4a(1) and (5)[1/] when the Board unilaterally revised its policy regarding unit employee use of sick leave pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., from consecutive to concurrent exhaustion of available sick leave with the use of FMLA leave. The charge alleges in Count II that the Board also unilaterally revised its sick leave verification policy without negotiating with the Associations the impact of the costs on the employees. Finally, the charge alleges in Count III that the Board unilaterally increased the contractual work year for certificated employees from 185 to 186 days.

On June 6, 2019, the Director of Unfair Practices issued a written decision dismissing Count III of the charge finding that the Commission's complaint issuance standard had not been satisfied. D.U.P. No. 2019-5, 45 NJPER 424 (¶115 2019). On September 17, the Director issued a Complaint on Counts I and II. On October 1, the Board filed an Answer with Affirmative Defenses.

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"; and "(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 February 28, 2020, the Board filed a motion for summary judgment on the remaining Counts with the Commission. On April 9, the Associations filed a letter brief in opposition to summary judgment. On May 4, the Board filed a reply brief and on May 13, the Associations filed a sur-reply. On April 15, the summary judgment motion was referred by the Commission to the Hearing Examiner for decision. The Board's motion is supported by briefs, exhibits, and the certifications of its counsel and Chief School Administrator Mary Steinhauer-Kula (Steinhauer-Kula). The Association filed briefs and the certification of New Jersey Education Association Region 2 Uniserv Field Representative Alfred Beaver (Beaver). Based upon the record submitted, I find the following facts.

FINDINGS OF FACT

1. The Board and the Associations are, respectively, public employer and public employee representatives within the meaning of the Act.

2. The DTTA represents all non-administrative and non-supervisory certificated staff employed by the Board.

3. The DTSSA represents a unit of all non-confidential secretarial employees and instructional aides employed by the Board.

4. The DTTA and Board are parties to a collective negotiations agreement (CNA) with a term of July 1, 2017 through June 30, 2020.

5. The DTSSA and the Board are parties to a collective negotiations agreement with a term of July 1, 2013 through June 30, 2017 that was extended by a Memorandum of Agreement dated June 28, 2018.

6. Article VII(A)(6) of the CNAs between the Board and the Associations are titled "Maternity/Paternity Leave" and provide, in pertinent part: "Employees may utilize their existing sick leave prior to taking maternity/paternity leave. Utilization of sick leave shall not delay appropriate contractual application for maternity/paternity leave."

7. Board Policies 4152.3 and 4252.3 are titled "Instructional Personnel Family Leave" and "Support Personnel Family Leave" respectively. Prior to April 2018, these policies permitted employees to use paid leave and FMLA leave consecutively. An employee first exhausted their paid leave and then could take FMLA leave unpaid.

8. In April 2018, the Board amended policies 4152.3 and 4252.3 to require concurrent use of paid and FMLA leave.

9. Board Policies 4151 and 4251 are titled "Instructional Personnel Attendance Patterns and "Support Personnel Attendance Patterns" respectively. Prior to April 2018, these policies

provided that the Board may require a doctor's note for employee absences more than three (3) days.

10. In April 2018, the Board amended Policies 4151 and 4251 to require a doctor's note for absences more than three (3) days in duration.

11. In April 2018, the Board further amended Board Policies 4151 and 4251 to include the requirement that a doctor's note be provided "for absences due to illness on days when in-service trainings or required after school meetings are held, and on days immediately proceeding or following a holiday or other day off for breaks, NJEA convention, etc."

12. On September 24, 2018, counsel for the Board, Mark Toscano (Toscano) emailed Beaver and advised that "representatives of the Board and Administration are happy to meet with representatives of the DTTA and DTSSA to discuss their previously expressed concerns over the Board's Sick Leave and FMLA/FLA Policies . . ."

13. On September 27, 2018, Beaver responded that he was discussing the matter with the local Associations.

14. On October 24, 2018, Toscano emailed Beaver advising the Administration was available on November 12 or 13 at 2:45 p.m.

15. On October 26, 2018 Beaver responded that the Associations were not available and requested new dates.

16. On October 31, 2018 Toscano proposed November 20, 27, 28 or 30 to hold the meeting.

17. On November 12, 2018, Beaver responded that November 27 or 28 would work for the Associations.

18. On November 14, 2018, Toscano emailed Beaver confirming a meeting on November 28, 2018 at 3:00 p.m.

19. On November 16, 2018, Beaver confirmed the November 28, 2018 meeting if the Board would excuse three (3) unit members from Grade Level meetings without loss of pay and without requiring them to make the time up in the future. On November 20, Beaver followed-up on this request.

20. On November 20, 2018, Toscano proposed the meeting start at 4:15 p.m. so as to avoid conflict with teachers' meetings. Toscano further requested a list of topics for the meeting.

21. On November 21, 2018, Beaver responded that he would send a list of topics on Monday and requested the Board do the same. He further requested that the parties not move the meeting start time as he (Beaver) had a mediation scheduled in another district the same evening.

22. On November 26, 2018, Toscano responded that the Board would like to keep the meeting start at 4:15 p.m. so the learning groups could meet. Toscano also inquired about the timing of the mediation.

23. On November 27, 2018, Beaver responded that he had received documents from the Board and would need time to review them. He also suggested that the parties look for another date on which to meet as the meeting would be abbreviated with a 4:15 p.m. start. Beaver further advised that he was meeting with the Associations that afternoon and would "get back" to Toscano.

24. On November 28, 2018, Beaver emailed Toscano advising that the Associations needed to reschedule the meeting. Beaver also requested additional documents from the Board prior to the meeting.

25. On November 29, 2018, Toscano responded that he had requested dates from the Board to reschedule the meeting and that the Board's negotiations committee would attend. Toscano also requested further information on the need for documents, specifically a scattergram, requested by the Associations.

26. On December 3, 2018, Beaver responded that the scattergram was requested as part of the Associations' review of the workday/school calendar issue.

27. On December 6, 2018, Toscano advised Beaver that the Board would not provide a scattergram as it was not deemed relevant. Toscano also advised that the Board was working on a date to meet, but acknowledged the parties would be able to discuss some issues at the exploratory conference on the unfair practice charge then-scheduled for January 8, 2019.

28. The parties met on February 5, 2019.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. 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).

N.J.A.C. 19:14-4.8(d) provides:

> 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 that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill, supra; Judson, supra. The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006, 32 NJPER 12 (¶6 2006).

The Board argues that it had a managerial prerogative to change the sick leave policy as it relates to FMLA leave as federal regulations preempt the treatment of sick leave use prior

to FMLA leave. "Substitution of Paid Leave", 29 C.F.R. §825.207 provides, in part:

> (a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. See §825.300(c). If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.
>
> (b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.
>
> (c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

The Board points to guidance from the United States Department of Labor and predominately unpublished federal court decisions to assert its argument that federal regulations empower employers to require concurrent use of paid and FMLA leave. The Board further argues that federal regulations preempt here under the conflict preemption doctrine. See Farina v. Nokia, Inc., 625 F.3d 97 (3rd Cir. 2010) (Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law creates an obstacle to the accomplishment and execution of the full purposes and objectives of congress). The Board also asserts that even if concurrent or consecutive use of paid leave were mandatorily negotiable, summary judgment is still appropriate as the Board alleges it negotiated with the Associations through email discussions, an in-person meeting held on February 5, 2019, and during the exploratory conference held on February 26, 2019.

The Associations respond that FMLA regulations do not preempt the use of consecutive FMLA leave as the regulatory language is discretionary and therefore not in conflict with Commission precedent. They cite Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015) where the Commission held, after the effective date of 29 C.F.R. $825.207, that whether an employer runs an employee's paid

leave and FMLA leave concurrently or consecutively is a mandatorily negotiable term and condition of employment.

The Board replies that 29 C.F.R. §825.220(d) provides "employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA." Thus, allowing an employee to first exhaust paid leave would be a waiver of their right to FMLA leave in violation of federal regulation. The Associations object to the Board's inclusion of this new argument in its reply brief. In sur-reply, the Associations assert that paid leave and FMLA leave are distinct. Permitting employees to choose to run FMLA leave and contractual leave consecutively rather than concurrently does not constitute a waiver of FMLA rights, but rather is an amplification of those rights.

The Commission and the courts have consistently held that whether FMLA and sick leave run concurrent or consecutive is mandatorily negotiable. 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) (The FMLA sets minimum family leave benefits and does not eliminate all employers discretion to negotiate with the union for greater benefits); Union Cty., P.E.R.C. No. 2021-57, 48 NJPER 46 (¶12 2021)(grievance contesting employer's requirement to use sick leave for NJFLA leave was mandatorily negotiable); Ocean Cty. Voc. Tech. School, P.E.R.C. No. 2022-32, 48 NJPER 359(¶80

2022)(Employer violated the Act when it unilaterally enacted a policy requiring concurrent use of sick leave with FMLA leave).

Recently, the Commission and Appellate Division revisited the issue of FMLA leave. In City of East Orange and East Orange SOA, P.E.R.C. No. 2021-50, 47 NJPER 530(¶124 2021) aff'd 48 NJPER 441 (¶100 App. Div. 2022), the Court affirmed a Commission decision holding that the City was required to negotiate before it adopted a new FMLA policy. Here, the Board acknowledges this long-standing precedent, but asserts the issue is still preempted. I am not persuaded by the Board's preemption argument. Written guidance from the Department of Labor is not a statute or regulation; and the regulations cited by the Board are discretionary as they state an employer "may" require concurrent use of sick leave with FMLA leave. They do not speak in the imperative and leave discretion to the Board. See Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (In order to be preemptive, a statute or regulation must expressly, specifically, and comprehensively set an employment condition and divest an employer of all discretion).

The Board also asserts summary judgment is appropriate as it negotiated with the Association on February 5 and at the PERC exploratory conference. However, the record is void of specifics, especially as it relates to prior to the implementation of the new policies. Public employers are

required to negotiate with a majority representative before making changes to mandatorily negotiable terms and conditions of employment. East Orange. Giving all inferences to the Association in light of the long-standing Commission and Court precedent and the scare record related to any negotiations, I deny the Board's motion for summary judgment as to Count I of the Complaint.

As to Count II of the Association's charge, the Board argues that it maintains a nonnegotiable managerial prerogative to verify sick leave. It cites City of Elizabeth v. Elizabeth Fire Officers Ass'n, Loc. 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985)(employers have a managerial prerogative to require sick leave verification at any time). The Board asserts that to the extent it is required to negotiate impact issues from the policy change, it did so at the February 5 meeting and the exploratory conference.

The Associations respond that Count II of the charge relates to the negotiable impacts of the Board's unilateral change to the sick leave policy including co-pays and mileage. As to the Board's argument that it did negotiate, the Associations highlight that the dates cited were after the policies had been changed. The Board replies that it is not required to negotiate economic impact issues prior to changing a sick leave policy. The Associations sur-reply that increasing the number of

occasions when a doctor's note is required increases the expenses employees incur and was therefore required to be negotiated prior to implementation.

The Commission has consistently held that a public employer has a managerial prerogative to use reasonable means to verify employee illness or disability. See, e.g., Atlantic Cty. Sheriff's Office and PBA Local 243, 43 NJPER 202 (¶60 2016); Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009); State of New Jersey (Dep't of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). This includes the right to require that employees taking sick leave produce doctors' notes; it also includes the right to determine the number of absences that will trigger a doctor's note requirement and the time frame in which absences will be counted. See, e.g., New Jersey State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Butler Bor., P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987). However, what the disciplinary penalties will be for abusing sick leave and the cost of obtaining verification are mandatorily negotiable and the application of a sick leave

verification policy may be challenged through contractual grievance procedures. See, e.g., Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); State of New Jersey (Dep't of Treasury).

Similar to Count I and giving every reasonable inference to the Associations while viewing the facts in the light most favorable to the charging parties, the record is void of any negotiations discussions prior to the implementation of the new sick leave verification policy. The Board asserts that negotiations took place via email and at the meeting of February 5. The Associations dispute that negotiations occurred. These disputed facts are material and require a plenary hearing.

Based on the foregoing, I deny the Board's motion for summary judgment.

/S/Marisa Koz
Hearing Examiner

DATED: September 13, 2022
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 September 23, 2022.