

P.E.R.C. NO. 2011-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MOUNT HOLLY,

Petitioner,

-and-

Docket Nos. SN-2010-077

SN-2007-078

CWA LOCAL 1036,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the requests of the Township of Mount Holly for restraints of binding arbitration of grievances filed by CWA Local 1036. The grievances seek payment for accumulated vacation time in a Civil Service jurisdiction. The Commission grants the requests to the extent the grievances seek to have the employee accumulate more vacation time than allowed by Civil Service regulations and denies the requests to the extent the grievances seek compensation for unused vacation days.

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. 2011-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MOUNT HOLLY,

Petitioner,

-and-

Docket Nos. SN-2010-077

SN-2007-078

CWA LOCAL 1036,

Respondent.

Appearances:

For the Petitioner, Gruccio, Pepper, DeSanto & Ruth,
P.A., attorneys (Shant J. Zakarian, of counsel)

For the Respondent, Barry D. Isanuk, attorney

DECISION

On March 25, 2010, the Township of Mount Holly petitioned for two scope of negotiations determinations. The Township seeks restraints of binding arbitration of two grievances filed by CWA Local 1036. The grievances seek payment for accumulated vacation time. Because the Township is governed by Civil Service regulations, we grant the request for a restraint to the extent the grievance seeks to have the employee accumulate more vacation time than allowed by regulations, but deny the request to the extent the grievance seeks compensation for unused vacation days.

The parties have filed briefs and exhibits. Neither party has filed any certifications. N.J.A.C. 19:13-3.5(f) (all

pertinent facts must be supported by certifications based upon personal knowledge). These facts appear.

CWA Local 1036 represents non-supervisory white collar employees of the Township. The parties entered into a collective negotiations agreement effective from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration. Article XVIII, Leaves of Absence provides, in relevant part:

4. Annual Leave (Vacation Leave)

* * *

d. Unused vacation may be accumulated beyond the calendar year in which it is earned but must be used during the following two (2) years. Leave taken is automatically charged against the earliest leave available to the employee.

e. Annual leave not taken within these time limits shall be eliminated except when an employee is prevented from using his leave due to the work load and/or assignment of the Township. In this instance, the employee shall be reimbursed for this leave rather than [sic] its elimination. An employee who is unable to utilize his accumulated vacation leave must notify the Township Manager at least three (3) months prior to the end of the year.

This dispute involves a principal account clerk. In November 1992, a supervisor requested that due to the office

workload, vacation time for her and the clerk be carried over. The Township Manager approved the request. In 1993, 1994, 2001, 2002, 2003, 2004, and 2005, similar requests were approved.

On October 27, 2006, the clerk made a similar request that was not answered until January 12, 2007. At that time, the Township Manager informed the clerk that she would not sign any further requests for vacation carryover. On October 17, 2007, the Manager issued a memorandum to Township employees stating that all vacation time not used for the year can be carried over for a maximum of two years. The memorandum also stated that vacation time not used within that two year period will not be permitted to be carried over any longer and that there are several employees with vacation time that must be used by December 31, 2007.

On October 31, 2007, the clerk requested permission to carry over vacation time in the amount of 95 days plus 5.5 hours. She stated that she found it very difficult to plan time off due to deadlines and the tremendous workload in the Finance Office.

On March 27, 2008, the Township Manager informed the clerk that her accumulated vacation time had to be used by the end of 2009. The memorandum suggested that she might want to begin a four-day workweek beginning April 1, 2008.

On September 30, 2008, the clerk informed the Township Manager that she had 116 vacation days in excess of the maximum

60 days that she could carry over and that the ever increasing workload of the Finance Office made it extremely difficult to use vacation leave. She requested permission to carry over or be reimbursed for the excess time.

On January 22, 2010, the Township Manager informed the clerk that her vacation time was reduced from 1420.15 hours to 420 hours. The memorandum stated that the Township had tried to facilitate a mutual agreement to allow her to use her accumulated time, but that since no agreement or plan had been established, her vacation time had been reduced.

The clerk filed two grievances. One grievance sought "Pay out the vacation carryover time." The other sought "to be made whole in every way for the loss." The grievances were not resolved and Local 1036 sought binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405]

A statute or regulation will not preempt negotiations unless it specifically and expressly fixes an employment condition, thereby eliminating the employer's discretion to vary that condition.

Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Township argues that Civil Service statutes and regulations preempt negotiations and arbitration over the accumulation of vacation leave in Civil Service jurisdictions.

Local 1036 responds that those statutes and regulations do not govern procedures for leave taking, a significant portion of the leave time was carried over by agreement of the Township, and the Township should not be permitted to gain a windfall by taking away benefits earned and by failing to reimburse the employee pursuant to the contract or by setting up procedures by which she could take the time in order to avoid loss of leave.

The number of vacation days and the possibility of payment for unused vacation days are mandatorily negotiable absent a preemptive statute or regulation. State of New Jersey (Dept. of Corrections) v. CWA, 240 N.J. Super. 26 (App. Div. 1990); State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 96-47, 22 NJPER 37 (¶27018 1995); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987).

N.J.S.A. 11A:6-3 preempts aspects of vacation leave for Civil Service employees. It provides, in relevant part, that "[v]acation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only."

Civil Service regulations also preempt certain aspects of vacation leave. N.J.A.C. 4A:6-1.2(f) and (g) provide:

(f) Appointing authorities may establish procedures for the scheduling of vacation leave. Vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only and shall be scheduled to avoid loss of leave.

(g) An employee who leaves State government service or service with a local jurisdiction shall be paid for unused vacation leave.

We agree with the Township that N.J.A.C. 4A:6-1.2(f) prohibits the accumulation of more than two years of vacation leave - the yearly allotment plus one year of leave carried over from the prior year. We have previously held, however, that the regulation addresses itself to the scheduling of vacation days and the loss of vacation days, not to possible payment for unused vacation days not yet lost. Hazlet Tp., P.E.R.C. No. 96-56, 22 NJPER 73 (¶27033 1996); contrast State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 96-47, 22 NJPER 37 (¶27018 1995) (retired employee may not be paid for vacation days lost by operation of regulation). The regulation entitles an employee to carry over vacation days unused because of business necessity into the next succeeding year, but does not expressly and specifically prohibit an employer from agreeing to give an employee the option of a cash payment for unused but still available vacation days instead. Other regulations require an employer to pay a retired employee or a deceased employee's estate for unused vacation days, but do not prohibit an employer from agreeing to pay a current employee for unused vacation days. N.J.A.C. 4A:6-1.2(g) and (i). We therefore restrain arbitration to the extent the grievance seeks accumulation of vacation leave beyond Civil Service limits, but decline to restrain arbitration

to the extent the grievance seeks compensation for vacation days carried over. The Township's assertion that the clerk could have and should have used her accumulated vacation leave before those leave balances were reduced is a question for the arbitrator.

ORDER

The request of the Township of Mount Holly for a restraint of binding arbitration is granted to the extent the grievances seek accumulation of vacation leave beyond Civil Service limits, but denied to the extent the grievances seek compensation for vacation days carried over due to business demands.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: October 28, 2010

Trenton, New Jersey