

P.E.R.C. NO. 2013-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Petitioner,

-and-

Docket No. SN-2012-062

JUDICIARY COUNCIL OF AFFILIATED UNIONS,
SUPPORT STAFF UNIT AND
SUPPORT STAFF SUPERVISORY UNIT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey Judiciary for a restraint of binding arbitration of a grievance filed by the Judiciary Council of Affiliated Unions, Support Staff Unit and Support Staff Supervisory Unit. The grievance asserts that the Judiciary's newly issued Leave Policy violates the parties' agreement by restricting the use of credited, but unaccrued, sick and vacation leave. The Commission holds that sick and vacation leave are mandatorily negotiable, and that the use of credited ("frontloaded") sick or vacation leave that was not yet earned based on work in a particular year is not statutorily preempted. The Commission finds that the Civil Service regulations cited by the Judiciary require reimbursement after using credited, unearned leave, but do not expressly preempt use of such leave.

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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Appearances:

For the Petitioner, Office of Counsel to the
Administrative Director of the Courts
(Susanna J. Morris, on the brief)

For the Respondent, Weismann & Mintz LLC, attorneys
(Ira W. Mintz, of counsel)

DECISION

On April 18, 2012, the State of New Jersey Judiciary filed a scope of negotiations petition. The Judiciary seeks a restraint of binding arbitration of a grievance filed by the Judiciary Council of Affiliated Unions - Support Staff Unit, and Support Staff Supervisory Unit (JCAU). The grievance asserts that on February 28, 2011, the Judiciary violated sections 16.4 and 18.1(a)2 of the parties' collective negotiations agreements when it unilaterally issued a new Leave Policy that restricted the use of credited, but unaccrued, sick and vacation leave in leave of absence situations.

The parties have filed briefs and exhibits.^{1/} These facts appear.

The JCAU represents all Judiciary support staff and support staff supervisors.^{2/} The Judiciary and the JCAU are parties to two collective negotiations agreements ("CNA")^{3/} with terms of July 1, 2008 through June 30, 2012, one for the Support Staff Unit and one for the Support Staff Supervisory Unit. The grievance procedure ends in binding arbitration.

Article 16 of the CNA governs vacation leave. Article 16.4, entitled "Credit at Beginning of Year", states:

Vacation leave is credited in advance at the beginning of the calendar year in anticipation of continued employment for the full year and may be used on that basis, unless reimbursement is required pursuant to N.J.A.C. 4A:6-1.5.

Article 18 of the CNA governs sick leave. Subsection 18.1(a)(2) states:

After the initial month of employment and up to the end of the first calendar year, employees shall be credited with one working day for each month of service. Thereafter, at the beginning of each calendar year in

1/ Neither party filed a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

2/ The specific titles in these categories are listed in "Appendix A" of the agreements (the Support Staff Unit and Support Staff Supervisory Unit have separate agreements).

3/ The relevant vacation and sick leave contract clauses at issue are identical between the agreements, and will be referred to in the singular.

anticipation of continued employment, employees shall be credited with 15 working days.

In addition to Article 16.4's reference to N.J.A.C. 4A:6-1.5 in relation to reimbursement, Article 16.1, entitled "Adherence to Regulations", generally places the CNA's vacation provisions in accord with the Civil Service regulations, stating:

Vacation leave shall be granted in accordance with the provisions of N.J.A.C. 4A:6-1.2.

Similarly, the CNA's sick leave provisions conform to the Civil Service regulations. Article 18.1(a) states, in pertinent part:

All employees covered by this Agreement shall accumulate sick leave with pay as provided by N.J.A.C. 4A:6-1.3 and shall reimburse the Employer for excess sick leave as provided by N.J.A.C. 4A:6-1.5.

On February 28, 2011, the Judiciary issued a Leave Policy that included sections concerning adjustments to vacation and sick leave for employees on a leave of absence. Policy section IV.A.3.a.iv states:

Unearned vacation leave may not be advanced to cover a leave of absence. Once an employee on an approved leave of absence exhausts his or her accrued vacation, the employee will not be permitted to utilize time anticipated to be earned during the remainder of the year or in subsequent years.

Similarly, Policy section IV.C.3.a.iii states:

Unearned sick leave may not be advanced to cover a leave of absence. Once an employee on an approved leave of absence exhausts his or her accrued sick leave, the employee will not be permitted to utilize time anticipated to be earned during the remainder of the year or in subsequent years.

On March 18, 2011, the JCAU filed a grievance asserting that sections IV.A.3.a.iv and IV.C.3.a.iii of the Judiciary's Leave Policy violate sections 16.4 and 18.1(a)(2) of the CNA, as well as Civil Service regulations N.J.A.C. 4A:6-1.2, 4A:6-1.3, and 4A:6-1.5. On August 2, 2011, the grievance was denied at Step 2. On December 12, 2011, the grievance was denied at Step 3. On April 2, 2012, the JCAU demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the Judiciary may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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]

Vacation leave and sick leave are mandatorily negotiable subjects unless a statute or regulation preempts negotiations. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); State of New Jersey (Dept. of Corrections) and CWA, 240 N.J. Super. 26 (App. Div. 1990); Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Barneгат Tp. Bd. of Ed., P.E.R.C. NO. 84-123, 10 NJPER 269 (¶15133 1984). Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). If a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Judiciary does not dispute that vacation and sick leave are ordinarily mandatorily negotiable subjects. The Judiciary also acknowledges that N.J.A.C. 4A:6-1.2 and 1.3 entitle full-time career service employees to be "credited" with their full annual allotment of vacation and sick days at the beginning of each calendar year "in anticipation of continued employment." Those provisions state, in pertinent part:

4A:6-1.2 Vacation leave

(a) Full-time State employees in the career service shall be entitled to annual paid vacation leave, credited at the beginning of each calendar year in anticipation of continued employment, based on their years of continuous State full-time or part-time service in the career, senior executive or unclassified service.

...

4A:6-1.3 Sick leave

(a) Full-time State employees shall be entitled to annual paid sick leave as set forth in (a)1 and 2 below. Full-time local employees shall be entitled to a minimum of annual paid sick leave as follows:

...

2. After the initial month of employment and up to the end of the first calendar year, employees shall be credited with one working day for each month of service. Thereafter, at the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days.

However, the Judiciary argues that the issue of whether an employee is permitted to use credited but unearned sick or vacation days to cover a leave of absence is preempted from negotiations by Civil Service regulations. Specifically, the Judiciary asserts that N.J.A.C. 4A:6-1.5(b) requires that an employee on a leave of absence have his/her leave prorated based on earned leave time up until the leave of absence, and therefore does not permit the employee to use unearned leave time that was credited at the beginning of the year.

The Civil Service regulation alleged to be preemptive, N.J.A.C. 4A:6-1.5, states in relevant part:

4A:6-1.5 Vacation, administrative and sick leave adjustments: State service

(a) Employees in State service are liable for vacation and sick leave days taken in excess of their entitlements.

(b) An employee who leaves State service or goes on a leave of absence without pay before the end of the calendar year shall have his or her leave prorated based on time earned, except that the leave of an employee on a voluntary furlough or furlough extension leave shall not be affected. An employee who is on the payroll for greater than 23 days shall earn a full month's allowance, and earn one-half month's allowance if he or she is on the payroll from the 9th through the 23rd day of the month.

1. An employee shall reimburse the appointing authority for paid working days used in excess of his or her prorated and accumulated entitlements.

2. An employee who returns to work from a leave of absence shall not be credited with paid vacation or sick leave until the amount of leave used in excess of the prorated entitlement has been reimbursed.

The JCAU responds that N.J.A.C. 4A:6-1.5(b) does not preempt the use of credited, but unearned, vacation or sick days during leaves of absence. Rather, the JCAU argues, the regulation provides that employees who take a leave of absence are liable to reimburse the employer for leave taken in excess of their prorated and accumulated entitlements. It asserts that subsections 1.5(b)1. and 2. specify how employees must reimburse the employer for credited, but unearned, leave time used during a leave of absence. The JCAU concludes that the regulation therefore contemplates the situation in which employees are permitted to use credited but unearned leave time, and thus does not expressly preempt the use of such credited vacation or sick leave during a leave of absence.

In determining whether N.J.A.C. 4A:6-1.5(b) preempts negotiations on the dispute at issue, it is helpful to clarify definitions of leave terminology commonly used in the regulations and by the parties. Credited leave (sometimes referred to as "frontloaded" vacation or sick leave) refers to the vacation and sick days that are prospectively credited to an employee at the start of the calendar year in anticipation that the employee will remain employed through the end of the upcoming year. Earned leave refers to the number of credited vacation and sick days that have actually been earned based on time worked at a particular point during the year, as calculated by the leave accrual formula.^{4/} Unearned leave refers to the number of remaining credited vacation and sick days at a particular point during the year that have not yet been earned based on time worked. Accumulated leave refers to earned and unused sick and/or vacation leave that has been carried over into the current calendar year from prior years.

The first paragraph of N.J.A.C. 4A:6-1.5(b) plainly states that an employee who goes on a leave of absence without pay before the end of the calendar year shall have his or her leave prorated based on time earned. This portion of the regulation

^{4/} An employee on the payroll for more than 23 days shall earn a full month's allowance, and earn one-half month's allowance if he or she is on the payroll from the 9th through the 23rd day of the month. N.J.A.C. 4A:6-1.5(b).

specifies how "earned" leave will be calculated in that circumstance, but does not specifically prohibit an employee from using unearned, credited leave in excess of such earned leave.

N.J.A.C. 4A:6-1.5(b)1. and (b)2. assist in clarifying the regulatory intent of the first paragraph in regard to use of unearned, credited leave during leaves of absence: (b)1. requires an employee to reimburse the employer "for paid working days used in excess of his or her prorated and accumulated entitlements" (emphasis added); and (b)2. provides incentive/penalty for an employee to reimburse the employer for use of such excess leave by not crediting additional "vacation or sick leave until the amount of leave used in excess of the prorated entitlement has been reimbursed" (emphasis added). By referring to leave used in excess of the prorated (or earned) and accumulated leave, and providing a mechanism for reimbursement of such excess (credited, but unearned) leave, the regulation contemplates circumstances in which an employee would use such leave during a leave of absence.

Therefore, N.J.A.C. 4A:6-1.5(b), read in its entirety, does not expressly prohibit use of credited, unearned leave during leaves of absence, and implicitly allows it by referencing such circumstances and specifying the reimbursement rules for use of such leave. Accordingly, sections 16.4 and 18.1(a)2 of the parties' CNA are not preempted by N.J.A.C. 4A:6-1.5(b), and the issue of whether sections IV.A.3.a.iv and IV.C.3.a.iii of the

Judiciary's Leave Policy violate the parties' CNA is legally arbitrable.

ORDER

The request of the State of New Jersey Judiciary for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Wall voted in favor of this decision. None opposed. Commissioner Jones abstained from consideration. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey