

P.E.R.C. NO. 2018-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

POINT PLEASANT BEACH BOROUGH,

Petitioner,

-and-

Docket No. SN-2018-009

PBA LOCAL 106,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Borough's request for a restraint of binding arbitration of a PBA grievance contesting the prorating of a unit member's sick and vacation leave due to his impending retirement before the end of the calendar year. Finding that N.J.A.C. 4A:6-1.3(a)2 preempts the granting of annual sick leave in excess of an employee's anticipated continued employment that year, the Commission restrains arbitration of the portion of the grievance concerning proration of sick leave. Finding that neither N.J.S.A. 40A:14-137.1, applicable to municipal police, nor the Civil Service regulations applicable to local government employees specifically prohibit the front loading of annual vacation leave or define when vacation leave is considered earned and accrued, the Commission declines to restrain arbitration of the portion of the grievance concerning proration of vacation 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, Armando Riccio, LLC, attorneys
(Armando V. Riccio, on the briefs)

For the Respondent, Crivelli & Barbati, LLC, attorneys
(Frank M. Crivelli, of counsel and on the brief; Donald
C. Barbati, on the brief)

DECISION

On August 15, 2017, the Point Pleasant Beach Borough (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 106 (PBA). The grievance asserts that the Borough violated Articles V, XII, and XV of parties' collective negotiations agreement (CNA) by prorating a police sergeant's sick and vacation leave due to his impending retirement.

The Borough filed briefs, exhibits, and the certification of Borough Administrator/Chief Financial Officer Christine Riehl. The PBA filed a brief and the certifications of its President,

Christopher Mosca, and the police sergeant (grievant). These facts appear.

The Borough is a Civil Service jurisdiction. The PBA represents all patrolmen, sergeants, lieutenants, captains and deputy chiefs employed by the Borough's Police Department, excluding the chief of police. The Borough and PBA are parties to a CNA in effect from January 1, 2015 through December 31, 2017.^{1/} The grievance procedure ends in binding arbitration.

Article XII of the CNA, "Vacation," provides for certain numbers of vacation days depending upon years of service, and Article XV, "Sick Leave," provides for 15 paid sick days per year following a specified period of service. The Borough's municipal code contains Ordinance 1971-6 concerning vacation leave and Ordinance 1980-18 concerning sick leave. Article V of the CNA, entitled "Retention of Benefits," provides for maintenance of "rights, privileges, and benefits" currently enjoyed by employees, and also incorporates the provisions of municipal ordinances into the CNA "except as specifically modified herein."

1/ The current CNA was the product of an interest arbitration award issued on September 28, 2016 and has not yet been executed by the parties. They appear to be in agreement that the contract provisions cited in the grievance remain unchanged from the previous CNA, a copy of which the Borough provided with its brief.

The grievant began his employment with the Borough on August 5, 1992. In September 2016, the grievant expressed his intention to retire from employment effective September 1, 2017. On January 19, 2017, the Borough informed the grievant that his allotments of vacation and sick leave for the year 2017 were being prorated based on his anticipated retirement date of September 1, 2017.

In his certification, President Mosca claims that contrary to the Borough's assertions, the grievant earned the vacation and sick leave at issue in this case in accordance with the terms of the CNA and past practice. Mosca maintains that vacation leave is earned when a member reaches his or her anniversary date of employment in a given year. He certifies that the grievant reached his anniversary date on August 5, 2016, completing 24 years of service and earning 30 days of vacation, and that the grievant earned another 30 days of vacation leave on his next anniversary date, August 5, 2017. As for sick leave, Mosca certifies that the grievant earned his yearly allotment of 15 sick days on January 1, 2017.

Administrator Riehl certifies that during her tenure as Borough Administrator, the prorating of vacation and sick leave time in an employee's year of retirement has been consistently applied. She maintains that the grievance seeks payment for vacation and sick leave beyond the date of his retirement,

contrary to applicable state law, Civil Service regulations, and Borough ordinances.

The PBA filed the subject grievance on January 28, 2017. On February 1, the Chief of Police denied the grievance, stating, in pertinent part:

I do not see in the language in those sections [Articles XII and XV], the proof required for me to support your argument.

I have been employed here for over thirty (30) years and the accepted and past practice by the Borough concerning sick and vacation time has always been that it is prorated for the final year of employment based on the time that the employee works during that last year.

On February 6, the PBA appealed the grievance to the Borough Administrator. On February 13, Administrator Riehl denied the grievance for the following reason:

Upon termination of employment, employees will be paid for unused time that has been earned through the last day of employment, up to any "cap" amount. If termination is before December 31st, accumulated time is pro-rated to the date of termination.

On February 15, the PBA filed for binding arbitration of the grievance. 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 the grievance or any contractual defenses the employer may have.^{2/}

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the

^{2/} Accordingly, we do not consider the Borough's claim that there is a past practice of prorating leave in an employee's year of retirement.

exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See *Middletown Tp.*, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), *aff'd* NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Borough asserts that N.J.A.C. 4A:6-1.3(a)(2) preempts the issue of proration of sick leave during the year of retirement, effectively mandating it and precluding an agreement permitting payment for unearned sick leave. It argues that because the Civil Service regulation provides for fifteen sick days to be credited at the beginning of the year "in anticipation of continued employment," the grievant could not accrue or be paid for sick leave for the period from September 1, 2017 to December 31, 2017 because he was retired. As for proration of

vacation leave during the year of retirement, the Borough asserts that N.J.A.C. 4A:6-1.2(h) preempts payment for any unearned vacation leave. It argues that not all of the vacation leave credited to the grievant at the start of the year has been earned due to his September 1, 2017 retirement date.

The PBA asserts that neither the sick leave issue nor the vacation leave issue are preempted by the Civil Service regulations contained in sections N.J.A.C. 4A:6-1.2 or N.J.A.C. 4A:6-1.3. It argues that neither regulation requires the proration and/or deduction of vacation or sick leave that has already been earned. The PBA contends that the Borough mischaracterizes the grievant's leave as "unearned," asserting instead that the leave time credited at the start of the year has already been earned. It argues that N.J.A.C. 4A:6-1.2(h) mandates non-prorated payment to the grievant of all of his vacation days in his year of retirement. The PBA asserts that N.J.A.C. 4A:6-1.3(a) sets a baseline of fifteen sick days annually and does not provide for a reduction if an employee retires at some point before the end of the year.

"Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012). Where a statute 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). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

Section N.J.S.A. 11A:6-1 of the Civil Service Act, N.J.S.A. 11A:1-1 et seq., provides the general authority for procedures regarding sick, vacation, and other leaves. Section N.J.S.A. 11A:6-9 of the Civil Service Act notes that, where applicable, the provisions of Title 40A continue to govern police officer and fire fighter leaves of absence:

11A:6-9. Leaves of absence for police officers and fire fighters.

Leaves of absence for police officer and fire fighter titles shall be governed by the applicable provisions of Title 40A of the New Jersey Statutes and N.J.S. 11A:6-10.

The Civil Service Act's implementing regulations are contained in N.J.A.C. 4A:1-1 et seq. The general Civil Service leave of absence regulations provide the following regarding sick and vacation leave for local government employees:

4A:6-1.1 General provisions.

(a) In local service, appointing authorities shall establish types of leaves and procedures for leaves of absence.

1. Pursuant to this subchapter, employees in local service shall also be entitled to vacation leave (N.J.A.C.

4A:6-1.2(b) through (h)); sick leave
(N.J.A.C. 4A:6-1.3(a) through (h)); . . .

4. Vacation and sick leaves for police officers and firefighters are established by local ordinance. See N.J.S.A. 40A:14-7 and 40A:14-118. . . .

(e) Where leave procedures are not set by this subchapter, appointing authorities shall establish such procedures subject to applicable negotiations requirements.

[N.J.A.C. 4A:6-1.1(a) and 4A:6-1.1(e).]

The Civil Service sick leave statute applicable to both State and local government employees provides for 15 days of sick leave after the initial year of employment. N.J.S.A. 11A:6-5. The specific Civil Service sick leave regulations applicable to State and local government employees provide, in pertinent part:

N.J.A.C. 4A:6-1.3

(a). . .

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.

[N.J.A.C. 4A:6-1.3(a)2; emphasis added.]

N.J.A.C. 4A:6-1.3(a)2 specifies that the 15 days of sick leave are to be credited at the start of each calendar year. However, the language states that such front-loading of sick leave is made "in anticipation of continued employment." This phrase supports the Borough's argument that payment for unused sick leave must be prorated based on when an employee retires during the year,

because that employee has not yet earned the full year's allotment of sick leave unless the employee continues employment for the full year.

The Civil Service Commission has interpreted N.J.A.C. 4A:6-1.3(a)2 to require proration of sick leave if an employee leaves service partway through the calendar year, recognizing that an employee is provided with the full annual sick leave allotment on January 1st "on the belief that [s/he] would continue [his/her] employment for the full year." In the Matter of Andrew Baker, Department of Human Services, 2014 N.J. CSC LEXIS 817 (CSC 2014); In the Matter of June Baker, Department of Human Services, 2014 N.J. CSC LEXIS 818 (CSC 2014).^{3/} In the instant case, there was no "anticipation of continued employment" warranting front loading of all 15 sick days for the year 2017 because it was known at the start of the year that the PBA unit member would be retiring partway through the year. Therefore, the Borough credited only the prorated amount of sick leave for 2017 based on the anticipated retirement date. Had the Borough credited all 15

^{3/} Because these cases involved State employees, other Civil Service provisions not applicable to local government employees were also pertinent but do not apply here, e.g., N.J.A.C. 1.2(a)2 mandating that vacation time also be front loaded in anticipation of continued employment, and N.J.A.C. 4A:6-1.5 providing for reimbursement of sick and vacation leave used in excess of earned/prorated and accumulated leave. See also, State of New Jersey Judiciary, P.E.R.C. No. 2013-70, 39 NJPER 472 (¶149 2013).

sick days on January 1, 2017, despite knowing of the PBA unit member's planned retirement, it would have contravened N.J.A.C. 4A:6-1.3(a)2. Or, if the employer had initially credited all 15 sick days and the employee retired before the completion of the year, paying the employee for any 2017 sick leave in excess of the prorated amount based on the retirement date would violate N.J.A.C. 4A:6-1.3(a)2. Accordingly, the Borough's proration of the grievant's 2017 sick leave allotment is preempted by Civil Service regulations and is not negotiable or arbitrable.

N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-1.2(b) set forth minimum annual vacation leave based on years of service, as well as maximum yearly vacation leave carryover, for local government workers in Civil Service jurisdictions. N.J.A.C. 4A:6-1.2(a), applicable to State employees only, specifies that they "shall be entitled to annual paid vacation leave, credited at the beginning of each calendar year in anticipation of continued employment." In contrast, N.J.A.C. 4A:6-1.2(b), applicable to local government employees, neither requires nor prohibits the front loading of vacation time at the start of the year, and does not state that a given year's allotment of vacation leave is credited "in anticipation of continued employment." Thus, the Civil Service statutes and regulations do not specifically prescribe or proscribe a vacation time accrual method for local government employees. See In re Vacation Leave Entitlement, 2009 N.J.

Super. Unpub. LEXIS 3182 (App. Div. 2009);^{4/} Communications Workers of Am. v. New Jersey Civ. Serv. Comm'n, 2014 N.J. Super. Unpub. LEXIS 2197 (App. Div. 2014)^{5/}

Here, the Borough does not claim that front-loading vacation days is preempted. Rather, the parties dispute whether the front-loaded vacation days are considered "earned" based on the years of service performed up until the start of the year, or are not considered "earned" until the employee works for the full upcoming year. The Borough urges its understanding should apply in interpreting the term "unused earned vacation leave" in N.J.A.C. 4A:6-1.2(h), which provides:

An employee who leaves State government service or service with a local jurisdiction shall be paid for unused earned vacation leave, even if the employee has received an intergovernmental transfer in accordance with N.J.A.C. 4A:4-7.1A.

[N.J.A.C. 4A:6-1.2(h); emphasis added.]

The Civil Service Commission has interpreted this regulation in the context of non-police, non-fire, local government employees

^{4/} "[N.J.A.C. 4A:6-1.2(b)] provides local governments with the flexibility to determine how vacation time will accrue in order to permit them to best address their local government and personnel needs." Id. at 8.

^{5/} "The CSC's own regulations regarding leaves of absence recognize that '[w]here leave procedures are not set by [these regulations], appointing authorities shall establish such procedures subject to applicable negotiations requirements.' N.J.A.C. 4A:6-1.1(e) (emphasis added)." Id. at 10.

to require that vacation leave in the year of retirement be prorated as if it were earned on a monthly basis up until the employee's retirement date. In the Matter of Deborah Moore, Newark, 2009 N.J. CSC LEXIS 1454 (CSC 2009).

However, terminal vacation leave for retiring police and fire employees in local service is also provided by statute, N.J.S.A. 40A:14-137.1, which provides in relevant part:

The governing body of any municipality having a paid police or fire department shall be authorized, upon the death or retirement in good standing of any permanent member of such municipal police department or paid fire department occurring on or after the effective date of this act, to cause to be paid to him or his estate the full amount of any vacation pay accrued but unpaid at the time of his death or retirement.

[N.J.S.A. 40A:14-137.1; emphasis added.]

In Atlantic City Prof'l Firefighters, Local 198 v. Atlantic City, 1985 N.J. Super. Unpub. LEXIS 9 (App. Div. 1985), certif. den. 102 N.J. 400 (1986), the Appellate Division addressed whether N.J.S.A. 40A:14-137.1 requires proration of terminal vacation leave during the year of retirement (for fire or police employees in a Civil Service jurisdiction). The court was presented with the same question as the instant case - whether vacation leave can be considered earned and accrued based on previous service or must be earned on a monthly basis even though it may be credited in full at the start of the year - as the Borough asserts here. The Appellate Division reversed a lower

court decision that had construed N.J.S.A. 40A:14-137.1 to disallow payment of a full year's allotment of vacation leave to an employee who retired before the end of the year. The court affirmed the arbitrator's interpretation of the parties' collective negotiations agreement permitting payment of the entire year's vacation leave, finding that the clause was not preempted by N.J.S.A. 40A:14-137.1. Based upon the Appellate Division's decision in Atlantic City, the portion of the PBA's grievance challenging the proration of the grievant's 2017 vacation leave is arbitrable.

Finally, we reject the Borough's argument that its ordinances preempt arbitration. An employer cannot, by passage of an ordinance pursuant to a general statute, preempt an otherwise mandatorily negotiable term and condition of employment. City of Paterson v. AFSCME Coun. 52, Local 2272, P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979), aff'd, NJPER Supp.2d 93 (¶76 App. Div. 1981)^{6/}; Borough of Clayton, P.E.R.C. No. 2013-47, 39 NJPER 272 (¶93 2012). Accordingly, the PBA's and Borough's respective interpretations of the meaning of the

6/ "State v. State Supervisory Employees Assn. 78 N.J. 54 (1978) makes it abundantly clear that a general statutory grant of authority is not grounds for a subject matter being outside the scope of collective negotiations. While the City may pass an ordinance to effectuate a negotiated payment procedure, it cannot preempt the matter by simply passing an ordinance purporting to set that procedure."
Paterson, 5 NJPER 543.

Borough's ordinances concerning vacation leave and the extent to which they are applicable or incorporated into the CNA via Article V, are for the arbitrator to decide.

ORDER

The request of the Point Pleasant Beach Borough for a restraint of binding arbitration is granted as to its proration of the grievant's 2017 sick leave allotment, but is denied as to its proration of the grievant's 2017 vacation leave allotment.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: December 21, 2017

Trenton, New Jersey