P.E.R.C. NO. 96-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HIGHER EDUCATION),

Petitioner,

-and- Docket No. SN-94-26

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the State of New Jersey's request for a restraint of binding arbitration of a grievance filed by the Communications Workers of America to the extent that the grievance claims that the employer must pay employees for vacation days they were permitted to use but did not use during the calendar year they were earned or during the next succeeding calendar year. The Commission denies the request for a restraint to the extent that the grievance claims that the employer refused to allow Martin Vigilante to take timely 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, Deborah T. Poritz, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Respondent, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION AND ORDER

On September 17, 1993, the State of New Jersey (Department of Higher Education) petitioned for a scope of negotiations determination. The petitioner seeks a restraint of binding arbitration of a grievance filed by the Communications Workers of America, AFL-CIO on behalf of a former employee. The grievance asserts that the employer violated the parties' collective negotiations agreement when it denied payment to the retiree for unused vacation days.

The parties have filed exhibits and briefs. These facts appear.

CWA affiliates represent four negotiations units of State employees, including a unit of primary level supervisors. The parties have entered into a collective negotiations agreement covering that unit and containing a grievance procedure ending in binding arbitration of contractual disputes.

Article XXII, Section G is entitled Vacation Leave - Career Service Program. Subsection 2 provides:

> 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 and in accordance with established State policy. Vacation allowance must be taken during the current calendar year at such time as permitted or directed by the Department Head unless the Department Head determines it cannot be taken because of pressure of work; except that an employee may request a maximum of one (1) year of earned vacation allowance be carried forward into the next succeeding year. The request shall be made in writing to the appropriate appointing authority and may be approved for good reason and providing the employee and his supervisor have scheduled the use of such vacation allowance. Such approval and scheduling shall not be unreasonably withheld.
>
> Where an employee has an earned vacation balance which has not been previously scheduled as of October 1, the supervisor will meet with the employee to determine a schedule of such vacation time so that no accrued vacation time will be lost.

Subsection 3 provides:

> Upon separation from the State or upon retirement, an employee shall be entitled to vacation allowance for the current year prorated upon the number of months worked in the calendar year in which the separation or retirement becomes effective and any vacation leave which may have been carried over from the preceding calendar year.

Martin Vigilante was a Chief Operating Engineer I at Kean College. He retired on September 1, 1991. On January 7, 1992, a grievance was filed asserting that the employer violated Article XXII, Section 6 when it refused to pay Vigilante for 31.75 unused vacation days. The grievance further asserted that the College had permitted him to carry over the days and had not scheduled him to use those days before his retirement. The grievance listed CWA as Vigilante's representative.

An employer designee conducted a hearing and denied the grievance. He concluded that the grievance was not contractually grievable or timely since Vigilante was now a retiree and since he should have filed a grievance when the vacation days were actually "lost" in 1985, 1986, 1987, and 1988.[1/] The designee's report stated that Vigilante's immediate supervisor (now retired himself) had testified that given work pressures and staffing shortages, Vigilante had been unable to take vacation time during 1985, 1986, 1987, and 1988.

CWA demanded 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:

1/ According to the employer, the maximum number of vacation days allowed to be carried over from one year into the succeeding year is 25. The employer calculates that Vigilante lost 5.75 vacation days at the end of 1984, 10 vacation days at the end of 1985, 9 vacation days at the end of 1986, and 9 vacation days at the end of 1988 for a total of 33.75 (not 31.75) "lost" vacation days.

> 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 cannot consider the contractual merits of this grievance or any contractual defenses the employer may have. We specifically decline to consider whether the grievance was timely or whether the parties' contract permits CWA to pursue a grievance on behalf of a retiree.

The employer asserts that there is no statutory basis for arbitrating this grievance since Vigilante is a retiree, not an employee. We reject this argument. Irrespective of the current or former status of an individual employee, the majority representative has a legally cognizable interest in ensuring that the terms of its collective negotiations agreement are honored. Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558-559 (App. Div. 1980). We will not construe the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to prohibit a majority representative from seeking to enforce its contract on behalf of a former employee who seeks accumulated or deferred compensation based

on his or her service as an employee.[2/] As CWA notes (brief p. 4), a majority representative should not be statutorily prohibited from claiming that the last pay check received by an employee upon retirement did not contain the amount the employer had agreed to pay. We add, however, that the parties may agree to exclude such claims from an arbitration clause and we repeat that we do not decide whether they have done so here.

N.J.S.A. 11A:6-2 grants vacation leave to State employees in career and senior executive status. For example, employees with over 20 years of continuous service are entitled to receive at least 25 working days of vacation a year. But section (f) provides:

> Vacation not taken in a given year because of business demands shall accumulate and be granted during the succeeding year only.

N.J.A.C. 4A:6-1.2(f) similarly provides:

> 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.

2/ Such claims differ from proposals to negotiate benefits on behalf of current retirees, proposals we have held not mandatorily negotiable. See, e.g., Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194, 196 (¶10111 1979), aff'd in pt., rev'd in pt., 6 NJPER 338 (¶11169 App. Div. 1980).

In addition, N.J.A.C. 4A:6-1.2(g) specifies that an employee who leaves State government service shall be paid for "unused earned vacation leave."[3/]

The employer contends that the quoted statute and regulation preempt CWA's claim because they prohibit the accumulation or use of vacation leave earned in one year beyond the next succeeding calendar year and because any claim about carrying over vacation days must be presented to the Merit System Board. CWA concedes that the statute and regulation prohibit using accumulated vacation days after the next calendar year, thereby preventing scheduling and staffing problems in future years, but it argues that they do not prohibit being paid for vacation days that an employee earned as part of the compensation package but could not use because of work pressures and staffing shortages.

A statute or regulation will not preempt negotiations unless it expressly, specifically, and comprehensively fixes a term and condition of employment, thereby eliminating the employer's discretion to vary it. 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 (1978). We agree with the employer that N.J.S.A. 11A:6-2(f) and N.J.A.C. 4A:6-1.2 (and their counterparts under the prior Civil Service System) preempt

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3/ Before the Civil Service system was revised in 1986, N.J.S.A. 11:14-1 and N.J.A.C. 4:1-17.4[4] governed the subject of vacation leave and loss of leave. Their provisions accorded with N.J.S.A. 11A:6-2 and N.J.A.C. 4A:6-1.2.

negotiations over any proposal routinely permitting employees to be paid for vacation days not used during either the year they were earned or the next succeeding year. N.J.S.A. 11A:6-2(f) recognizes that business demands may prevent vacation days from being used in the year they are earned, but states that such days shall accumulate and be granted during the next succeeding year only -- the unmistakable implication is that any accumulated vacation days will be lost if not used within the succeeding year. N.J.A.C. 4A:6-1.2 expressly clarifies this point by stating that vacation days "shall be scheduled [during the next succeeding year only] to avoid loss of leave." We therefore restrain arbitration to the extent that CWA claims that the employer contractually agreed to pay employees for any vacation days they were permitted to use but did not use in the year earned or the next succeeding year.4/

This ruling does not end this case. Under N.J.S.A. 11A:6-2(f) and N.J.A.C. 4A:6-1.2, an employer must allow an employee to use vacation days within either the year the days were earned or the next succeeding calendar year -- it cannot claim that business necessity prevented it from fulfilling that obligation within that period or required an employee to surrender his or her earned vacation days. An employer violating its duty to permit timely vacation leave presumably must make aggrieved employees whole,

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4/ We do not comment on the policy reasons advanced by CWA for permitting an agreement to make such payments. Those reasons must be addressed to the Legislature and the Merit System Board.

either by recrediting vacation days for a current employee or paying for "lost" vacation days for an employee since retired. Eaddy v. Dept. of Transportation, 208 N.J. Super. 156 (App. Div. 1986), appeal dism. 105 N.J. 569 (1986).[5/] Since statutes and regulations setting terms and conditions of employment are incorporated in collective negotiations agreements, a grievance claiming a refusal to allow an employee to take timely vacation leave may be submitted to binding arbitration. State v. State Supervisory at 80.[6/] The employer's reliance on N.J.A.C. 4A:6-6.10 as providing a Civil Service appeal procedure is inapt since that regulation applies only to the subchapter governing award programs. In any event, N.J.S.A. 34:13A-5.3 mandates that negotiated grievance procedures be used for any contractual disputes concerning terms and conditions of employment and State Supervisory itself contemplates that such procedures may be used to resolve disputes over terms and conditions of employment set by Civil

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5/ Eaddy held that an employee whose discharge violated Civil Service law was entitled to receive back pay and credit for sick and vacation leave accruing between his discharge and his reinstatement so that he could be made whole for the illegal discharge. The Court rejected the employer's reliance on cases stating that employees cannot receive paid leave absent the performance of services -- i.e., no work, no pay. Petitioner cites similar cases in its reply brief (p. 2). See, e.g., Springfield Tp. v. Pedersen, 73 N.J. 1, 6 (1977). These citations are especially incongruous in the context of this case since Vigilante worked more days than he had to under Civil Service laws.

6/ We do not consider whether the employer did not allow Vigilante to use vacation days. That factual question goes to the merits of the grievance. Ridgefield Park.

Service regulations. Id. at 80, n.4; see also West Windsor Tp. v. P.E.R.C., 78 N.J. 98, 116 (1978).

ORDER

The request of the State of New Jersey (Department of Higher Education) for a restraint of binding arbitration is granted to the extent that the grievance claims that the employer must pay employees for vacation days they were permitted to use but did not use during the calendar year they were earned or during the next succeeding calendar year. The request is denied to the extent that the grievance claims that the employer refused to allow Martin Vigilante to take timely vacation leave.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: December 21, 1995
Trenton, New Jersey
ISSUED: December 21, 1995