P.E.R.C. NO. 81-138

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

HACKENSACK BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-81-81

HACKENSACK EDUCATION ASSOCIATION,

Respondent.

HACKENSACK EDUCATION ASSOCIATION,

Petitioner,

-and- Docket No. SN-81-95

HACKENSACK BOARD OF EDUCATION,

Respondent.

SYNOPSIS

In a scope of negotiations determination, the Public Employment Relations Commission refuses to restrain arbitration of a grievance filed by the Hackensack Education Association against the Hackensack Board of Education. The grievance challenged the Board's decision to deny a teacher use of her accumulated sick leave benefits for child rearing purposes after the first month of motherhood in the absence of a physician's certificate evidencing disability. The Commission held that leaves of absence are mandatorily negotiable terms and conditions of employment and that statutory sick leave provisions, N.J.S.A. 18A:30-1 et seq., did not make the contested contractual clause illegal.

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Appearances:

For the Board of Education, Greenwood & Sayovitz
(Sidney Sayovitz, of Counsel)

For the Education Association, Bucceri & Pincus
(Louis P. Bucceri, of Counsel)

DECISION AND ORDER

On March 19, 1981, the Hackensack Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks to restrain arbitration of a grievance filed by the Hackensack Education Association ("Association")[1/] and a teacher, Paula Zorner. Simply put, the grievance challenged the Board's decision

1/ Pursuant to the recognition clause of the current collective agreement, the Association is the exclusive representative of "...the non-supervisory certificated teachers, aides, and cafeteria personnel employed by the Board and excluding all secretaries, custodial employees and all [supervisors]."

to deny Zorner use of her accumulated sick leave benefits for child rearing purposes after the first month of motherhood in the absence of a physician's certificate evidencing disability.

On May 4, 1981, the Association filed a Petition for Scope of Negotiations Determination with the Commission. The Association seeks a declaration that the Association-Zorner grievance is arbitrable. The Commission has consolidated the two petitions.

The Board and the Association frame the legal issue in widely divergent terms in their separate scope petitions. However, the undisputed factual background considerably narrows the issue before us.

On September 9, 1980, Zorner wrote to the Hackensack Superintendent of Schools and requested a maternity leave commencing after work on November 26, 1980. She asked that her accumulated sick leave days first be exhausted and that she then receive the maximum possible maternity leave.

On November 24, 1980, the Board adopted Policy No. C-3810 on Leaves of Absence. In pertinent part, this policy provided:

> Pregnancy related disabilities shall be treated like any other disability. For the month preceding and the month following childbirth, the employee is presumed to be disabled and shall be entitled to disability leave benefits. Should disability occur earlier in the pregnancy or continue for more than one month following birth, the employee may receive additional disability leave benefits if she presents a physician's certificate attesting to her extended disability.

> Child care leaves, without pay, for periods where the employee is not disabled may be granted by the Board in accordance with HBE/ Association Agreements regarding leaves without pay.

On December 4, 1980, the Superintendent responded to Zorner's maternity leave request. He enclosed a copy of Policy No. C-3810 and stated:

> Please refer to Item No. 4 which details the terms under which your leave is granted. You may use accumulated sick leave for 30 days prior to and 30 days following the birth of your child. If there is a pregnancy related disability which occurs more than 30 days earlier or continues for more than 30 days following the child's birth, you may use additional sick leave (if you have it) by presenting a physician's statement attesting to the disability and the length of time it is expected to continue.
>
> Once the period of disability following child birth has expired, you will be placed on a child rearing leave without pay in accordance with the HBE/HEA Agreement.

On December 14, 1980, the Association and Zorner filed the grievance triggering this litigation. The grievance alleged that Policy No. C-3810 and the denial of Zorner's request to use all of her accumulated sick leave days violated contractual clauses governing recognition (Article 1), teacher rights (Article 4), extended leaves of absence (Article 14), and past practices (Article 26). Article 14(D)(3) provides:

> D. The Board shall grant disability leave, without pay, to any teacher, upon request, subject to the following stipulations:
>
> * * *
>
> 3. Any teacher granted leave, without pay, in accordance with this section may elect to use all or part of his or her accumulated sick leave during the period of leave, thus receiving full pay during that portion of leave. The teacher shall notify the Superintendent, in writing, that he or she elects this option indicating the number of accumulated sick leave days to be used.

The grievance also alleged that Board negotiators had explained that Article 14 (D)(3) would allow a teacher having a baby to use any part of her sick time during a two year child rearing leave of absence, even if she was not disabled.

On February 13, 1981, the Board rejected the grievance. The Board stated:

> The basis of the Board's decision is that Article 14D of the 1980-82 Agreement between the Hackensack Education Association and the Board authorizes the use of sick leave for disability due to pregnancy only if the teacher is actually disabled or sick. Policy C-3810 (4) merely requires that the teacher demonstrate disability through presentation of a physician's certificate for the period in excess of one (1) month prior to and one (1) month after the birth. Upon presentation of the physician's certificate, the teacher may utilize her sick leave benefits in accordance with Article 14D of the Agreement.

On February 19, 1981, the Association filed its demand for binding arbitration, and the Board responded with its petition seeking to restrain arbitration.

In its Petition, the Board states:

> The underlying issue concerns the fact that in accordance with Board policy, when an employee wishes to receive sick leave benefits for a pregnancy related disability, the Superintendent requires that the employee must provide a physician's certificate attesting to the disability, if such disability will be in effect either more than one month prior to childbirth or more than one month after childbirth. The H.E.A. position is that an employee must be provided her accumulated sick leave benefits for the aforementioned alleged pregnancy related disability even without producing a physician's certificate.

> The position of the Board is that the above matter is beyond the scope of negotiations and is not subject to arbitration as requested by the H.E.A.

In an accompanying brief, the Board charts the following course in support of its Petition. Under N.J.S.A. 18:30-1,[2/] an employee is not entitled to sick leave benefits unless he is absent "...because of personal disability due to illness or injury...." Under N.J.S.A. 18A:30-4,[3/] a board of education may require the filing of a physician's certificate when an employee requests sick leave. The State Board of Education and the Commissioner of Education have approved a policy requiring a physician's certificate when a pregnant teacher requests that sick leave commence more than one month prior to her anticipated delivery or that sick leave continue more than one month after the day of delivery. See, Hynes v. Board of Education of Bloomfield, 1980 S.L.D. (State Board of Education, December 3, 1980); Board of Education of Cinnaminson v. Silver, 1976 S.L.D. 739, aff'd by the State Board of Education, April 4, 1979. The Board concludes that under Bd of Ed of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed Ass'n, 81 N.J. 582 (1980), the dominant issue is the verification of eligibility for sick leave benefits. Further, under State v. State Supervisory Employees Ass'n ("State Supervisory"),

2/ 18A:30-1 provides: "Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household."

3/ 18A:30-4 provides: "In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave."

78 N.J. 54 (1978), N.J.S.A 18A:30-1 through 18A:30-6 specifically preempt any contractual arrangement not requiring Board verification of an employee claim for sick leave benefits. See also, In re Verona Board of Education, P.E.R.C. No. 79-29, 5 NJPER 22 (¶10015 1978).

The Association in its petition states the issue differently;

> The Board has sought a scope determination as to whether or not it has the right to require a physician's certificate of disability when sick leave is claimed for a pregnancy disability leave during a period other than the 30 days before and after delivery. The Association does not assert that claim in its grievance. Rather, it claims that a teacher may choose to receive full benefits during a child rearing leave, which would normally be an unpaid leave not involving disability, up to the number of accumulated sick leave days held by that person. The Association maintains that the past practice in Hackensack has been to permit this choice and that such a practice is not outside the scope of negotiable subjects.
>
> Accordingly, P.E.R.C. is asked to rule on the question of whether or not a public school district and the majority representative of its employees may negotiate and/or go to arbitration on the subject of allowing individuals on child rearing leaves who are not disabled, to choose to receive full benefits during that leave up to the number of accumulated sick leave days held by that person with a concomitant reduction in the number of accumulated days available for use by such person upon his or her return from said leave. This is the practice which the Association contends has been violated by the Board.

In its accompanying brief, the Association sets forth the following train of argument. Since the Association's grievance asserts that even if not disabled, Zorner was entitled to

use her accumulated sick leave benefits for child rearing purposes, the Board's right to require a physician's certificate in cases of claimed sickness is neither disputed nor germane.[4/] Maywood Education Ass'n v. Maywood Board of Education, 131 N.J. Super. 551 (Chan. Div. 1974), ("Maywood"), established that accumulated sick leave days can be used as a measure of benefits for a non-disabled employee. See also, City of Camden v. Dicks, 135 N.J. Super. 559 (Law Div. 1975). Further, the Association argues that N.J.S.A. 18A:30-7,[5/] specifically authorizes the payment of leave benefits to non-disabled employees for other forms of absence, including child rearing leaves. Accordingly, the Association concludes that the instant grievance is arbitrable since it does not implicate educational policy considerations and does not trench on areas specifically preempted or proscribed by statute or regulation.

In a reply brief, the Board reframes the issue: "[it] now appears that the HEA grievance alleges instead that sick leave benefits here may be used by an employee who is not sick or disabled." (Emphasis in original). The Board maintains that regardless of

4/ The Association traced the history of collective agreement provisions since 1974-75 on "disability leave," "maternity leave," and "child rearing leave" in an effort to show that non-disabled employees could use accumulated sick leave benefits for child rearing purposes.

5/ 18A:30-7 provides: "Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year."

the label placed on the leave request ("sick leave," maternity leave," or "child rearing leave"), N.J.S.A. 18A:30-1 and the following sections prohibit the payment of sick leave benefits to non-disabled employees. It also emphasizes that permitting payment of sick leave benefits to a non-disabled employee on a child rearing leave would result in the depletion and consequent unavailability of sick leave benefits during a period of true sickness.[6/] By letter dated May 27, 1981, the Association submitted a response to this brief.

We commence our analysis by emphasizing that the issue of contractual arbitrability is not before us, Ridgefield Park Education Ass'n v. Ridgefield Park Board of Education, 78 N.J. 144, 3 NJPER 341 (¶4164 1978); In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), nor is the question of the wisdom of such a clause. In re Byram Twp. Bd of Education, 152 N.J. Super. 10, 30 (App. Div. 1977). Thus, we do not determine whether either the Association or Board correctly interprets Article 14(D)(3) and related provisions. Instead, we address the limited question of whether the payment of accumulated sick leave benefits to an employee on a child rearing leave who is not in fact disabled once the first month of parenthood is past is within the scope of collective negotiations.

State Supervisory sets forth the definitive two-fold approach for determining whether a matter is within the scope of

6/ By letter of May 20, 1981, the Board requested oral argument pursuant to N.J.A.C. 19:13-3.8. The Board has ably presented its position in two briefs; the Commission perceives no need for oral argument.

collective negotiations required by the New Jersey Employer-Employee Relations Act. First, the matter must concern a "term and condition of employment;" the Court defined this phrase as encompassing "...those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy." Id. at 67. Second, the matter, if a term or condition of employment, is mandatorily negotiable unless preempted by a specific statute or regulation which expressly "sets" that particular term or condition. State Supervisory defines "sets" as referring "...to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer." Supra. at 80. See also, Hoboken Board of Education and Hoboken Teachers Ass'n, P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981).

Provisions concerning leaves of absence, including leaves for personal reasons, sicknesses or sabbaticals, directly and intimately affect the work and welfare of public employees and in the absence of a factual record to the contrary, generally do not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy. See, e.g. Burlington County College Faculty Ass'n v. Board of Trustees, Burlington County College, 64 N.J. 10,

14 (1973); Board of Education of the Twp. of Piscataway v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (1977); In re South River Board of Education, P.E.R.C. No. 81-108, 7 NJPER 156 (¶12069 1981); In re Hoboken Board of Education, supra; In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); In re Willingboro Board of Education, P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd App. Div. Docket No. A-1756-79 (12/8/80), cert. den. ___ N.J. ___ (1981). Accordingly, a contractual clause providing a paid child rearing leave of absence for non-disabled employees constitutes a term or condition of employment.7/ The more difficult question is whether the statutes cited by the Board preempt a contractual provision allowing an employee to apply accumulated sick leave benefits to a child rearing leave of absence, even if the employee is not disabled.

Maywood analyzes the allegedly preemptive effect of N.J.S.A. 18A:30-1 through 18A:30-7 in a factual setting analogous to the instant case. There, the parties entered into a collective agreement which provided for the payment of retirement compensation. The amount of compensation was to be figured by multiplying

7/ The Board argues that its managerial prerogatives include the right to insist upon verification of a purported illness or injury for sick leave claims. In light of the Association's concession that the Board has this right when an employee is actually claiming that an illness or injury has occurred -- not the case here --, we need not consider this issue.

5% of the unused portion of accumulated sick leave days times the daily rate of pay established by the existing guide at the time of retirement, provided the retiring teacher had 20 years of service. In rejecting the argument that the statutory sick leave provisions prohibited the contractual clause, the Court stated:

> None of the foregoing sections of Title 18A expressly prohibits payment by a Board of Education for unused sick leave. The statutory scheme spells out the minimum standards for sick leave applicable to all school boards and vests in the individual board discretion to exceed the prescribed minimums. The only statutory limitation on sick leave for school employees is that an employee may not accumulate more than 15 days a year for future years (N.J.S.A. 18A:30-7). Supra. at pp. 553-54.

Further, the Court stated:

> Thus, as to school boards, N.J.S.A. 18A:27-4 confers power upon them to "make rules *** governing the employment***and salaries and time and mode of payment thereof of teaching staff members." This statutory grant of authority is broad enough to encompass payment for unused sick leave either as part of the teacher's annual salary or in the form of additional compensation upon retirement. Cf. Fred v. Mayor, etc., Old Tappan, supra. Whether such payments are to be made rests with the individual board, unless otherwise fixed by a collective negotiation agreement as was the case here. Cf. Teachers Ass'n Cent. H.S.D. No. 3 v. Board of Ed., etc., 34 A.D.2d 351, 312 N.Y.S.2d 252, 256 (1970).8/

8/ The Court also rejected the board's argument that payment for unused sick leave constituted a gift of public monies. The Court observed that the employer receives consideration for the retirement provision based on accumulated sick leave benefits since it encourages employees to stay in public service and deters the taking of sick leave for trifling reasons.

See also, Camden v. Dicks, supra.

We believe that Maywood's reasoning is applicable here. No statutory limitation specifically prevents an employer from agreeing to pay an employee deferred compensation during a child rearing leave, even if the employee is otherwise able to work. No statutory limitation specifically prevents the negotiating parties from agreeing to peg the amount of this deferred compensation to accumulated sick leave benefits.[10/] To the contrary, N.J.S.A. 18A:30-7 empowers the Board to fix "...either by rule or individual consideration, the payment of salary in cases of absence not constituting sick leave." Assuming that Article 14(D)(3) and the parties' past practice established an agreement to pay accumulated sick leave benefits to employees on child rearing leaves of absence, then such a provision would in fact be a rule fixing the payment of salary in a child rearing case not constituting sick leave.[11/] Indeed, such an agreement may be

10/ N.J.S.A. 18A:30-7 prevents the number of sick leave days accumulated in any one year from exceeding 15 and N.J.S.A. 18A:30-6 prevents a Board of Education from making a blanket rule on sick leave payments after an employee has exhausted his annual and accumulative sick leave. See e.g., Verona Board of Education, supra. The provision in question contravenes neither limitation.

11/ Because the instant matter involves a child rearing leave, rather than a sick leave based on a claim of pregnancy disability, injury, or illness, the two Commissioner of Education cases, supra, which the Board cites are inapposite. Further, neither case involved a collective agreement provision or discussed the nature of the relationship between statutory sick leave provisions and statutory collective negotiations obligations.

preferable from an employer's point of view to a straight cash benefit for a person taking a child rearing leave since it discourages employees from calling in sick when beset by minor ailments, rewards employees in proportion to the length of their service, and affords the employer a concomitant reduction in the number of sick leave days available to an employee on leave.

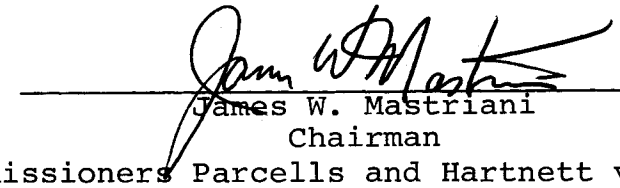
We do not believe that Maywood is materially distinguishable simply because the present contractual arrangement, assuming the Association's reading is correct, would result in the reduction and even exhaustion of accumulated sick leave benefits for employees who might return to work and subsequently become ill. The Board has fulfilled its statutory obligations by providing all sick leave benefits required by N.J.S.A. 18A:30-1 and by allowing accumulation of sick leave benefits pursuant to N.J.S.A. 18A:30-3. The contractual arrangement does not empower either the Association or the Board to deprive an individual of these benefits. Instead, the individual retains complete freedom to use sick benefits only in case of actual sickness or disability or, if the employee desires, to use the benefits when "disabled" by the demands of child rearing rather than by sickness. The Board's noblesse oblige would make this choice for the employee. We do not read N.J.S.A. 18A:30-1 et seq. as depriving employees of the opportunity to make an informed choice between the payment of accumulated benefits during a present child rearing leave of absence or the possible payment of accumulated benefits during a future illness or disability.

In conclusion, we hold that a contractual provision allowing an employee to receive accumulated sick leave benefits during a child rearing leave of absence even if not disabled is a mandatorily negotiable term and condition of employment which is not preempted by any statutory sick leave provisions. Accordingly, we decline to restrain arbitration of the instant grievance.

ORDER

For the foregoing reasons, the Commission finds that the dispute herein concerns a term and condition of employment and may properly be submitted to binding arbitration if otherwise arbitrable under the terms of the parties' agreement.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Parcells and Hartnett voted for this decision. Commissioner Suskin voted against this decision. Commissioners Newbaker and Hipp abstained. Commissioner Graves was not present.

DATED: June 9, 1981
Trenton, New Jersey
ISSUED: June 10, 1981