

P.E.R.C. NO. 2001-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY UTILITIES AUTHORITY,

Petitioner,

-and-

Docket No. SN-2001-9

BERGEN COUNTY UTILITIES AUTHORITY
SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Bergen County Utilities Authority for a restraint of binding arbitration of a grievance filed by the Bergen County Utilities Authority Supervisors Association. The grievance concerns the termination of a program for paying out accumulated sick leave hours. The Commission concludes that although the Authority's minutes and resolution state that a pilot program authorizing sick leave payouts was approved for two years, a statute and the terms of the Commissioner of Personnel's order preempt arbitration to enforce the alleged agreement to continue the pilot program for more than one year.

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, Giblin & Giblin, attorneys
(Paul J. Giblin, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Merick H. Limsky, on the brief)

DECISION

On August 17, 2000, the Bergen County Utilities Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by the Bergen County Utilities Authority Supervisors Association. The grievance concerns the termination of a program for paying out accumulated sick leave hours.

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

The Association represents supervisors in various civil service titles within the Authority. The parties' collective negotiations agreement is effective from January 1, 1999 through

December 31, 2000. The grievance procedure ends in binding arbitration.

On April 17, 1997, the Authority and the Association entered into a Memorandum of Understanding. Item No. 3 is entitled Sick Time Payment. It provides:

The parties agree to a payout of all earned and accumulated sick time. Employees may maintain a 160 hour bank maximum. For purposes of sick time payouts, sick time will be paid at the rate of pay at which the time was earned. The LIFO system of accounting will be used in disbursing sick time payments. Hours in excess of 160 accrued hours of sick time as of each November 30 will be paid out annually. The parties agree to review annually the cumulative hours of each unit employee.

This payment agreement is subject to any modification or change in language necessary to satisfy the legal obligations of the State of New Jersey and on determination that State and Federal standards have been met, pursuant to an Advisory Opinion, if necessary, from the State of New Jersey. The cut-off date for the sick time balance and the rate of pay used for the 1996 payout is December 31, 1996.

N.J.S.A. 11A2-11i authorizes the Commissioner of Personnel to approve pilot programs despite civil service statutes or regulations which would make the programs illegal. The Authority, the Association and the majority representative of the Authority's non-supervisors sought the Commissioner's approval of a pilot program authorizing the annual payment of accumulated sick leave that would otherwise have to be carried over from year to year pursuant to N.J.A.C. 4A:6-1.3. They submitted this proposal:

1. Program Description

This pilot program is submitted on behalf of the Petitioners captioned above. The purpose of the program is to permit the appointing authority to pay accumulated sick time on an annual basis in lieu of accumulation and payment of sick time in accordance with N.J.A.C. 4A:6-1.3 which in pertinent part reads:

(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....

(f) Unused sick leave shall accumulate from year to year without limit.

The Authority asserts that the pilot program will achieve economy and efficiency. Specifically, the Authority desires to provide incentives for employees to attend work and receive payment of accumulated sick time on an annual basis in order that the Authority may minimize the need for payment and use of overtime services from Authority employees.

2. Individuals Affected by the Program

All Bergen County Utilities Authority employees who are currently serving in Civil Service titles and are Civil Service employees, either represented or unrepresented by respective bargaining units, are to be affected and eligible for the program provided the individual meets the following requirements:

The individual shall be required to meet the criteria and eligibility for receipt of payment of accumulated sick leave as set forth in N.J.A.C. 4A:6-1.3 et seq. which is incorporated by reference herein and made a part hereof.

3. Duration of the Program

The pilot program will be effective January 1, 1997 through December 31, 1997.

4. Anticipated Benefits of the Program

The program will benefit the appointing authority in exercising fiscal prudence, payroll savings, and general economies and efficiencies in directing the work force at the Authority. Under separate cover, the Authority shall submit to the Department of Personnel a detailed fiscal analysis of projected savings as consequence of the pilot program.

Effective January 1, 1997, the Commissioner approved this request. Her order states that the pilot program "will be effective for a one year period from January 1, 1997 through December 31, 1997."

On November 6, 1997, the Authority's Commissioners held a work session. The minutes reflect these comments:

1. Pilot Program on Sick (accrued) Pay with DOP, Local 534 and Supervisors' Union. The money has been paid out to only bargaining unit employees. The DOP said all employees could be eligible for this. Labor Counsel Giblin and General Counsel Sinisi were involved in the study of the Pilot Program. Mr. Giblin said we have an order from DOP permitting us to initiate this program for one year. If we don't renew for 1998, it will be done for the following year. (This program was approved for two years.) The program will terminate as of November 30, 1997. We may continue this program in 1999 if we so desire. By terminating program now, we will save money.

We have noticed the DOP that we will terminate the program at the end of the year. We still reserve the right to use one more year in 1999. The recommendation of the Management Committee is to approve the proposal made by Labor Counsel.

On November 13, 1997, the Commissioners held a public meeting. They resolved to extend the payout program to all eligible employees for 1997. The resolution stated that DOP had authorized the pilot program for a two-year period through December 31, 1998.

Employees were paid their excess accumulated sick leave hours for 1997. They were not paid such hours for 1998.

On December 16, 1998, the Association's president demanded that employees receive the sick time payout for 1998 as soon as possible. He cited the memorandum of understanding and the Authority's minutes and resolution. The president stated that each employee should "have the option of specifying how many hours he or she would like to retain in the bank and be allowed to cash out the remainder so that there is no more than 160 hours in the bank as of November 30th."

On January 14, 1999, the Authority's counsel responded that the Commissioner of Personnel had approved the pilot program for one year only. He stated that under N.J.A.C. 4A:1-4.3, a pilot program cannot exceed one year and that under N.J.A.C. 4A:6-1.3, the Authority cannot pay for accumulated sick leave annually.

On March 12, 1999, the Association demanded arbitration. It identified the grievance to be arbitrated as "Sick Time Payout." 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 cannot consider the contractual merits of this dispute or any contractual defenses the employer may have.

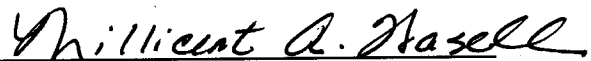
The Authority asserts that N.J.A.C. 4A:6-1.3 requires that unused sick leave accumulate yearly rather than be paid annually; an employee can be paid for accumulated sick time only upon termination or retirement. The Association does not contest that interpretation. Given that requirement, the parties sought DOP's approval for a pilot program authorizing payouts. N.J.S.A. 11A:2-11i states that the Commissioner of Personnel may authorize pilot programs "for a maximum of one year outside the provisions of this title." See also N.J.A.C. 4A:1-4.3; CWA v. New Jersey Dept. of Personnel, 154 N.J. 121, 131 (1998). Consistent with that limit, the proposal submitted to DOP and the Commissioner's order approving

the proposal both state that the program will last one year, through December 31, 1997. While the Authority's minutes and resolution state that the program was approved for two years, the statute and the terms of the Commissioner's order must prevail on that issue. N.J.A.C. 4A:6-1.3 and N.J.S.A. 11A:2-11i preempt arbitration to enforce the alleged agreement to continue the pilot program for 1998. State v. State Supervisory Employees' Ass'n, 78 N.J. 54, 80-82 (1978).

ORDER

The request of the Bergen County Utilities Authority for a restraint of arbitration over the continuation of the pilot program during 1998 is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: October 30, 2000
Trenton, New Jersey
ISSUED: October 31, 2000