P.E.R.C. NO. 2015-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2014-071

HOWELL TOWNSHIP ADMINISTRATIVE COUNCIL,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a contract clause in an expired collective negotiations agreement between the Howell Township Board of Education and the Howell Township Administrative Council. The Commission holds that N.J.S.A. 18A:30-3.6 preempts negotiability of an accumulated sick leave payment clause to the extent the clause applies to employees who commenced service with the Board on or after the effective date of the law.

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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, New Jersey Principals and Supervisors Association (Wayne J. Oppito, of counsel)

DECISION

On March 4, 2014, the Howell Township Board of Education (Board) petitioned for a scope of negotiations determination. The Board seeks a determination that an article in its collective negotiations agreement (CNA) with the Howell Township Administrative Council (HTAC) regarding investment of accumulated unused sick days is not mandatorily negotiable.

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

HTAC represents a negotiations unit of all of the Board's Principals, Vice Principals, and Administration Supervisors. The Board and HTAC are parties to a CNA effective from July 1, 2008

through June 30, 2011, with amendments through a Memorandum of Understanding (MOA) effective through June 30, 2012.

Article 24, Section D. of the CNA provides:

> D. Retirement or Termination of Employment Adjustment:
>
> Each tenured administrator, with twelve (12) years of service in the District, upon retirement or termination of employment, shall be granted financial compensation for accumulated sick leave up to one hundred (100) days at the rate of one hundred sixty-five dollars ($165.00) per day.

Article 24, Section G., of the CNA provides:

> G. Each tenured administrator, with twelve (12) years of service in the district, shall be granted the option of investing in a 403b plan, utilizing accumulated, un-used sick days, as follows:
>
> 1. During the 2003-2004 school year, up to 100 days may be invested at the rate of 65% of the calculated per-diem rate of pay for each qualifying administrator;
>
> 2. During the 2004-2005 school year, up to 50 days may be invested at the rate of 65% of the calculated per-diem rate of pay for each qualifying administrator;
>
> 3. Thereafter, up to 50 days per annum (school year) may be invested at the rate of 65% of the calculated per-diem rate of pay for each qualifying administrator;
>
> 4. Each tenured administrator participating in the above plan may, at any time, withdraw from participation in the plan and continue to accumulate, without limit, any un-used sick time (statutory). Any/all contributions made to the 403b plan would remain thereto.
>
> 5. Each tenured administrator participating in the above plan shall be required to keep a minimum of

> 100 days in reserve, to address cases of emergency or extended illness.

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." We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

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].

The Board initially asserted that Article 24, Section G. of the CNA, which allows investment of unused accumulated sick leave in a 403b plan, is preempted by N.J.S.A. 18A:30-3.5. The

Association responded that N.J.S.A. 18A:30-3.5 has been determined by the New Jersey Supreme Court and the New Jersey Superior Court, Appellate Division to apply only to superintendents, assistant superintendents, and business administrators, none of which are titles within the unit. The Board replied that the language of N.J.S.A. 18A:30-1 and N.J.S.A. 18A:30-3, defining sick leave and accumulated sick leave, indicate that accumulated unused sick leave was only ever intended to be used for personal illness and that no statutes or regulations provide employees with the ability to convert it into supplemental compensation prior to retirement.

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); Barnegat 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. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); 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).

N.J.S.A. 18A:30-1 and N.J.S.A. 18A:30-3 provide:

> 18A:30-1. Definition of sick leave
>
> 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.
>
> * * *
>
> 18A:30-3. Accumulated sick leave
>
> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

These provisions of the education law define sick leave and allow it to accumulate into subsequent years if the full allotment is not used in any given school year.

In Morris School District Bd. of Ed., P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), the Commission restrained the Board from applying a factfinder's proposed caps on "Compensatory Pay At Retirement" to employees who already had accumulated leave amounts in excess of those caps. In affirming the Commission, the Appellate Division addressed the education law's sick leave statutes as follows:

> We add that the Commission's decision comports with common sense and settled precedent. Chapter 30 of Title 18A (N.J.S.A. 18A:30-1 to -7) deals with leaves of absence for employees of boards of education. It allows all employees sick leave with full pay for a minimum of ten school days in any school year. N.J.S.A. 18A:30-2. Sick leave is defined as "absence from [work]...because of personal disability due to illness or injury." N.J.S.A. 18A:30-1. The statutes authorize an accumulation of sick leave. N.J.S.A. 18A:30-3. Sick leave days not utilized during the year are "accumulative to be used for additional sick times as needed in subsequent years. Ibid. **We have said that these sections provide only minimum standards and that, unless expressly prohibited, "there is ample room for negotiation on particular matters" relating to sick leave.** Board of Educ. of Piscataway Township v. Piscataway Maintenance & Custodial Assoc., 152 N.J. Super. 235, 246 (App. Div. 1977).
>
> [Morris School District Bd. of Ed. and The Ed. Ass'n of Morris, P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), aff'd 310 N.J. Super. 332 (App. Div. 1998); recon den. 5/26/98, certif. denied 156 N.J. 407 (1998); emphasis added]

Therefore, nothing in N.J.S.A. 18A:30-1 or N.J.S.A. 18A:30-3 expressly or specifically prohibits public employers and majority representatives from negotiating about converting accumulated sick leave into other forms of compensation.

Furthermore, in 2007 and 2010, the State legislature amended the education laws regarding accumulated sick leave by passing P.L. 2007, c. 92, §44 (N.J.S.A. 18A:30-3.5) and P.L. 2010, c. 3, §3 (N.J.S.A. 18A:30-3.6), respectively. Both provisions capped

supplemental compensation for unused sick leave at $15,000 and made it only payable at retirement, applying such limitations prospectively to new employees and only upon expiration of any contracts in force on the effective dates of the laws. It is apparent from the following Senate and Assembly committee Statements on P.L. 2010, c. 3, §3 that the legislature intended to create two new requirements where there were none before, on both the amount of supplemental compensation and on the timing of when such accumulated sick leave compensation could be paid:

> These section[sic] provide that supplemental compensation for accumulated unused sick leave payable to any local government or school district officer or employee cannot exceed $15,000 and can only be paid at the time the officer or employee retires.
> [Senate Committee Statement to Senate No. 4 (2/18/2010)]
>
> Specifically, the bill provides that:
> 1) supplemental compensation for accumulated unused sick leave payable to any new local government or school district officer or employee cannot exceed $15,000 and can only be paid at the time the officer or employee retires.
> [Assembly Committee Statement to Senate No. 4 (3/18/2010)]

The 2007 law, N.J.S.A. 18A:30-3.5, was limited to certain high-level board of education officers or employees, which the state Appellate Division and Supreme Court have ruled includes superintendents, assistant superintendents, and school business administrators. N.J. Ass'n of Sch. Bus. Officials v. Davy, 409 N.J. Super. 467 (App. Div. 2009); New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535 (2012). The Association's unit

does not include any officers or employees covered by N.J.S.A. 18A:30-3.5, so the statute is inapplicable to the instant matter.

However, the 2010 law, N.J.S.A. 18A:30-3.6, is applicable to the instant case because it expanded the $15,000 cap on payment for unused sick leave upon retirement to all other school employees not covered by the sick leave limitations imposed by N.J.S.A. 18A:30-3.5. N.J.S.A. 18A:30-3.6 provides:

> 18A:30-3.6. Cap on compensation for unused sick leave from board of education
>
> Notwithstanding any law, rule or regulation to the contrary, a board of education, or an agency or instrumentality thereof, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of $15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the board of education, or the agency or instrumentality thereof, on or after the effective date [May 21, 2010] of P.L.2010, c.3. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date.

The New Jersey Supreme Court stated:

> The legislative history for N.J.S.A. 18A:30-3.6 reveals that the Senate and Assembly meant to expand the sick leave cap in N.J.S.A. 18A:30-3.5 to cover a greater number of employees....Accordingly, we read N.J.S.A. 18A:30-3.6 as an expansion of the sick leave cap imposed in N.J.S.A. 18A:30-3.5...
>
> [New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535, 556, 559 (2012)]

The disputed CNA clause at hand, Article 24., Section G., allows for tenured administrators with 12 years of service in the district and 100 sick days in reserve, to convert unused accumulated sick leave into a form of compensation through investment in a 403b retirement plan. Article 24.G. does not place a $15,000 cap on compensation for accumulated sick leave as required by N.J.S.A. 18A:30-3.6. More comprehensively, as N.J.S.A. 18A:30-3.6 mandates that supplemental compensation for accumulated sick leave "shall be payable only at the time of retirement," the statute fully preempts Article 24.G. for those unit members who fall within the statute's effective timeframe. However, as N.J.S.A. 18A:30-3.6 "shall apply only to officers and employees who commence service with the board of education, or the agency or instrumentality thereof, on or after the effective date [May 21, 2010]" of the law, Article 24.G. of the CNA is not preempted as to any employees hired prior to May 21, 2010.[1/] Accordingly, Article 24.G. is not mandatorily negotiable for

1/ N.J.S.A. 18A:30-3.6 also states that it "shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date," so Article 24.G. remained in force even for employees hired on May 21, 2010 or later until the expiration of the parties' 2008-2011 CNA on June 30, 2011. The MOA extending the CNA until June 30, 2012 was signed after the effective date of the law, so N.J.S.A. 18A:30-3.6 applied to these parties as of July 1, 2011.

employees hired May 21, 2010 or later, but is mandatorily negotiable for employees hired prior to May 21, 2010.

ORDER

Article 24., Section G., of the 2008-2011 collective negotiations agreement is not mandatorily negotiable for employees hired May 21, 2010 or later, but is mandatorily negotiable for employees hired prior to May 21, 2010.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioners Jones voted against this decision. Commissioner Bonanni recused himself.

ISSUED: March 26, 2015

Trenton, New Jersey