P.E.R.C. NO. 2015-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Petitioner,

-and- Docket No. SN-2015-017

MILLVILLE ADMINISTRATORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Millville for a restraint of binding arbitration of a grievance filed by the Millville Administrators Association. The grievance challenges the City's elimination of the municipal engineer's 28.5 days of accumulated vacation leave. Finding that the municipal engineer position is unclassified according to Civil Service law and regulation, and N.J.S.A. 11A:6-3 only limits vacation leave accrual for classified positions, the Commission holds that the issue is not preempted and is therefore arbitrable.

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.

P.E.R.C. NO. 2015-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Petitioner,

-and- Docket No. SN-2015-017

MILLVILLE ADMINISTRATORS ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys (Nicole J. Curio, of counsel)

For the Respondent, Testa Heck Scrocca & Testa, P.A., attorneys (Todd W. Heck, of counsel)

DECISION

On September 16, 2014, the City of Millville (City) petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Millville Administrators Association (MAA). The grievance asserts that the City, on January 1, 2014, unilaterally eliminated vacation time (28.50 days) which the City considered to be in excess of the New Jersey statutory maximum amount and the collective negotiations agreement (CNA) from a member who was assigned as the Municipal Engineer.[1/] We deny the City's request to restrain arbitration.

1/ The parties refer to the position as City Engineer.

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

The City is a Civil Service jurisdiction. The MAA is the majority representative for all administrators employed by the City. The City and the MAA are parties to a collective negotiations agreement (CNA) with a term of January 1, 2013 through December 31, 2016. The contractual grievance procedure ends in binding arbitration. Article 14 is entitled "Vacation Leave" and provides in pertinent part at Section 2., "Vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding calendar year only and shall be scheduled to avoid loss of leave."

On May 12, 2014, the MAA filed a request for submission of a panel of arbitrators.

The City asserts that this matter is not legally arbitrable because it is preempted by N.J.S.A. 11A:6-3 and N.J.S.A. 40A:9-10.3,[2/] both of which establish that vacation leave not taken in the year earned because of business necessity must be used in the following year. The MAA responds that N.J.S.A. 11A:6-3 does not apply to the Municipal Engineer because he is in the "unclassified service" and the limitations of the statute regarding the accrual of vacation leave only apply to employees

2/ N.J.S.A. 40A:9-10.3 is only applicable to jurisdictions that have not adopted the provisions of Title 11A, Civil Service.

in the "classified service."[3/] The MAA additionally asserts that there is a past practice between the parties that allowed members to accrue more vacation than set forth in the statute.

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]

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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,

---

3/ The City asserts in its reply brief that "at least until March, 2004, Civil Service considered the position of Municipal Engineer a classified position."

> 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.
>
> [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

N.J.S.A. 11A:6-3. Vacation leave; full-time political subdivision employees provides at (e) as follows:

> Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only; except that vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved by the commission, the leave is used or the employee is compensated for that leave, which shall not be subject to collective negotiation or collective bargaining.

N.J.S.A. 40A:9-140. Engineer; appointment; compensation; term provides as follows (emphasis added):

> In every municipality the governing body, by ordinance, shall provide for the appointment of a municipal engineer and fix his compensation in an annual salary or fixed fee basis or at an hourly rate and based upon actual time and expenses agreed on prior to the rendering of the services. No municipal engineer shall be compensated by receiving a percentage of the contract for which he

> renders services. Unless otherwise provided by law his term of office shall be 3 years.

N.J.A.C. 4A:3-1.3. Unclassified service, provides, in pertinent part, as follows (emphasis added):

> (a) A job title shall be allocated by the Board to the unclassified service when:
>
> 4. A specific statute provides that incumbents in the title serve for a fixed term or at the pleasure of the appointing authority;

The New Jersey Civil Service Commission has held the following regarding the accrual of vacation leave in the unclassified service:

> N.J.S.A. 11A:3-5 provides that "the political subdivision unclassified service shall not be subject to the provisions of this title unless otherwise specified." The provisions of Civil Service law and rule governing the allotment and use of sick and vacation leave are not specifically extended to unclassified employees. See In the Matter of Joyce Ann Herbert (MSB, decided April 6, 2005).
>
> [In the Matter of Laura Martin, Borough of Edgewater, 2013 N.J. CSC LEXIS 638 (N.J. CSC 2013)]

A statute or regulation will have preemptive effect if 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. The New Jersey Supreme Court held, "In carrying out its duties, [the Commission] will at times be

required to interpret statutes other than the Employer-Employee Relations Act." Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316 (1979). See also Hunterdon Central H.S. Bd. of Ed., 174 N.J. Super. 468, 473-474 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981).[4/]

We find that N.J.S.A. 11A:6-3(e) does not preempt the MAA's grievance in this matter since, based on the above statutes, regulation and the cited Civil Service decision, the Municipal Engineer was in the unclassified service and not subject to the statute regarding the accrual and use of vacation leave.

ORDER

The City of Millville's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: March 26, 2015

Trenton, New Jersey

4/ We note that the City has asserted that Article 14 in the CNA was specifically negotiated by the parties and applies to the Municipal Engineer; however in scope of negotiations determination matters, we do not consider any contractual defenses that the employer may have. Ridgefield Park.