

P.E.R.C. NO. 2016-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2016-002

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey for a restraint of binding arbitration of grievances filed by the New Jersey Law Enforcement Supervisors Association. The grievances assert that the State violated the parties' agreement when it deducted leave time and disallowed leave time accrual for unit members returning from workers' compensation leaves. Finding that N.J.A.C. 4A:6-1.2 mandates proration of leave for employees who go on a leave of absence without pay and that workers' compensation is considered a leave without pay under N.J.A.C. 4A:3-4.6, the Commission holds that N.J.A.C. 4A:6-1.2 preempts negotiations over proration of leave for employees out on workers' compensation 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, Robert Lougy, Acting Attorney
General (Steven Hahn, on the brief)

For the Respondent, Crivelli & Barbati, LLC (Frank M.
Crivelli, of counsel and on the brief; Donald C.
Barbati, on the brief)

DECISION

On July 13, 2015, the State of New Jersey (State) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the New Jersey Law Enforcement Supervisors' Association (NJLESA or Association). On November 2, 2015, the State filed an amended petition seeking to restrain a related grievance. Both grievances assert that the State violated the parties' collective negotiations agreement (CNA) when it applied N.J.A.C. 4A:6-1.5(b) to the two grievants upon their return from workers' compensation leave, in one instance deducting leave time, and in the other, not allowing the accrual of leave time.

The State filed a brief, exhibits, and the certification of the Director (Director) of the New Jersey Department of Corrections (NJDOC) Office of Employee Relations. NJLESA filed a brief and exhibits.^{1/2/} The State also filed a reply brief. These facts appear.

NJLESA represents law enforcement officers employed by various State departments, agencies, and colleges at the rank of sergeant. The State and NJLESA were parties to a CNA in effect from July 1, 2011 through June 30, 2015.^{3/} The grievance procedure ends in binding arbitration.

N.J.A.C. 4A:6-1.5, entitled "Vacation, administrative and sick leave adjustments: State service," provides in pertinent part:

(b) An employee who leaves State service or goes on a leave of absence without pay before the end of the calendar year shall have his or her leave prorated based on time earned, except that the leave of an employee on a voluntary furlough or furlough extension leave shall not be affected. An employee who is on the payroll for greater than 23 days shall earn a full month's allowance, and earn

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- 1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."
- 2/ On August 10, 2015, NJLESA requested oral argument. We deny the request given that the issue in dispute has been fully briefed.
- 3/ A successor agreement has not been executed yet according to the NJLESA.

one-half month's allowance if he or she is on the payroll from the 9th through the 23rd day of the month.

1. An employee shall reimburse the appointing authority for paid working days used in excess of his or her prorated and accumulated entitlements.

2. An employee who returns to work from a leave of absence shall not be credited with paid vacation or sick leave until the amount of leave used in excess of the prorated entitlement has been reimbursed.

Grievant #1

Grievant #1 (JP) is a corrections sergeant at East Jersey State Prison. On or about April 3, 2013, JP was injured while on duty. He did not return to work until May 3, 2013. During his absence, JP received workers' compensation. Upon his return to active duty, NJDOC deducted one and one-half vacation days and one and one-half sick days from JP's accumulated leave time.

In June 2013, NJLESA filed a grievance claiming that JP should be reimbursed for the vacation and sick leave that NJDOC deducted from his accrual. The State denied the grievance at each step of the process. On November 21, 2013, NJLESA filed a Request for Submission of a Panel of Arbitrators (AR-2014-366) which claims, in pertinent part:

The Department's actions in deducting 1.5 sick and vacation days from [JP] on account of his being out on workers' compensation is in violation of the collective bargaining agreement between the NJLESA and the State of New Jersey, namely Article XIV and Article XX(A) (2). The Department's actions are also

in violation of the applicable law, specifically N.J.S.A. 43:16A-15.2(a) and N.J.A.C. 4A:6-1.5. As such, the Department should reimburse [JP] the 1.5 sick and vacation days wrongfully taken from him.

The initial scope petition ensued.

Grievant #2

Grievant #2 (EH) is a corrections sergeant at Albert C. Wagner Youth Correctional Facility. In July 2012, EH was injured while on duty and began receiving workers' compensation benefits. He returned to work in February 2013. EH did not accrue vacation or sick days while he was out.

On September 2, 2015, NJLESA filed a Request for Submission of a Panel of Arbitrators (AR-2016-112) which claims, in pertinent part:

The Department's actions in failing to allow [EH] to accrue sick and vacation days on account of his being out on workers' compensation is in violation of the collective bargaining agreement between the NJLESA and the State of New Jersey, namely Article XIV and Article XX(A) (2). The Department's actions are also in violation of the applicable law, specifically N.J.S.A. 43:16A-15.2(a) and N.J.A.C. 4A:6-1.5. As such, the Department should reimburse [EH] for the sick and vacation days that they did not allow to accrue during the time he was absent from work and collecting workers' compensation.

On September 15, 2015, the Commission granted the State's request to amend its original scope petition to include the grievance concerning EH. On October 7, 2015, the Director of

Conciliation and Arbitration granted the parties' request to consolidate the arbitration of AR-2014-366 with AR-2016-112. The amended scope petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management

prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if we conclude that NJLESA's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

"[A]n otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Educ. v. Bethlehem Tp. Educ. Ass'n, 91 N.J. 38, 44 (1982). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." County of Mercer, P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" "

Bethlehem Tp. Bd. of Educ., 91 N.J. at 44 (citing Council of New Jersey State College Locals v. State Board of Higher Ed., 91 N.J. 18, 30 (1982)). "The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public employer.'" Id. (citing Local 195, 88 N.J. at 403-404); see also, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978) (holding that the "adoption of a *statute* or *regulation* setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing" the matter).

The State argues that N.J.A.C. 4A:6-1.5(b) preempts negotiation of all issues involving the proration of leave for employees who go on a leave of absence without pay inasmuch as the regulation, by its plain terms, mandates proration in that instance unless the leave is a voluntary furlough or furlough extension. The State also maintains that it is clear the Civil Service Commission meant to include leave taken while receiving workers' compensation benefits as a leave without pay given that a leave under that circumstance is not included within any statutory or regulatory provision that permits an appointing authority to grant a leave of absence with pay.^{4/} Rather, the

^{4/} In support of that contention, the State cites N.J.S.A. 11A:6-11.1 and N.J.A.C. 4A:6-1.18 (permitting leaves of absence with and without pay to certified disaster service volunteers), N.J.S.A. 11A:6-10 and N.J.A.C. 4A:6-1.13
(continued...)

State contends, an appointing authority's right to grant an employee a leave of absence while receiving workers' compensation benefits falls under N.J.A.C. 4A:6-1.10, authorizing State appointing authorities, with the approval of the Civil Service Commission, to grant leaves without pay, and therefore a leave while receiving those benefits must be considered without pay for purposes of N.J.A.C. 4A:6-1.5(b). The State also argues that N.J.A.C. 4A:4-2.15(d)(1)(ii), which specifies the types of leaves of absence without pay that are not to be deducted from seniority for purposes of promotional examinations, among which are leaves without pay for personal illness or disability, informs the reading of N.J.A.C. 4A:6-1.5(b) and demonstrates that the Civil Service Commission intended absence while receiving workers' compensation benefits to be considered a leave of absence without pay.

NJLESA acknowledges that N.J.A.C. 4A:6-1.5(b) has preemptive effect and requires proration of leave when an employee leaves

4/ (...continued)
(permitting leaves of absence with pay for certain employee union conventions), N.J.S.A. 11A:6-11 and N.J.A.C. 4A:6-1.15 (permitting leaves of absence with pay for certain athletic competitions), N.J.S.A. 11A:6-12 (permitting leaves of absence with or without pay for certain elected and appointed union officials), N.J.S.A. 38:23-2 (permitting leaves of absence with pay for certain State and national conventions), N.J.S.A. 52:17B-69A (permitting leaves of absence with pay during police training courses), and N.J.A.C. 4A:6-1.11 (permitting leaves of absence with pay for certain military service).

State service or goes on a leave of absence without pay. However, NJLESA argues that the regulation is inapplicable when an employee is out on workers' compensation. According to the NJLESA, the State is correct that whether an employee is on a leave without pay under N.J.A.C. 4A:6-1.5(b) depends on whether the individual is on the payroll. But it disagrees with the State that an employee is not on the payroll when receiving workers' compensation benefits. In that regard, it cites N.J.S.A. 34:15-44, which requires the name of a public employee receiving workers' compensation to "be carried upon the payroll."^{5/} NJLESA also relies upon N.J.S.A. 43:16A-15.2, requiring public employers to make pension contributions for an employee while absent and receiving workers' compensation benefits.^{6/}

^{5/} N.J.S.A. 34:15-44 provides in relevant part:

When any payment of compensation under this chapter shall be due to any public employee, the name of the injured employee, or in case of his death, the names of the persons to whom payment is to be made as his dependents, shall be carried upon the pay roll, and payment shall be made in the same manner and from the same source in which and from which the wages of the injured employee were paid.

^{6/} N.J.S.A. 43:16A-15.2(a) provides:

If any member of the retirement system receives periodic benefits payable under the Workers' Compensation Law during the course of his active service, in lieu of his normal compensation, his regular salary deductions shall be paid to the

(continued...)

In reply, the State contends that any question regarding the application of N.J.A.C. 4A:6-1.5(b) must be brought before the Civil Service Commission, as opposed to an arbitrator. It also argues that the regulation must be construed together with N.J.A.C. 4A:3-4.6, specifying "periods of non-pay status" that are not to be deducted from earned time in calculating anniversary dates, among which is "leave without pay while receiving workers' compensation benefits."

We agree with the parties that N.J.A.C. 4A:6-1.5(b) preempts negotiation over the issue of proration of leave with respect to a State employee who goes on a leave of absence without pay before the end of the year. If, therefore, the regulation applies to a leave of absence while receiving workers' compensation benefits, any inconsistent contractual provision would not be negotiable.

As in any other case of a law's construction, our task is to determine the promulgator's intent. We must determine whether the Civil Service Commission intended the mandated proration to apply to a leave while receiving workers' compensation benefits.

6/ (...continued)
retirement system by his employer The moneys paid by the employer shall be credited to the member's account in the annuity savings fund and shall be treated as employee contributions for all purposes The member for whom the employer is making such payments, will be considered as if he were in the active service.

Initially, ascertaining the promulgator's intent must be derived from the plain language of the law under review. See, generally, *Cashin v. Bello*, 223 N.J. 328, 335 (2015). At the outset, we find it instructive to some degree that the Commission excepted furlough leaves and furlough extension leaves from N.J.A.C. 4A:6-1.5(b)'s mandate but not leaves while receiving workers' compensation benefits or any other type of leave without pay. Given the specific exemption, we could infer that the Commission intended all other unpaid leaves to trigger the proration requirement.

Turning then to the Association's argument that N.J.S.A. 34:15-44 requires us to find that a leave of absence while receiving workers' compensation benefits is a leave with pay for purposes of N.J.A.C. 4A:6-1.5(b), we agree with the State that the argument is not sound. N.J.S.A. 34:15-44 was designed to clarify the right of public employees to collect workers' compensation and to provide a bookkeeping mechanism for the payment of appropriate claims. Novak v. Camden County Health Services Bd. Of Managers, 255 N.J. Super. 93, 97 (App. Div. 1992). We discern no intent from that statute or any other provision of the workers' compensation law that State employees on leave while receiving workers' compensation benefits should be exempt from the proration mandate of N.J.A.C. 4A:6-1.5(b). In order to reach the result urged by the Association, we would have

to read into both N.J.S.A. 34:15-44 and N.J.A.C. 4A:6-1.5(b) such an exemption, thereby rewriting those laws, which we are not at liberty to do. See, Cashin, supra, 223 N.J. at 335. That relief must be sought from the Civil Service Commission, which pursuant to N.J.S.A. 11A:6-1, has been delegated authority "to designate the types of leaves and adopt rules for State employees in the career and senior executive services regarding procedures for sick leave, vacation leave and other designated leaves with or without pay as the Civil Service Commission may designate." As the Court said in State v. State Supervisory Employees Ass'n, 78 N.J. 54, 82 (1978), "If the subject matter is covered by a specific Civil Service regulation and the parties are dissatisfied, their recourse is to seek a modification of such regulation through the administrative process."^{7/}

Further with regard to N.J.S.A. 34:15-44 as well as N.J.S.A. 43:16A-15.2, the pension statute on which the Association relies, we note that the Legislature has provided that the Civil Service Act supersedes any other law that is inconsistent with its provisions. N.J.S.A. 11A:12-1. While we are not suggesting that N.J.S.A. 34:15-44 or N.J.S.A. 43:16A-15.2 is inconsistent with

^{7/} In addition, permitting an arbitrator to carve out an exception from the regulation for this group of state employees would lead to the "somewhat odd spectacle," borrowing that phrase from the Court in State Supervisory Employees Ass'n, 78 N.J. at 74, of "some state employees having different rules governing their employment from other similar groups."

N.J.A.C. 4A:6-1.5(b), we do not find them to be in *pari materia* with the regulation.

That is to say, the workers' compensation statutes "have wholly different ends and purposes" than the Civil Service leave regulations, "and the differences warrant different rules of construction in their application." Morreale v. State of New Jersey, Civil Service Commission, 166 N.J. Super. 536, 539 (App. Div. 1979), cert. denied, 81 N.J. 275 (1979). As the court explained, the workers' compensation act "is designed to place the cost of worker-connected injury on the employer who may readily provide for it as an operating expense" and consequently, "marked liberality in favor of the injured worker is commonly accorded the construction" of that act. In contrast, the civil service statutes have the "different objective of achieving an efficient public service system for the welfare of all citizens," and consequently, in construing those statutes, "the imposition of costs and expenses upon the public should not be inferred from a statute not expressly or by fair implication mandating the charge against the State." Given the "wholly different ends and purposes" of the workers compensation act and civil service statutes, the court declined to apply the rule of *in pari materia* in determining the meaning and applicability of the civil service regulation at issue there.

We agree with the State that a more apt law to read *in pari materia* with N.J.A.C. 4A:6-1.5(b) in construing the latter is another civil service regulation, namely N.J.A.C. 4A:3-4.6. It states that a "leave without pay while receiving workers' compensation benefits" is a type of "non-pay status" for purposes of calculating anniversary dates. Thus, it appears that the Civil Service Commission considers a leave while receiving workers' compensation benefits a leave without pay and a period of non-pay status, N.J.S.A. 43:16A-15.2(a) notwithstanding. That might explain why the Commission found it unnecessary to expressly state in N.J.A.C. 4A:6-1.5(b) that a leave without pay while receiving workers' compensation benefits is a leave of absence without pay for which proration of leave time is mandated.

We are aware that in a case neither party cited, the Civil Service Commission held that "a leave of absence while an employee is receiving Workers' Compensation benefits should not be deducted from an employee's 'continuous service' or seniority for the calculation . . . of vacation leave accrual." In re Thomas M. Jardine and Karriem Beyah, Department of Corrections, CSC Docket Nos. 2014-1810 and 2014-1811, 2014 N.J. CSC LEXIS 496 (CSC August, 2014). However, in doing so, the Commission specifically declined to address proration of leave under N.J.A.C. 4A:6-1.5(b), stating it was not germane to the issue

before it. The issue in Jardine concerned the amount of annual vacation leave credited to State employees based upon their "continuous service" under N.J.A.C. 4A:6-1.2. We find it significant that the Commission declined the opportunity to extend its holding to proration of leave time under N.J.A.C. 4A:6-1.5(b) when an employee goes on a leave without pay while receiving workers' compensation benefits.

Vacation leave and sick leave are mandatorily negotiable subjects unless a statute or regulation preempts negotiations. See, e.g., State of New Jersey Judiciary, P.E.R.C. No. 2013-70, 39 NJPER 472 (¶149 2013) and cases cited therein. Since we find that N.J.A.C. 4A:6-1.5(b) does preempt negotiation over proration when State employees take any leave without pay other than a voluntary furlough or furlough extension leave, arbitration must be restrained.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Wall was not present.

ISSUED: May 26, 2016

Trenton, New Jersey