

P.E.R.C. NO. 2018-28

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

POINT PLEASANT BEACH BOROUGH,

Petitioner,

-and-

Docket No. SN-2018-010

PBA LOCAL 106,

Respondent.

SYNOPSIS

The Public Employment Relations Commission, finding N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g) to be preemptive, grants the Borough's request for a restraint of binding arbitration of a grievance contesting the Borough's application of carry-over limitations to the grievant's vacation leave pursuant to the statute and regulation.

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, Armando Riccio, LLC, attorneys  
(Armando V. Riccio, on the brief)

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

DECISION

On August 15, 2017, the Borough of Point Pleasant Beach (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Policeman's Benevolent Association, Local 106 (PBA). The grievance alleges that the vacation leave of Sergeant William Ippolito was incorrectly subject to a carry-over limitation upon his return from Sick Leave Injury (SLI).<sup>1/</sup>

The Board has filed briefs, exhibits, and the certification of Christine Riehl, Borough Administrator. The PBA has filed a

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<sup>1/</sup> The grievance also contests the Borough's position that Ippolito could not accrue vacation leave while out on SLI. However, the Borough withdrew this aspect of the grievance.

brief and the certifications of Christopher Mosca, its President, and Ippolito.

The Borough and the PBA are parties to a collective negotiations agreement with a term of January 1, 2015 to December 31, 2017. Article XII, "Vacation", section B states, in pertinent part, as follows:

After the first full year of employment, and regardless of whether such time occurs after the posting of the normal vacation schedule in February, an Employee shall be entitled to vacation days during the calendar year in which he shall reach each anniversary date of his employment in accordance with the following schedule. . . . ten (10) working days.

Thereafter, one (1) additional day for each year of service to a maximum of thirty (30).

Article XV, "Sick Leave", section C provides, in pertinent part, as follows:

Whenever any Employee entitled to sick leave under the Article is absent from work as the result of injury incurred in the course of his employment, the Borough shall pay each Employee his full salary for the period of such absence to a maximum of one (1) year without having such absence charged to the Employee's annual sick leave. Any amount of salary paid to the Employee shall be reduced by the amount of any Workmen's Compensation payments made, but not including, awards made of permanent disability.

The grievance procedure ends in binding arbitration. These facts appear.

The Borough is a civil service jurisdiction. On June 16, 2016, and pursuant to Article XV, Ippolito was placed on SLI. He returned to work on March 8, 2017.

Riehl certifies that as Borough Administrator her day-to-day responsibilities include direct oversight of all municipal government operations, including personnel and employee relations matters. She certifies as follows with regard to Ippolito's personnel records:

- At the beginning of 2016, Ippolito had 53.59 vacation days, consisting of 23.69 days carried over from 2015 plus 30 days credited to him for 2016;
- At the time Ippolito went on paid injury leave, he had 43.19 vacation days, consisting of 13.19 days from 2015 plus 30 days credited to him for 2016; and
- At the time he returned to work on March 9, 2017, he had 60 vacation days, consisting of 30 days carried over from 2016 plus 30 days credited to him for 2017.<sup>2/</sup>

Mosca certifies that the Borough mischaracterizes the period when Ippolito earned the vacation leave that was wrongfully deducted from him, and that the period when vacation leave is earned is crucial because it dictates when the carry-over limitations are applicable. Mosca further certifies that in accordance with the wording of Article XII, PBA members are

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<sup>2/</sup> Riehl's certification also references Ippolito's personal leave; however, the PBA's brief focuses only on vacation leave.

provided with their vacation leave at the start of the calendar year in anticipation of reaching their anniversary date, although the leave is actually "earned" on their anniversary dates. He further certifies that Ippolito should have had up to 90 days of vacation leave available to him upon his return to work, including 30 vacation days he would have received on his anniversary date of September 5, 2017.

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.

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 a 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.

The Board argues that this matter is preempted by both N.J.S.A. 11A:6-3, "Vacation leave, full-time political subdivision employees" and N.J.A.C. 4A6-1.2, "Vacation leave."

The PBA responds that pursuant to the language of Article XII, Ippolito earned his vacation leave on his anniversary date (September 5) as opposed to the beginning of the calendar year; therefore, the carry-over limitation should be applied on an anniversary-date basis as opposed to a calendar-year basis.

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. Of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 11A:6-3(e) states, in pertinent part, as follows:

Vacation leave 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 ... the leave is used or the employee is compensated for that leave...

N.J.A.C. 4A6-1.2(g) states, in pertinent part, as follows:

Vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only and shall be scheduled to avoid loss of leave, provided however, that:

\* \* \*

3. In local service, 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 ... the leave is used or the employee is compensated for that leave.

Here, Ippolito began SLI on June 16, 2016 and returned to work on March 9, 2017. According to Rieh's certification, when Ippolito's SLI began he had 43.19 vacation days, consisting of 13.19 vacation days carried over from 2015 plus 30 days credited for 2016. When he returned to work on March 9, 2017, he had 60 vacation days, consisting of 30 days carried over from 2016 plus 30 days credited for 2017. Thus, upon his return to work, the Borough deducted the 13.19 vacation days from 2015 in accordance with the carry-over limitation set out in N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g).

The plain language of both N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g) provides that vacation leave not taken in a given year can only be carried over into the succeeding year, and that the only exception to this limitation is for vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor. Thus, not using vacation leave due to being out on SLI is not an exception to the carry-over limitation for vacation leave set out in both the statute and regulation. Therefore, we find that the language of N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g) preempts the issue of whether Ippolito should have been credited with his vacation leave from 2015 when he returned from SLI on March 9, 2017. Hazlet Tp.,



P.E.R.C. No. 96-56, 22 NJPER 73 (¶27033 1996); see also Mount Holly Tp., P.E.R.C. No. 2011-41, 36 NJPER 423 (¶164 2010).

The PBA's argument with regard to tying the date when vacation leave is earned to an employee's anniversary date rather than the beginning of the calendar year is without merit. The express language of N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g) speaks to vacation leave not used in a "calendar year," and the regulation is replete with references on the calendar-year basis upon which employees are entitled to receive and use vacation in the context of both State and local service.

ORDER

The request of Point Pleasant Borough for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: January 25, 2018

Trenton, New Jersey