P.E.R.C. NO. 97-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STAFFORD TOWNSHIP,

Petitioner,

-and- Docket No. SN-96-60

AFSCME COUNCIL 71, LOCAL 3304A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds mandatorily negotiable a contract provision proposed by AFSCME Council 71, Local 3304 during successor contract negotiations with Stafford Township. The provision concerns paid disability leave for an off-duty injury or illness. The Commission finds that N.J.S.A. 40A:9-7 does not remove the parties' discretion to negotiate over paid leave for non-work injuries for non-police.

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. 97-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STAFFORD TOWNSHIP,

Petitioner,

-and- Docket No. SN-96-60

AFSCME COUNCIL 71, LOCAL 3304A,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Maestro & Murphy, attorneys (James L. Plosia, Jr., of counsel)

For the Respondent, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys (Sidney H. Lehmann and Jennifer Weisberg Millner, of counsel)

DECISION AND ORDER

On January 3, 1996, Stafford Township petitioned for a scope of negotiations determination. The Township seeks a declaration that a successor contract proposal of AFSCME Council 71, Local 3304A is not mandatorily negotiable. The provision concerns paid disability leave for an off-duty injury or illness.

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

The parties' predecessor collective negotiations agreement expired on December 31, 1994. During negotiations for a successor agreement, the employer asserted that the issue of disability leave was preempted by N.J.S.A. 40A:9-7. The employer filed this petition. The parties then reached a memorandum of understanding

and disability leave was tentatively included as Article 20 pending resolution of this petition. Article 20 states:

> Effective January 1, 1996, employees hired subsequent to that date will, for the duration of their employment in Stafford, be eligible for disability leave up to the benefit leave allowed under the State Disability Plan. Employees hired between January 1, 1992 and January 1, 1996 will receive the same benefit for their first five years of employment. Thereafter, those employees, as well as all employees hired prior to January 1, 1992, will be eligible for disability leave which will consist of one of the two options:
>
> (a) Employees who choose only to use eight sick days prior to going on disability shall receive the State Disability rate of pay.
>
> (b) Employees who choose to exhaust all their accumulated sick leave will be eligible to receive full pay for disability leave after they exhaust all accumulated sick leave. Employees who have more than fifty accumulated sick days as of the time they begin the disability leave under this option will be permitted to "save" five of those accumulated sick days.
>
> An employee who has used either thirteen or twenty six weeks of disability (as the case may be) will not be entitled to any further disability leave for the same illness until 180 calendar days have elapsed from the last contractual disability day used for that illness. No employee shall be entitled to more than thirteen or twenty six weeks of disability leave (as the case may be) cumulatively in a calendar year.

N.J.S.A. 40A:9-7 states:

> The Board of Chosen Freeholders of any county, by resolution, or the governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding

> one year, to any of its officers or employees who shall be injured or disabled resulting from or arising out of his employment, provided that the examining physician appointed by the county or municipality shall certify to such injury or disability.

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 Supreme Court has also articulated the standards for determining when a statute or regulation preempts negotiations.

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council [of New Jersey State College Locals v. State Bd. of Higher Ed.], 91 N.J. [38] at 30, 449 A.2d 1244 [1982]. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE

> Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233. [Id. at 44]

Applying these standards, the courts and the Commission have held that leaves of absence, paid or unpaid, are mandatorily negotiable absent a preemptive statute or regulation. Burlington Cty. College Faculty Ass'n, Bd. of Trustees, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (App. Div. 1977); Egg Harbor Tp., P.E.R.C. No. 91-76, 17 NJPER 161 (¶22066 1991); Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988); West Orange Tp., P.E.R.C. No. 84-141, 10 NJPER 358 (¶15166 1984).

The Township argues, however, that N.J.S.A. 40A:9-7, when read in conjunction with N.J.S.A. 40A:14-137, preempts negotiations over Article 20. N.J.S.A. 40A:14-137 allows municipalities to provide a paid leave of absence for up to one year for a police employee's injury, illness or disability from any cause. By contrast, N.J.S.A. 40A:9-7 allows a county or municipality to provide a leave of absence to non-police for up to one year if their injury or disability resulted from or arose out of their employment. The Township characterizes N.J.S.A. 40A:9-7 and

40A:14-137 as "sister statutes" that must be read together because they were enacted at the same time, and that it must be presumed that the Legislature knowingly allowed municipalities to provide up to one year's paid disability leave "from any cause" for police employees but allowed a municipality to offer its non-police employees paid leave for work-related disabilities only. The Township contends that it is an accepted principle of legislative construction that the failure to include a provision in a statute necessarily indicates an intention to exclude that provision.

AFSCME contends that N.J.S.A. 40A:9-7 does not preclude negotiations over paid leave for injury or disability not related to work, and that the issue is mandatorily negotiable. AFSCME acknowledges that N.J.S.A. 40A:9-7 places a one-year limit on benefits due to work-related injuries, but asserts that the statute does not preclude negotiations for some type of insurance or extended leave for other disabilities if that leave is for a period of one year or less.

AFSCME further contends that the New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq., authorizes municipalities to negotiate paid leave for periods of disability unrelated to work. The employer responds that disability leave is not the same as leave with full pay and that it has not opted to enroll in the State Temporary Disability Benefits Plan or provide a wage supplement pursuant to a private disability plan.

Although both N.J.S.A. 40A:9-7 and 40A:14-137 were enacted in 1971 as part of an overall recodification of existing laws relating to counties and municipalities, their source statutes were enacted at different times, 1930 and 1931 respectively. We cannot infer that when the Legislature in 1930 authorized paid leaves for all employees for job-related injury or disability, it knew or could have known that the Legislature in 1931 would authorize paid leaves for police for injury, illness or disability for any cause. Nor can we read the later statute to limit the rights of employees to negotiate protections not specifically prohibited by the earlier statute. In a similar vein, we note that the earlier statute covers only injury and disability; the later statute covers injury, illness and disability. The suggested mode of analysis would require us to read the later statute to preclude payment to non-police for illness even though related to work simply because illness is mentioned in the later statute but not mentioned in the earlier one. Given this legislative history, we decline the invitation to read N.J.S.A. 40A:9-7 as a sister statute to, and limited by, N.J.S.A. 40A:14-137.

We next consider the Township's argument that whatever is not included within the municipality's discretionary scope of authority is preempted by statute and thus may not be collectively negotiated. Our Supreme Court has stated that in a preemption analysis, the question is not whether a statute authorizes an employer to establish an employment condition, but whether a statute or regulation prohibits negotiations over that employment

condition. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 330 (1984). In any event, a similar argument was rejected in Camden v. Dicks., 135 N.J. Super. 559 (Law Div. 1975). In Camden, the employer argued that it did not have statutory authority to grant payment for unused sick leave. The employer pointed out that the Legislature had provided for such payment for state employees and argued that the doctrine of expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) required a holding that it was the legislative intent to withhold like treatment for municipal employees. The Court rejected the argument that the employer did not have the authority to negotiate payment for unused sick leave. It stated:

> In the absence of express restriction against bargaining for that term of an employment contract between an employer and its employees, the authority to provide for such payment resides in the municipality under the broad powers and duties delegated by the statutes. Were it otherwise a municipality would not be able to bargain collectively and to make agreements concerning terms of employment with its employees unless specific statutory authority for each provision of the agreement existed. Such a narrow and inflexible construction would virtually destroy the bargaining powers which public policy has installed in the field of public employment and throttle the ability of a municipality to meet the changing needs of employer-employee relations. [Id. at 562-563]

As for the employer's argument about legislative intent, the Court noted that:

> the action of the Legislature ... in providing mandatory supplemental compensation to retiring

> state employees for their unused sick leave without taking any action concerning payment for unused sick leave time with respect to any other class of employees, cannot, in itself, be interpreted as evidencing a legislative intent to prohibit payment for unused sick leave to nonstate employees. The court [in Maywood Ed. Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974)] held that[:]
>
> > A more reasonable interpretation of its action is that as to other public employees such payments were and continue to be committed to the discretion of the public employers within their existing statutory authority to compensate their employees. [135 N.J. Super. 563-564]

While this case is distinguishable from Camden to the extent N.J.S.A. 40A:9-7 and 40A:14-137 authorize but do not require certain benefits, we believe the point is the same. The Legislature has authorized public employers to negotiate over mandatorily negotiable employment conditions of which paid leave is one. Absent a statute or regulation that specifically, expressly and comprehensively sets an employment condition and removes the parties' discretion to negotiate anything different, the employer remains free to negotiate and enter into an agreement over that condition. Contrast Ocean Tp, P.E.R.C. No. 86-37, 11 NJPER 594 (¶16211 1985); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶1011 1979), aff'd in pert. part 6 NJPER 338 (¶11169 App. Div. 1980)(statute authorizing leaves of not more than one year preempts negotiations over leaves of more than one year). Since N.J.S.A. 40A:9-7 does not prohibit negotiations

over paid leave for non-work injuries for non-police, it does not preempt negotiations over such leave.[1/]

ORDER

Article 20 is mandatorily negotiable.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: February 27, 1997
Trenton, New Jersey
ISSUED: February 28, 1997

---

1/ The Temporary Disability Benefits Law does not appear to prohibit negotiations over paid leave for non-work injuries for non-police. In any event, the Township does not argue that it preempts negotiations over Article 20 and we therefore need not address this statute any further.