

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOBOKEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-81-33

HOBOKEN TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Commission finds that the method of calculating the number of accumulated sick leave days a teacher could increase his or her total in any one year is a mandatorily negotiable subject and could therefore be submitted to binding grievance arbitration if otherwise arbitrable under the parties' contract. The Board of Education had maintained that N.J.S.A. 18A:30-6 and N.J.S.A. 18A:30-7, as interpreted by two Commissioner of Education decisions, established the method of calculating how many unused sick days could be added to the number which could be accumulated from year to year. The Commission found that these two statutes did not set a specific method of calculation within the standards established by State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). Further the Commission noted that the two Commissioner of Education decisions relied upon by the Board both pre-dated the amendments to the Employer-Employee Relations Act, enacted by Chapter 123 of the Public Laws of 1974 as well as the Supreme Court's analysis of the meaning of those amendments in State Supervisory Employees Ass'n to terms and conditions of employment and the duty to negotiate. Applying that analysis to the two statutes in question the Commission finds that they do not "set" a specific method of calculation of accumulative sick leave days, and therefore do not preclude negotiations on this acknowledged term and condition of employment.

P.E.R.C. NO. 81-97

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Appearances:

For the Petitioner, Lowenstein, Sandler, Brochin,
Kohl, Fisher & Boylan, P.C.
(Gregory B. Reilly, of Counsel)

For the Respondent, Goldberg & Simon, P.C.
(Theodore M. Simon, of Counsel)

DECISION AND ORDER

On November 13, 1980, the Hoboken Board of Education ("Board") filed a Petition for Scope of Negotiations Determination pursuant to N.J.S.A. 34:13A-5.4(d) and N.J.A.C. 19:13-1.1 et seq. with the Public Employment Relations Commission. The Petition alleged that the Board and the Hoboken Teachers Association ("Association") had adjourned an arbitration over the Board's unilateral change in the method of calculating a teacher's accumulated sick leave days so that the Board could petition the Commission for a determination of the negotiability and arbitrability of its admitted change.

The Petitioner alleges the following relevant series of facts. The Association has not controverted any of these allegations.

The Association represents a unit of approximately 467 employees including all certificated personnel employed by the Hoboken Board of Education and excluding the Superintendent of Schools, Assistants to the Superintendent, Administrative Assistants, Principals, Vice-Principals, Supervisors and Directors. The Board and the Association executed their current two-year contract on July 1, 1979.

Under the current contract, teachers are allowed from 10 to 25 sick leave days per year, depending upon length of service. Teachers allowed 10 or 15 days per year may accumulate all unused days for use in future years in case of extended illness necessitating absence for more than the annual number of days allotted.^{1/} Teachers allowed 20 or 25 days may accumulate up to a maximum of 15 unused days each year under N.J.S.A. 18A:30-7.^{2/}

The dispute arose because in the 1978-79 school year the Board unilaterally changed the method of calculating the

^{1/} If a teacher retires or resigns after 10 years service, he/she will receive a lump sum cash payment based upon the number of accumulated sick leave days.

^{2/} N.J.S.A. 18A:30-7 provides:

Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

number of accumulated sick days a teacher could increase his or her total in any one year. The Board maintains that N.J.S.A. 18A:30-6 and N.J.S.A. 18A:30-7 as interpreted by the Commissioner of Education in King v. Board of Education of Woodcliff Lakes, 1972 S.L.D. 449 and Woodbridge Twp. Federation of Teachers Local No. 822 AFL-CIO v. Board of Education of Woodbridge, 1974 S.L.D. 1201, requires that a board of education differentiate between annual sick days above 15 (designated non-accumulative) and the first 15 sick days (designated accumulative) in calculating how many unused sick days can be added to the number which can be accumulated or "banked" from year to year.

Prior to 1978-79, the Board did not differentiate between sick days above or below 15 as a teacher used up his or her annual sick leave in any given year. Thus, if the contract called for a teacher to get twenty (20) days of sick leave in a year, and the teacher was out five days in that year he or she had 15 unused sick days left and could increase his or her total of accumulated or banked sick days by 15 for that year.^{3/} Additionally, if a teacher were out sick 18 days in that year, the Board would deduct all 18 from his or her annual contractual allotment of twenty before deducting any from his or her accumulated sick leave.

^{3/} Based on N.J.S.A. 18A:30-7, if that same teacher were only sick three days that year, he or she could still accumulate 15 for that year. The remaining two would simply be lost as unused.

Following the Board's change in the method of calculation in the 1978-79 school year, annual sick leave is now divided into accumulative sick leave, the first fifteen days each year; and non-accumulative sick leave, all sick days over 15 for any given year. Deductions from a teacher's sick leave are made in the following order: 1) from the teacher's 15 accumulative days; 2) from the teacher's bank of accumulated sick days from past years; and 3) from the teacher's annual allotment of non-accumulative days.

Again, using the example of a teacher with sufficient years of experience to qualify for 20 days of sick leave annually under the contract who was out five days, he or she would have these days deducted from the 15 accumulative days. Thus, that teacher would only be permitted to increase his or her total of accumulated days ("bank") by 10 days. If that same teacher were out 18 days he or she would use up all 15 of the days which could have been carried over plus three days from the total accumulated from prior years. All days accumulated from prior years would have to be exhausted before the five additional days over the 15 in the annual allotment would be deducted. Similarly, in this example of 18 sick days none would be accumulated even though the annual sick leave allotment were 20 since the last five are designated non-accumulative.^{4/}

^{4/} The parties' contract makes no differentiation in the type of sick days nor does it describe the way such days are to be deducted. It merely sets forth the number of sick days allotted based on the number of years in the district.

It is the Board's position based on the two cited decisions of the Commissioner of Education, that the method of calculation is mandated or "set" by N.J.S.A. 18A:30-6 and N.J.S.A. 18A:30-7. As such, the Board argues that the prior method was illegal since it has no discretion in this area and must utilize the new method of deducting sick days. Therefore, pursuant to State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978), the Board argues it lacked the authority to agree to the old method and the method of calculating sick leave is non-negotiable and non-arbitrable. Accordingly, the Board requests that we issue an injunction permanently restraining arbitration over this issue.

On December 8, 1980, after receiving an extension of time, the Association filed its brief. The Association accepts the Board's facts, but disputes the Board's application of law to these facts. The Association first argues that the method used to compute accumulated sick leave days is a term and condition of employment. Next, the Association argues that the statutes and cases which the Board cites do not preempt the Board's discretion to continue the old system.

On December 14, 1980, the Board filed a letter in lieu of reply brief.

State Supervisory sets forth the definitive two-fold approach for determining whether a matter is within the scope of collective negotiations required by the New Jersey Employer-Employee Relations Act. First, the matter must concern a "term

and condition of employment." State Supervisory defines terms and conditions of employment as "...those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy." Id. at 67. Second, the matter, if a term and condition of employment, is mandatorily negotiable unless it is preempted by a specific statute or regulation which expressly "sets" terms and conditions of employment. State Supervisory defines "sets" as referring "...to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer." Supra at 80. See also Cranford Board of Education and Cranford Education Ass'n P.E.R.C. No. 80-13, 5 NJPER 305 (¶10167 1979).

We have no doubt that the method for utilization of accumulated and nonaccumulative sick leave days concerns a term and condition of employment. See, e.g., Board of Education of the Township of Piscataway v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-44 (1977); In re Freehold Reg. Board of Education, P.E.R.C. No. 81-58, 6 NJPER 548 (¶11278 1980), appeal pending App. Div. Docket No. A-1220-80-T4. The question this case poses is not whether a term and condition of employment is involved, but rather whether N.J.S.A. 18A:30-6 and 18A:30-7 specifically and unilaterally "set" the nature of this term and condition and thus preclude negotiation or arbitration.

N.J.S.A. 18A:30-6 provides, in pertinent part:

When absence...exceeds the annual sick leave 5/ and the accumulated sick leave, 6/ the Board of Education may pay any such person each day's salary less the pay of a substitute...for such length of time as may be determined by the board of education in each individual case....

N.J.S.A. 18A:30-7 provides, in pertinent part:

Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

In King, the Acting Commissioner of Education addressed the legality of a Board's sick leave policy under sections 18A:30-6 and 18A:30-7. The policy allowed 60 days of non-accumulative sick leave, which was to be taken after the use of the 15 accumulative sick leave days allowed and before the use of any banked accumulated sick leave days.

The Acting Commissioner, in finding the provision invalid, stated:

5/ N.J.S.A. 18A:30-2 provides certain school district personnel with sick leave with full pay for a minimum of 10 school days any school year.

6/ N.J.S.A. 18A:30-3 provides that if any such person requires in any school year less than the specified number of days of sick leave with pay allowed then that person may accumulate all days of such minimum sick leave not utilized for use in future years.

The Commissioner is constrained to notice that the adoption of a sick leave policy, which grants annually fifteen days of accumulative sick leave and in addition sixty days of non-accumulative sick leave, is an improvident action which constitutes an abuse of discretion by the Board of Education.

Supra. at 455-456.

In Woodbridge, supra, the Commissioner of Education applied King to invalidate a sick leave policy which allowed the annual allotment of non-accumulative days to be used before a teacher had to deplete banked sick leave days (accumulated over prior years). The Commissioner reasoned that the intent of N.J.S.A. 18A:30-6 and 7 was to require the utilization of all accumulated sick days, including those acquired in prior years, before any non-accumulative days were used.

While the Board herein has accurately set forth the holdings of these decisions, we find they are not controlling of the instant situation for a number of reasons.

Initially we observe that both of these decisions were rendered prior to the effective date of L. 1974, c. 123 which amended the New Jersey Employer-Employee Relations Act. As construed by the Supreme Court in State v. State Supervisory Employees, supra, the major change in the scope of negotiations made by the amendments was to provide that statutes concerning terms and conditions of employment would not preclude negotiations on subjects covered unless the statute specifically set the term and condition of employment addressed therein. See 78 N.J. at 80-83. In emphasizing this point the Court observed:

It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable.

In rendering both King and Woodbridge, the Commissioner did not have the benefit of the above guidelines,^{7/} and the holdings were based mainly upon his view of the intent of the statute rather than the specific limitations placed upon the terms and conditions of employment contained therein.^{8/}

N.J.S.A. 18A:30-6 and 7 do not suggest, much less set whether in a given year non-accumulative or accumulative sick leave days are to be utilized first. Hence, under the holding of State Supervisory Employees, the parties would be free to negotiate that non-accumulative days be used first, or vice-versa,

^{7/} The 1974 amendments to the Act vested PERC with primary jurisdiction to resolve negotiability disputes. N.J.S.A. 34:13A-5.4(d). Hence the disputes in King and Woodbridge, had they arisen in 1975 or thereafter would likely have been addressed by us in the first instance. This is true even though the dispute involved construction of education statutes. See Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316-317 (1979).

^{8/} It is also apparent from a reading of King, supra, that the fact that the Board therein agreed to an inordinate number of annual sick days (75) weighed heavily on the mind of the decision-maker.

or to develop by mutual agreement any other formula regarding the deduction of sick days (e.g., alternating accumulative and non-accumulative days). What the statutes do mandate is that no more than 15 days per year may be "banked."

Moreover, the language of N.J.S.A. 18A:30-6, contrary to the Commissioner's holding in Woodbridge, supra, can be viewed as suggesting that all annual sick leave (which can include both accumulative and non-accumulative sick days) be exhausted before deductions are made from days accumulated in prior years. In Woodbridge, the Commissioner held all accumulative days are utilized first before the non-accumulative days may be reached.

We thus conclude that N.J.S.A. 18A:30-6 and 18A:30-7 do not mandate or even suggest a "set" procedure requiring the exhaustion of accumulative before non-accumulative sick days. We do not read the underlying legislative intent as a mandate to protect against the possibility of a local board's "inprovident" judgment by setting an inflexible procedure for utilizing sick leave days. We perceive no such intent in the statutory context at hand, and we have not been directed to any legislative history evidencing any such intent.^{9/} By contrast, the legislature has

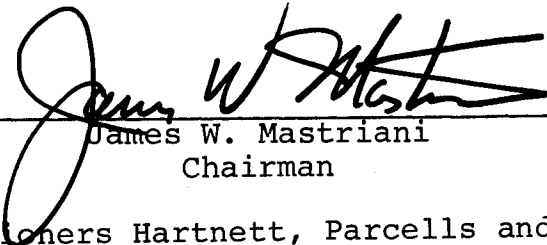
^{9/} We wish to make it clear that we do not lightly disregard holdings of the Commissioner of Education and we normally give deference to his construction of education statutes when such laws are implicated in disputes involving our jurisdiction. See, e.g. In re Rockaway Twp. Bd of Education, P.E.R.C. No. 76-44, 2 NJPER 214 (1976). However, as discussed above, changes in the way statutes are to be viewed with respect to their impact on the negotiability of terms and conditions of employment were made by the 1975 amendments to our Act and the Commissioner's decisions were rendered prior to these changes and the Supreme Court's construction of them in State Supervisory.

established collective negotiations in this State as a public policy. If enforcement of the established terms and conditions is to be denied, serious public policy considerations must be at stake.^{10/} No such policy considerations are apparent or applicable here.^{11/} Accordingly, we conclude that 18A:30-6 and 18A:30-7 do not specifically "set" the method for utilizing sick leave days, and that the Board's change in sick leave policy is arbitrable.

ORDER

For the aforementioned reasons, the request of the Board for a permanent restraint of arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani and Commissioners Hartnett, Parcells and Graves voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
March 10, 1981
ISSUED: March 11, 1981

^{10/} Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969), cert denied, 55 N.J. 310 (1970).

^{11/} We also believe that the instant negotiated sick leave policy cannot be characterized as improvident.