NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5320-11T1

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 1, LOCAL 195 and INTERNATIONAL FEDERATION OF P PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO,

Appellants,

v.

NEW JERSEY CIVIL SERVICE COMMISSION,

Respondent.

Argued January 7, 2014 – Decided September 8, 2014

Before Judges Messano, Hayden and Rothstadt.

On appeal from the New Jersey Civil Service Commission.

Ira W. Mintz, Paul L. Kleinbaum and Arnold S. Cohen argued the cause for appellants (Weissman & Mintz, L.L.C., attorneys for appellant Communications Workers of America, AFL-CIO; Zazzali, Fabella, Nowak, Kleinbaum & Freidman, attorneys for appellant American Federation of State, County and Municipal Employees, AFL-CIO; Oxfeld Cohen, attorneys for appellant Local 195; Mr. Mintz, Mr. Kleinbaum and Mr. Cohen, on the joint brief).

Todd A. Wigder, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Wigder, on the brief).

PER CURIAM

This matter is before us for a second time. It stems from memoranda of agreement (MOA), negotiated in 2009 by the Communications Workers of America, AFL-CIO, American Federation of State, County and Municipal Employees, AFL-CIO, Council 1, and Local 195, International Federation of Professional and Technical Engineers, AFL-CIO (collectively, "the Unions"), and the State of New Jersey that sought to avoid widespread layoffs occasioned by the then-existing fiscal crisis. In our prior opinion, we set forth the relevant background.

"Each MOA provided that 'if any provision[] of th[e] MOA require[d] legislation or regulation to be effective, the parties w[ould] jointly seek the enactment of such legislation or the promulgation of such regulations.'" Commc'n Workers of Am. v. N.J. Civil Serv. Comm'n, No. A-1110-10 (App. Div. Jan. 18, 2012) (slip op. at 4). In return for deferring previously-negotiated salary increases, the Unions agreed to the use of ten unpaid furlough days prior to July 1, 2010; the State agreed there would be no layoffs and further agreed to provide the employees with a separate bank of personal leave days ("PLB

days"), computed in part upon the number of days each employee was furloughed. Ibid. The MOAs specifically provided that, unlike the restrictions placed upon carrying over paid vacation leave and administrative leave days from year to year, "'there [would] be no limitations on the carryover of days in the PLBs.'" Ibid.

Despite the unambiguous language of the MOAs, the CSC proposed a regulation, N.J.A.C. 4A:6-1.2(l) (2010), that "categorized PLB days as vacation days subject to the restrictions of N.J.S.A. 11A:6-2(f) ("Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only.")." Id. at 5-6. Under the regulation, all PLB days were to be used by June 30, 2012. Id. at 6.

Acknowledging the proposed regulation was contrary to the express terms of the MOAs, ibid., the CSC nonetheless took the position that, since vacation leave was "'the only type of leave authorized by statute that provide[d] for time off with pay without a specific purpose[,]'" PLB days were most like vacation leave and, hence, the unrestricted carryover of PLB days was contrary to statute. Id. at 7. The CSC rejected requests by the Governor's Office of Employee Relations and the Unions to eliminate any carryover restriction from the regulation and

adopted the proposed amendment without change, leading to the Unions' appeal. Ibid.

The Unions argued that nothing compelled the CSC to treat PLB days in the same manner as vacation leave, and that the CSC had in the past adopted regulations governing employee leave time that were not statutory-based. Id. at 9, 12-13. However, we concluded it was "not for us to decide whether the CSC should have adopted an entirely new regulation dealing with the PLB days, included them within the vacation leave regulation and not have restricted their carryover, chosen to address the issue in some other way, or not have addressed the problem at all absent action by the Legislature." Id. at 13 (emphasis removed).

Nonetheless, we expressed our concern over the CSC's rationale for adopting the regulation:

> [T]he CSC determined it was powerless to classify the PLB days as anything other than vacation days and limit their carryover in a similar fashion because, despite the existence of the negotiated MOAs, there was no statutory authority to grant employees such leaves. The inconsistency of that position is obvious. Indeed, if the CSC believed there was no statutory authority permitting such leaves, we fail to see why it adopted any regulation in the first instance.
>
> [Id. at 14.]

As a result, we remanded the matter to the CSC for further consideration, id. at 15, and provided the following guidance:

> First, the CSC must consider whether the creation of the PLB banks in the MOAs was contrary to existing law and cannot be implemented without Legislative action. The Unions have not addressed that point since they seek only to overturn that portion of the proposed amendment that prohibits the carryover of PLB days; nor has the CSC specifically addressed this issue. . . .
>
> If the CSC concludes that despite Legislative inactivity, PLB days may nonetheless be provided to State workers, it shall consider whether other provisions of the Civil Service Act and the CSC's own regulations permit adoption of a regulation that mirrors the provisions of the MOAs. . . .
>
> . . . [W]e believe that the CSC must consider the overriding public purposes of the Civil Service Act in promulgating any regulation specifically designed to implement provisions of agreements collectively-bargained between the Unions and the State.
>
> Lastly, . . . the Unions may present evidence that any limitation of the carryover of PLB days would substantially impair the bargained-for contractual rights under the MOAs. The issue was not raised before the CSC, and the appellate record provides no evidence, for example, of the financial impact the regulation would have upon the membership of the Unions.
>
> [Id. at 15-17.]

Following our remand, on May 16, 2012, the CSC issued its final administrative determination, concluding "that the creation of the PLB in the MOAs was contrary to existing law and cannot be implemented without Legislative action." The CSC

further concluded that "no provision of Title 11A . . . permits adoption of a regulation that mirrors the provisions or the MOA, i.e., PLB days with unlimited carryover and cash-out." (Aa85) In a footnote, the CSC stated that it was therefore unnecessary to consider whether "any limitation on the carryover of PLB days would substantially impair contractual rights." The CSC proposed "the repeal of N.J.A.C. 4A:6-1.2(1) as well as subsections (m) and (n), which implemented the PLB program in the State colleges and universities."[1]

Lastly, under its authority to waive repayment of salary overpayment erroneously received under N.J.S.A. 11A:3-7c, the CSC waived any salary repayment for employees who had already used PLB time during fiscal years 2011 and 2012, and for those who would use PLB days before December 31, 2012. In other words, employees would be permitted to use PLB days until December 31, 2012, but not thereafter. This appeal ensued.

The Unions first reiterate their argument that the CSC was not required to treat PLB days as vacation leave. On that score, however, the proverbial horse has left the barn. We now review the CSC's final agency action on remand, the effect of which was to repeal the regulation that treated PLB days as

[1] The CSC subsequently repealed subsections (l) through (n). See 44 N.J.R. 1751(a), 44 N.J.R. 2301(a).

vacations days and invalidated the grant of PLB days to employees in the first instance, without regard to how those days are classified for regulatory purposes.

The Unions also contend that they did not need specific statutory authorization to negotiate over PLB days, and the CSC's decision to invalidate a central provision of a collectively-bargained agreement with the State contravened public policy and substantially impaired their contractual rights. Lastly, the Unions argue that those employees who were forced to use their PLB days before December 31, 2012, should have those days restored.

We have considered these arguments in light of the record and applicable legal principles. We reverse that portion of the CSC's final agency determination that required the use of unused PLB days by the Unions' employees before December 31, 2012, and hold that, in accordance with the MOAs, there are no carryover restrictions on remaining unused PLB days. The CSC may adopt a regulation that mirrors the language of the provisions of the MOAs if it so chooses. We reject the Unions' request that PLB days be restored to employees that have already used them.

Regulations promulgated under the Civil Service Act (the "Act"), N.J.S.A. 11A:1-1 to 11A:12-6, are "the means by which the statutory purposes of the merit employment system are

carried out[,]" and such regulations may be relaxed "in order to effectuate the purposes of [the Act]." N.J.A.C. 4A:1-1.2(c). One of the stated public purposes of the Act "is . . . to ensure the recognition of such bargaining and other rights as are secured pursuant to other statutes and the collective negotiations law." N.J.S.A. 11A:1-2(e).

"Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); see State Troopers Fraternal Ass'n of N.J., Inc. v. State, 149 N.J. 38, 51 (1997); see also Twp. of W. Windsor v. Pub. Emp't Relations Comm'n, 78 N.J. 98, 116 (1978). A collective negotiations agreement may provide public employees with more leave time than the minimum provided by statute. Id. at 452. Stated more broadly, "[i]n the absence of a statute or regulation precluding a public employer from agreeing to a particular type of provision, the employer's general grant of authority, by statute, provides the authority to agree to those provisions. State v. Int'l Fed'n of Prof'l & Technical Eng'rs, Local 195, 169 N.J. 505, 525 (2001). "[T]here is no need for specific statutory authorization for every possible item to which the public employer and the bargaining unit may agree." Id. at 526.

Here, there is no dispute that the State and the Unions collectively negotiated the terms of the MOAs which provided benefits to, and exacted concessions from, both sides during the fiscal crisis of 2009. One such benefit for each of the Unions' employees was the establishment of a bank of PLB days, in consideration of which the employees agreed to potentially ten days of unpaid furlough time. Although the CSC has taken the position that there was no expressed legislative authority for PLBs, it must equally acknowledge that there was no statutory prohibition against a collectively negotiated agreement that provided for them.

To implement the public purposes of the Act, the Legislature mandated that the CSC "shall 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." N.J.S.A. 11A:6-1 (emphasis added). As we noted in our prior opinion, it is not for us to decide specifically how the CSC should effectuate the purposes of its enabling legislation, one purpose of which, we reiterate, is "to ensure the recognition of such bargaining and other rights as are secured pursuant to other statutes and the collective negotiations law." N.J.S.A. 11A:1-2(e).

Nonetheless, based upon the cited precedent and the specific grant of authority from the Legislature to "adopt rules for . . . other designated leaves with or without pay as the Civil Service Commission may designate," N.J.S.A. 11A:6-1, we are compelled to reject the CSC's position that it lacked the authority to adopt any regulation because the Legislature did not authorize PLB days by enacting specific legislation.

We therefore reverse that portion of the CSC's final administrative determination that required the use of all PLB days by December 31, 2012. There is simply no authority for that action in light of the collectively-negotiated terms of the MOAs to the contrary. Having clarified the CSC's authority to adopt a regulation that strictly implements the terms of the MOAs, we reject the Unions' invitation to order the CSC do so, preferring instead to again remand the matter to the CSC for further consideration. We add the following observations.

The CSC's own regulations regarding leaves of absence recognize that "[w]here leave procedures are not set by [these regulations], appointing authorities shall establish such procedures subject to applicable negotiations requirements." N.J.A.C. 4A:6-1.1(e) (emphasis added).[2] We also note that, under

[2] "'Appointing authority' means a person or group of persons having power of appointment or removal." N.J.A.C. 4A:1-1.3.

the terms of the MOAs, an individual employee's bank of PLB days was intended to offset unpaid furlough days. More than two decades ago, the Legislature specifically ordered the CSC to "establish a voluntary furlough program for State employees under which days of leave without pay, singly or consecutively, may be taken." N.J.S.A. 11A:6-1.1. N.J.A.C. 4A:6-1.23 was adopted by the CSC in response to the Legislature's command, and, while it does not address PLB days, we fail to see why the CSC could not enact an appropriate regulation under this specific grant of statutory power.

The Unions' argument that employees who actually used PLB days prior to December 31, 2012 under the threat of "us[ing] or los[ing]" them should have those days restored lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded. We do not retain jurisdiction.