B-50

STATE OF NEW JERSEY

In the Matter of Paid Leave Bank Days	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2015-674	Court Remand
	ISSUED: NOV - 7 2014 (CSM)

In *Communications Workers of America, et al. v. New Jersey Civil Service Commission,* Docket No. A-5320-11T1 (App. Div. September 8, 2014) (*CWA v. NJCSC*), the Appellate Division, Superior Court of New Jersey, reversed and remanded the determination of the Civil Service Commission (Commission) that the creation of the Paid Leave Bank (PLB) in various Memoranda of Agreement (MOAs) between the State and the Communications Workers of America (CWA), the International Federation of Professional and Technical Engineers (IFPTE) Local 195, and the American Federation of State, County, and Municipal Employees (AFSCME) (collectively, "the Unions") was contrary to existing law and could not be implemented without Legislative action.

The background of this matter is discussed extensively in *Communications Workers of America v. New Jersey Civil Service Commission,* Docket No. A-1110-10T3 (App. Div. January 18, 2012) and *In the Matter of Paid Leave Bank Days* (CSC, decided May 16, 2012) (*Paid Leave Bank Days*) which are also attached herein. Subsequently, the Unions further appealed the Commission's determination in *Paid Leave Bank Days, supra,* to the Appellate Division, arguing, in pertinent part, that they did not need specific statutory authorization to negotiate over PLB days and that the Commission's decision invalidated a central provision of a collectively-negotiated agreement. In its current determination, the Appellate Division reversed the portion of *Paid Leave Bank Days, supra,* that required the use of unused PLB days before December 31, 2012 and found that in accordance with the MOAs, there were no carryover restrictions on remaining unused PLB days. The Appellate Division did not order or mandate that the

Commission adopt any rules or regulations in its decision, and rejected the appellants' request to restore PLB days that had already been used.

CONCLUSION

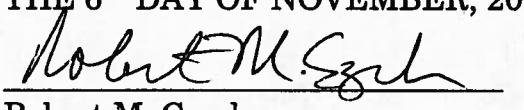
In the present matter, the Appellate Division determined that there was no authority to require the use of all PLB days by the employees represented by the Unions by December 31, 2012. The Appellate Division rejected the Unions' request to restore PLB days that had already been used. Therefore, pursuant to the decision of the Appellate Division, the Commission is removing the carry-over restrictions on unused PLB days after December 31, 2012, for the affected employees represented by the Unions. However, the Commission declines to adopt regulations concerning PLB days since such regulations are not necessary or required to implement the Appellate Division decision.

ORDER

Therefore, consistent with the Appellate Division decision, the Civil Service Commission orders removal of the carry-over restriction on unused PLB days after December 31, 2012, for the affected employees represented by the Unions. In this regard, the Commission directs the Division of Classification and Personnel Management to identify the affected employees and provide for the restoration of any such unused PLB days lost by those employees as of December 31, 2012.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF NOVEMBER, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments

c: All State Appointing Authorities
Sherryl Gordon
Hetty Rosenstein
Timothy Rudolph
Michael Dee
Ira Mintz, Esq.
Paul Kleinbaum, Esq.
Arnold Shep Cohen, Esq.
Todd A. Wigder, DAG
Kenneth Connolly

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.

B-43

STATE OF NEW JERSEY

In the Matter of Paid Leave Bank Days	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2012-3096	Court Remand
	ISSUED: MAY 17 2012 (CSM)

In *Communications Workers of America v. New Jersey Civil Service Commission,* Docket No. A-1110-10T3 (App. Div. January 18, 2012) (*CWA v. NJCSC*), the Appellate Division, Superior Court of New Jersey, reversed the adoption of *N.J.A.C.* 4A:6-1.2(l) and remanded to the Civil Service Commission (Commission) to consider whether the creation of Paid Leave Bank (PLB) days in various Memoranda of Agreements (MOAs) between the State and the Communications Workers of America (CWA), Local 195 of the International Federation of Professional and Technical Engineers (IFPTE), Local 518 of the New Jersey State Motor Vehicle Employees Union (SEIU), and the American Federation of State, County, and Municipal Employees (AFSCME) was contrary to existing law and could not be implemented without Legislative action and, in the event the Commission concludes that Legislative action is not necessary, whether other provisions of Title 11A (Civil Service Act) and Title 4A permit the adoption of a regulation that mirrors the provisions of the MOAs.

By way of background, in 2009, the State and the CWA, IFPTE, SEIU, and AFSCME entered into MOAs, modifying the parties' collective negotiations agreements, with such terms expiring on June 30, 2011. The MOAs provided, in pertinent part, that covered employees would take a total of 10 unpaid furlough days prior to July 1, 2010. In exchange for these unpaid furlough days, negotiations unit members were to be credited with up to 7 PLB days that could be utilized after July 1, 2010 for the duration of their employment with the State. These PLB days were in addition to the employee's regular annual vacation, sick, and administrative leave allotment. The MOAs provided in part:

> 2. The PLB days will be maintained separate and apart from banks of other paid leave and there will be no limitations on the carryover of days in the PLBs. Specifically, the carry over restrictions that are applicable to paid vacation and administrative leave days will not be applicable to the PLBs.
>
> . . .
>
> 4. At the time the employee retires, resigns or is otherwise separated from State service, either voluntarily or involuntarily, any unused days in an employee's PLB will be treated in accordance with the provisions of Article 22(G) of the parties' agreements [Vacation Leave]. If an employee dies prior to leaving State service with unused paid leave days in his/her PLB, those days will be treated in accordance with Article 22(G)(4) of the parties' agreements.

In an effort to provide parity for as many State employees as possible, the former Chairperson of the Commission recommended the establishment of a Pilot Program for unrepresented employees similar to the agreed upon MOAs. In *In the Matter of Unpaid Furlough Days for Unrepresented Employees Pilot Program* (CSC, decided August 5, 2009) (*Unpaid Furlough*), the Commission indicated that a Pilot Program was necessary since there is no statutory or regulatory authority for the provision of unpaid furlough days or for the establishment of the PLB which provided for additional leave days other than those days statutorily prescribed. Similar to the MOAs, in *Unpaid Furlough*, the Commission indicated that since there was no provision in the rules for the establishment of a PLB, rules would be promulgated to govern the specifics regarding the administration of the PLBs.

Thereafter, on May 19, 2010, the Commission approved the publication of a proposed amendment to codify the PLB program under *N.J.A.C.* 4A:6-1.2, the vacation leave regulation, adding a new subsection (l). *See* 42 *N.J.R.* 1116(a) (June 21, 2010). The proposed amendment categorized PLB days as vacation days subject to the restrictions of *N.J.S.A.* 11A:6-2f ("Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only."). By letter dated August 20, 2010, the Governor's Office of Employee Relations (OER) and CWA made a joint request to the Commission for the promulgation of a regulation consistent with their MOA, to the extent a rule was necessary to implement the provisions of the MOA. On September 15, 2010, the Commission adopted the proposed amendment without change and it was codified as *N.J.A.C.* 4A:6-1.2(l). *See* 42 *N.J.R.* 2400(b) (Oct. 18, 2010).

Subsequently, CWA, IFPTE, and AFSCME appealed the adoption of *N.J.A.C.* 4A:6-1.2(l) to the Appellate Division, Superior Court, arguing that the Commission was not required by statute to characterize PLB days as vacation days and to treat

them similarly. In the attached decision, *CWA v. NJCSC, supra,* the court emphasized that in adopting *N.J.A.C.* 4A:6-1.2(l) limiting the carryover of PLB days in the same manner as vacation leave, the Commission did not exceed the power delegated to it by the Legislature nor did it transgress the statute it was purported to effect. However, the court reversed the rule adoption and remanded the matter to the Commission to first consider whether the creation of the PLBs in the MOAs was contrary to existing law and could not be implemented without Legislative action. The court also indicated that if the Commission concludes that despite Legislative inactivity, PLB days may nonetheless be provided to State workers, it shall consider whether other provisions of Title 11A, *N.J.S.A.,* (Civil Service Act) and Title 4A, *N.J.A.C.,* permit the adoption of a regulation that mirrors the provisions of the MOAs.

CONCLUSION

In this case, the Commission finds that the creation of the PLB in the MOAs was contrary to existing law and cannot be implemented without Legislative action. The Commission has been entrusted by the Legislature to designate leaves of absence. *N.J.S.A.* 11A:6-1. The Legislature has spelled out in detail the specific purposes for which paid leaves of absence may be granted to State employees and has dramatically limited the unused leave time which may be accumulated and carried over beyond the year in which the leave is earned. *N.J.S.A.* 11A:6-1, *et seq.* For example, the Commission's enabling legislation authorizes vacation leave to be used and carried over to the next succeeding year only, *N.J.S.A.* 11A:6-2; and paid administrative leave is authorized for personal reasons but must be used by the end of the year, *N.J.S.A.* 11A:6-6. Legislation specifically authorizes sick leave and its carryover, subject to a cap on payout. *N.J.S.A.* 11A:6-2; 11A:6-16 and -19.

The Civil Service Act does not permit adoption of a regulation that mirrors the PLB provisions of the parties' MOA. "As the administrative agency empowered to promulgate and enforce the Civil Service Act, the Commission's construction of the act and its regulations is entitled to great weight." *See Appleby v. State Civil Serv. Comm'n,* 190 *N.J. Super.* 249, 255 (App. Div. 1983). Since Title 11A does not provide for the establishment of any types of paid personal leave outside of administrative, sick or vacation leave, PLB days for an employee's personal use is contrary to existing law and cannot be implemented without Legislative action.

Consistent with the court's direction, the Commission has conducted a review of this matter and has determined, as it did during the rule making process, that there is no statutory authority for PLB days as provided in the MOAs within current Civil Service law. The court indicated that if the Commission concludes that despite Legislative inactivity, PLB days may nonetheless be provided to State workers, it shall consider whether other provisions of Title 11A, *N.J.S.A.,* (Civil Service Act) and Title 4A, *N.J.A.C.,* permit the adoption of a regulation that mirrors

the provisions of the MOAs. The Commission concludes that the creation of the PLB banks cannot be implemented without legislative action and there is no provision of Title 11A that permits adoption of a regulation that mirrors the provisions of the MOA, *i.e.*, PLB days with unlimited carryover and cash-out.[1] Given the court's decision in *CWA v. NJCSC, supra,* and the Commission's determination today confirming the lack of statutory authority for PLB days, there is now no existing regulatory or statutory authority for the provision and administration of PLB days. Therefore, the Commission has proposed, at today's meeting, the repeal of *N.J.A.C.* 4A:6-1.2(l) as well as subsections (m) and (n), which implemented the PLB program in the State colleges and universities.

However, although there is no statutory authority for PLB days, the majority of State employees have utilized PLB days in Fiscal Years 2011 and 2012 and a minority of State employees still have remaining PLB days they have not yet utilized. As such, in the absence of statutory authority to grant PLB days, employees who have utilized PLB days may now be in a salary overpayment situation. It cannot be ignored that all State employees who have utilized PLB days at this juncture did so, in good faith, under the belief that such leave was authorized by regulation and based upon communications from this agency. Similarly, State appointing authorities granted such leave in good faith based upon the same information and communications. The fact that PLB days were ultimately found to lack statutory or regulatory authority should not be held against the employees given the prolonged and complex legal history of this matter.

N.J.S.A. 11A:3-7c states that when an employee has erroneously received a salary overpayment, the Commission may waive repayment based on a review of the case. Therefore, it is appropriate for the Commission to waive recoupment of any PLB time already used by State employees for Fiscal Years 2011 and 2012 and up to December 31, 2012. This would permit State employees who relied on the rule amendment and other communications from this agency, or who delayed using these days due to the litigation of this matter in the Appellate Division, as well as the Commission's deliberation in connection with the Appellate Division's remand, to avoid being unfairly placed in a salary overpayment situation.

ORDER

Therefore, the Civil Service Commission concludes that although no statutory or regulatory authority exists for PLB days within current Civil Service law, there shall be no recoupment of any PLB time used or paid during Fiscal Years 2011 and 2012 and up to December 31, 2012.

---

[1] In light of this conclusion, it is not necessary for the Commission to consider the issue of whether any limitation on the carryover of PLB days would substantially impair contractual rights.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF MAY, 2012

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Merit System Practices and Labor Relations
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: All State Appointing Authorities
Sherryl Gordon
Hetty Rosenstein
Timothy Rudolph
David Cohen
Ira Mintz, Esq.
Sidney Lehmann, Esq.
Arnold Shep Cohen, Esq.
Todd A. Wigder, DAG
Kenneth Connolly

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1110-10T3

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,

Appellants,

v.

NEW JERSEY CIVIL SERVICE COMMISSION,

Respondent.

Argued September 27, 2011 - Decided January 18, 2012

Before Judges Messano, Yannotti and Espinosa.

On appeal from the Final Administrative Action of the Civil Service Commission.

Ira W. Mintz argued the cause for appellants (Weissman & Mintz, LLC and Zazzali, Fagella, Nowak, Kleinbaum & Friedman and Oxfeld Cohen, attorneys; Mr. Mintz, Sidney H. Lehmann and Arnold Shep Cohen, on the brief).

Todd A. Wigder, Deputy Attorney General argued the cause for respondent (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Wigder, on the brief).

PER CURIAM

The Communication Workers of America, AFL-CIO, the 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), appeal the Civil Service Commission's (CSC) adoption of an amendment to N.J.A.C. 4A:6-1.2, the regulation governing vacation leave for State workers. The amendment authorized the use of paid leave bank days (PLB days), which were created by memoranda of agreement (MOAs) between the Unions and the Governor's Office of Employee Relations (the State). The negotiated MOAs were intended to avoid layoffs and compensate State employees for wages lost during a mandatory furlough period and the deferral of scheduled wage increases. We provide some background leading up to the adoption of the amended regulation.

In April 2009, the CSC adopted emergency rule N.J.A.C. 4A:8-1.1A, permitting temporary layoffs for economy and efficiency. Several unions immediately challenged the regulation, and in an unpublished opinion, we upheld the CSC's ability to promulgate the emergency rule. In re Emergency Temporary Layoff Rule, Nos. A-3636-08, A-3627-08, A-3656-08, A-3657-08 (App. Div. Apr. 17, 2009). We concluded that adoption

of the rule "complied with the statutory requirements" of N.J.S.A. 52:14B-4(c).[1] Id. (slip op. at 3). We also held that the State could "lay off all employees in a layoff unit," but declined to address whether "staggered layoffs" -- "[a] layoff of each employee in a layoff unit for one or more [workdays] over a defined period" -- could be implemented by regulation. Id. (slip op. at 4-5). We referred that issue to the Public Employment Relations Commission (PERC). Id. (slip op. at 4).

PERC subsequently declined to restrict the regulation's scope. Negotiations began between the Unions and the State to avoid widespread layoffs.

In June 2009, those negotiations were finalized in a series of MOAs, which stated purposes were to "facilitate the accomplishment of vital government policies and objectives, including the avoidance of layoffs, the delivery of needed public services, and the achievement of substantial budgetary

---

[1] That statute provides:

> If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing its reasons for that finding, and the Governor concurs in writing that an imminent peril exists, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it finds practicable, to adopt the rule.

savings." The MOAs alleviated the need for the emergency regulation, and the State and the Unions agreed to request its rescission by the CSC. 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."

The MOAs included deferral to January 2011 of "[t]he 3.5% across-the-board increase to annual base salaries" scheduled for 2009 under the then-current collective bargaining agreements. The Unions also agreed to the use by their employees of ten unpaid furlough days prior to July 1, 2010.

In exchange, the State agreed there would be no layoffs during the period of wage deferral. The State also agreed to establish a "Paid Leave Bank" for each Union employee. Each employee was credited with one PLB day on July 1, 2009, one additional PLB day for every two days of furlough used, and one PLB day on June 30, 2010. In other words, an employee using ten furlough days would be credited with seven PLB days.

The MOAs provided:

> The PLB days will be maintained separate and apart from banks of other paid leave and there will be no limitations on the carry over of days in the PLBs. Specifically, the carry over restrictions that are applicable to paid vacation and administrative leave days will not be applicable to the PLBs.

On August 5, 2009, "[i]n an effort to provide parity for as many State employees as possible," the CSC issued an order adopting a pilot program for unrepresented State employees. The pilot program effectuated a Paid Leave Bank for these employees that mirrored those established by the MOAs. It provided that "[u]nlike the carryover restriction[s] for vacation leave and administrative leave" found in applicable statutes and regulations, "there w[ould] be no limitations on the carryover of days credited to the Paid Leave Bank." The CSC believed the pilot program was "necessary since there [was] no statutory or regulatory authority for the provision of unpaid leave of this nature or for the establishment of additional leave days other than those . . . statutorily prescribed." Because no regulation authorized the establishment of PLB days, the CSC indicated that "rules w[ould] be promulgated to govern the specifics regarding the administration of Paid Leave Banks."

On May 19, 2010, the CSC filed a proposed amendment to N.J.A.C. 4A:6-1.2, the vacation leave regulation, "adding a new subsection (l) to codify the PLB program." 42 N.J.R. 1116(a) (June 21, 2010). The proposed amendment 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."). In salient part, the proposed regulation provided:

> These additional paid leave days may be used beginning July 1, 2010 through June 30, 2011, subject to operational needs. . . . If not taken in a given year because of business demands, these days shall accumulate and be granted during the next succeeding year only. In no case shall any such additional paid leave be carried beyond June 30, 2012.
>
> [42 N.J.R. 1116(a) (June 21, 2010) (codified at N.J.A.C. 4A:6-1.2(l)(5)).]

Any employee leaving State service would be paid for unused PLB days, and salary for unused PLB days would be paid to any employee's estate upon death.

The CSC acknowledged that the restriction was contrary to the MOAs but claimed it was required by statute.

> While the MOA states that these unused, additional days may be used for the duration of the employee's service with the State, this provision is inconsistent with the statutory limitation regarding the carry-over of vacation leave (see N.J.S.A. 11A:6-2). Further, the MOA expires on June 30, 2011. Therefore, any additional, unused days are to be carried over for one year only, so that none of these days may be carried beyond June 30, 2012.

On July 13, 2010, a public hearing was held on the proposed amended regulation; written comments were solicited until August 20, 2010. See 42 N.J.R. 1116(a) (June 21, 2010). The leadership of the Unions and non-union employees urged rejection

of the proposed rule because it was inconsistent with the MOA provisions permitting unlimited carry-over of PLB days. The CSC responded that it,

> believe[d] . . . codifying the PLB program under the vacation leave rules [wa]s both appropriate and necessary. Specifically, the [CSC] is bound by statute, and the only type of leave authorized by statute that provides for time off with pay without a specific purpose (such as sick leave, jury leave or military leave) is vacation leave.

On August 20, 2010, in conjunction with the Unions, the director of the Governor's Office of Employee Relations, David Cohen, submitted a letter to the CSC requesting "elimination, in the rule, of the carryover restriction regarding the use of PLB days." The CSC responded by restating its belief that such a provision for PLB days was "beyond [its] regulatory authority."

On September 15, 2010, the CSC adopted the proposed amendment without change. 42 N.J.R. 2400(b) (Oct. 18, 2010). This appeal followed.

Before us, the Unions raise the following arguments:

> Point I
> THE STANDARD OF REVIEW REQUIRES THAT THERE BE SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE AGENCY'S ACTION.
>
> Point II
> THE CIVIL SERVICE COMMISSION WAS NOT REQUIRED TO TREAT PLB DAYS AS VACATION LEAVE

Point III
THE CSC'S TREATMENT OF PLB DAYS CONTRAVENES THE PUBLIC POLICY OF THIS STATE

We have considered these arguments in light of the record and applicable legal standards. We reverse and remand the matter to the CSC for further consideration.

We recently stated the standards that govern our review of a challenge to agency rulemaking.

> Agency regulations "are accorded a presumption of validity." N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999). Our courts give "great deference" to administrative agencies when they adopt rules implementing their enabling statutes. N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008). However, the "presumption of validity does not attach if the regulation on its face reveals that the agency exceeded the power delegated to it by the Legislature." In re N.J. Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1 et seq., 179 N.J. 570, 579 (2004).
>
> "[A] regulation can only be set aside if it is proved to be arbitrary or capricious, plainly transgresses the statute it purports to effectuate, or alters the terms of the statute and frustrates the policy embodied in it." In re Adopted Amendments to N.J.A.C. 7:7A-2.4, 365 N.J. Super. 255, 265 (App. Div. 2003). The party challenging the rulemaking has the burden of demonstrating that the rulemaking was arbitrary, unreasonable, or capricious. In re N.J. Individual Health, supra, 179 N.J. at 579; In re Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 & 4.3, 305 N.J. Super. 389, 401-02 (App. Div. 1997).

> [N.J. Ass'n of Sch. Adm'rs v. Schundler, 414 N.J. Super. 530, 545-46 (App. Div. 2010) (alteration in original) (parallel citations omitted), certif. granted, 205 N.J. 519 (2011).]

The Court has characterized the "search for arbitrary or unreasonable agency action," as limited to "three inquiries":

> (1) whether the agency's action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [In re Petitions for Rulemaking, 117 N.J. 311, 325 (1989).]

The Unions' argument is essentially that the CSC was not required by statute to characterize PLB days as vacation days and to treat them similarly. However, contrary to Point I of the Unions' brief, consideration of that argument does not require us to evaluate "whether there [was] substantial evidence in the record to support" the CSC's factual findings because none were made. Instead, the issues presented are purely legal in nature: first, whether the regulation, as adopted, violated or frustrated the legislative policies undergirding the CSC's

enabling legislation; second, whether the regulation otherwise contravenes the public policy of the State.[2]

"Overall, the . . . goal [of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6] 'is to secure the appointment and advancement of civil service employees based on their merit and abilities[,]' and to effectuate 'the purpose of the Act, which is to ensure efficient public service for state, county, and municipal government.'" Headen v. Jersey City Bd. of Educ., 420 N.J. Super. 105, 111-12 (App. Div.) (second alteration in original) (quoting Commc'ns Workers v. N.J. Dep't of Pers., 154 N.J. 121, 126 (1998)), certif. granted, 208 N.J. 370 (2011). N.J.S.A. 11A:6-1 provides, in relevant part:

> The [CSC] shall designate the types of leaves and adopt rules for State employees . . . regarding procedures for sick leave,

---

[2] For the first time in their reply brief, the Unions argue that the CSC "promulgat[ed] a regulation that impaired contractual obligations," a contention premised on the contracts clauses of the United States and New Jersey Constitutions. See U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3; see also State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 64 (1991) (discussing what constitutes an "unconstitutional impairment of contracts"). The constitutional argument was not raised before the CSC, and it is improper to raise the issue for the first time in a reply brief. Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 387 (App. Div.), certif. denied, 200 N.J. 502 (2009). Although the matter presented is of significant public interest and might otherwise justify exercise of our discretion and consideration of the issue on its merits, ibid., we decline the opportunity having concluded a remand is necessary. The Unions, of course, are free to present the issue to the CSC upon remand.

> vacation leave and other designated leaves with or without pay as the [CSC] may designate.

The Legislature expressly created certain types of leaves for employees in State service, set limits upon the accumulation of such leave time, and provided for disposition of unused leave time upon retirement or death.

For example, N.J.S.A. 11A:6-2 sets forth how vacation leave is accrued and limits its accumulation to the next "succeeding year only"; N.J.S.A. 11A:6-4 provides for payment to "[t]he estate of a deceased employee" of "accumulated annual vacation leave." N.J.S.A. 11A:6-5 defines how sick leave is accrued, and provides that "[u]nused sick leave shall accumulate without limit." N.J.S.A. 11A:6-16 provides for the lump-sum payment of "supplemental compensation for . . . accumulated sick leave," "upon retirement," not to exceed $15,000, N.J.S.A. 11A:6-19. Administrative leave is authorized by N.J.S.A. 11A:6-6, which also provides that "[a]dministrative leave shall not be cumulative and any administrative leave unused by an employee at the end of any year shall be cancelled." Other particularized and limited leaves were expressly created by the Legislature. See, e.g., N.J.S.A. 11A:6-10 (convention leave); N.J.S.A. 11A:6-13 (gubernatorial appointment leave); N.J.S.A. 11A:6-14 (leave for elective office). In each instance, the CSC has adopted

regulations that implement the statutorily-granted leaves. See, e.g., N.J.A.C. 4A:6-1.2 (vacation leave); -1.3 and 1.4 (sick leave); -1.9 (administrative leave).

In adopting the amended regulation, the CSC concluded that it had no authority to create a type of leave not expressly enacted by the Legislature. Since PLB days could be used at the discretion of the employee for any or no reason, subject only to the business demands of the State agency, the CSC deemed them to be most similar to vacation days.

The Unions argue that N.J.S.A. 11A:6-1 confers broad discretion upon the CSC to establish "other designated leaves with or without pay as the [CSC] may designate," and, therefore, nothing compelled the CSC to treat PLB days as vacation days. (Emphasis added). Citing N.J.A.C. 4A:6-1.14, the regulation governing education leave, the Unions also argue that the CSC has previously adopted regulations governing leaves that are not statutorily-created. Furthermore, contrary to the CSC's determination that "the only type of leave authorized by statute that provides for time off with pay without a specific purpose . . . is vacation leave," the Unions contend that other statutorily-enacted leave, e.g., administrative leave, does not require that the employee supply a "specific purpose" when requesting the use of leave. See N.J.S.A. 11A:6-6 (allowing use

of administrative leave for "personal reasons"); see also N.J.A.C. 4A:6-1.9 (granting administrative leave for "personal business, including emergencies and religious holidays").

"As the administrative agency empowered to promulgate and enforce the Civil Service Act, the Commission's construction of the act and its regulations is entitled to great weight." Appleby v. State Civil Serv. Comm'n, 190 N.J. Super. 249, 255 (App. Div. 1983). "On the question of interpretation, courts normally defer to agency determinations and their enabling act so long as the interpretation is reasonably debatable." In re Musick, 143 N.J. 206, 217 (1996).

Under our standard of review, it is 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. We have said, "The fundamental consideration in reviewing agency actions is that a court may not substitute its judgment for the expertise of an agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable." In re Adopted Amendments to N.J.A.C. 7:7A-2.4,

supra, 365 N.J. Super. at 264 (emphasis added) (citation and internal quotation marks omitted)).

In adopting subsection (1) of N.J.A.C. 4A:6-1.2, and limiting the carryover of PLB days in the same manner as vacation leave, the CSC clearly did not "exceed[] the power delegated to it by the Legislature." In re N.J. Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1 et seq., 179 N.J. 570, 579 (2004). As already noted, N.J.S.A. 11A:6-1 accords the CSC substantial discretion in adopting necessary regulations governing various types of leave. Nor did the amendment of the regulation "plainly transgress[] the statute it purports to effectuate, or alter[] the terms of the statute and frustrate[] the policy embodied in it." In re Adopted Amendments to N.J.A.C. 7:7A-2.4, supra, 365 N.J. Super. at 265.

However, the 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.

We are, therefore, compelled to remand the matter to the CSC for further consideration of the issue. We provide some guidance in this regard.

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. In this regard, however, we note that both the Unions and the State specifically included provisions in the MOAs that obligated them to "jointly seek the enactment of such legislation or the promulgation of such regulations" as necessary.

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. As the Unions have argued, the public policies that undergird the Civil Service Act are contained in N.J.S.A. 11A:1-2. Importantly, the Legislature declared, among other things,

> It is the public policy of this State to provide public officials with appropriate

> appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities;
>
> . . . .
>
> It is the public policy of this State . . . 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(b) and (e).]

In Communications Workers, supra, 154 N.J. at 123-25, the Court considered whether the Commissioner, under her power to adopt pilot programs pursuant to N.J.S.A. 11A:2-11(i), could adopt two programs that directly conflicted with provisions of the Civil Service Act -- in particular, the so-called rule of three, N.J.S.A. 11A:4-8, and the working test period following regular appointment, N.J.S.A. 11A:4-15(a). The Court concluded that the pilot programs were "consistent with the broad purposes of the Act," and furthered its objectives. Id. at 130-31. Among other things, the Court cited N.J.A.C. 4A:1-1.2(c), which provides "[t]he Commissioner . . . may relax these rules for good cause in a particular situation . . . in order to effectuate the purposes of Title 11A," as justification for adoption of the pilot program. Id. at 127.

While the circumstances here are quite different factually, we 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, as noted above, 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.

We reverse the CSC's adoption of N.J.A.C. 4A:6-1.2(1), and remand the matter to the CSC for further consideration. We do not retain jurisdiction.