



**STATE OF NEW JERSEY**

In the Matter of J. R., Department of  
Environmental Protection

CSC Docket No. 2018-3211

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

Request for Reconsideration

**ISSUED: OCTOBER 10, 2018 (CSM)**

J.R., an Administrative Analyst 1, requests reconsideration of the attached decision rendered on March 27, 2018, which denied his request to continue to participate in the Donated Leave Program (DLP) on an intermittent basis.

By way of background, the petitioner had been approved to participate in the DLP on an intermittent basis since October 22, 2015 to care for his spouse.<sup>1</sup> In August 2016, the petitioner's spouse was diagnosed with cancer which required that she begin a regimen of chemotherapy. However, when he reapplied for the DLP, the Department of Environmental Protection (DEP) denied his request, indicating that it revised its policy in conformance with the Civil Service Commission's (Commission) decision that intermittent donated leave was not provided for in the rules and that the donated leave program was intended to provide additional leave time for employees expected to require a prolonged absence from work who have exhausted all accrued leave time, but may, in limited circumstances, need additional time to transition back into the workplace after a prolonged absence. *See In the Matter of T.C.* (CSC, decided June 3, 2015). The petitioner appealed the matter to the Commission, which found that he did not meet the regulatory criteria to participate in the DLP.

On reconsideration, the petitioner states that he was not provided "a 30-day notice from the DLP as per regulation *N.J.A.C. 4A:6-1.22(g)4*". He also states that his prior application to the DLP took the appointing authority's Human Resources seven days to process in the past, whereas when he re-applied for donated leave on

<sup>1</sup> According to the approval letter he submitted in the prior matter, the petitioner was approved for intermittent donated leave from October 15, 2014 to April 15, 2016.

October 17, 2016 it was not processed. As he claims that he was not provided any warning of his removal from the program, the petitioner requests reinstatement of DLP to October 2016 for a six-month period. Further, he asserts that he “was forced to use all available sick and vacation time (entire allocation for calendar year 2016) prior to entering the DLP.” However, he contends that he did not accrue additional sick or vacation time which could have been used after his wife’s death in June 2017 as required by *N.J.A.C. 4A:6-1.22(e)*. Therefore, the petitioner requests “compensation for this lost time.” The petitioner reiterates that he had previously been permitted to use intermittent donated leave since his initial approval, like “dozens” of other employees since 2007 and that “precedent for this was set by the lack of action” by the appointing authority’s human resources unit. Moreover, he emphasizes that he demonstrated a basis justifying the use of donated leave on an intermittent basis, such as transporting his wife to the hospital for treatment. The petitioner further claims that his request to define how donated leave time is used and for the Commission to consider a “rule revision” to address the use of intermittent use of donated leave was ignored. He also indicates that he utilized intermittent donated leave to care for his wife’s catastrophic condition. Because he was not permitted to continue to use intermittent donated leave and mandated to use his allotted sick and vacation time, the petitioner states that he was forced to use “Without Pay” status and was eventually penalized for that use emotionally, financially, and with the loss of benefit time beginning calendar year 2018.

## CONCLUSION

*N.J.A.C. 4A:2-1.6(b)* sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, the petitioner has not met the standard for reconsideration. The petitioner argues that he was “not provided a 30-day notice from the DLP as per regulation *N.J.A.C. 4A:6-1.22(g)4*.” Initially, *N.J.A.C. 4A:6-1.22(g)4* only applies to a DLP established in local service and does not apply to employees such as the petitioner who is a State employee. Regardless, an Executive Branch State agency, such as the DEP, does not have the authority to suspend or terminate the DLP as this option is not authorized under the rules for any State agency. Rather, as exhaustively discussed in the prior decision, since September 2013, the Commission has determined that intermittent donated leave was not contemplated or provided for in the rules. Although the DEP did not update its internal policy until three years later to comply with the Commission’s directive, it did not terminate the DLP.

The petitioner asserts that his “October 17, 2016 re-application was not processed” and that he was “not provided any warning of my removal from the program.” However, in the prior matter, the petitioner only provided a copy of the October 22, 2015 correspondence from the DEP approving his participation in the DLP, on an intermittent/as needed basis, from October 15, 2015 to April 15, 2016. As such, since there was nothing in the record indicating that he was in the DLP after April 15, 2016 up to his October 17, 2016 “re-application” date, the petitioner was never “removed” from the program. Rather, the petitioner had to “re-apply” to participate in the program since he was only authorized to participate up to April 15, 2016. The petitioner argues that his October 17, 2016 re-application was not processed. However, a review of the DEP’s November 16, 2016 correspondence to the petitioner clearly indicates that it was being sent to him because he “applied for participation in the program” and based on the documentation he provided, he was not eligible to participate. As the petitioner was not currently in the program, as his last authorization expired on April 15, 2016, he could not continue to participate in the program after that date.

The petitioner asserts that he “was forced to use all available sick and vacation time (entire allocation for calendar year 2016) prior to entering the DLP.” In this regard, he contends that he did not accrue additional sick or vacation time which could have been used after his wife’s death in June 2017. *N.J.A.C. 4A:6-1.22(a)2* states, in pertinent part, that a State employee shall be eligible to receive donated leave if the employee has exhausted all accrued sick, vacation and administrative leave, all sick leave injury benefits, if any, and all compensatory time off. Thus, he was required to exhaust all of his accrued paid time off as a condition of being accepted into the program. Concerning his argument that he did not accrue additional sick or vacation time, in his original appeal submission, the petitioner provided a copy of an e-mail dated December 6, 2016 which states:

As of November 18, 2016, my timesheet for hours for vacation, sick and Donated leave was zeroed out. Only with the help of [S.B], Gary and Al was my accrued time reinstated so I did not face a paycheck with 12.5 hours of without pay status” (sic).

As such, it appears that the matter of his leave accrual had been resolved.

With respect to the petitioner’s argument that he had previously been permitted to use intermittent DLP, as stated in the prior decision, the Commission determined in September 2013 that intermittent donated leave is not contemplated or provided for in the rules. The DEP’s actions to ensure compliance, although untimely, does not, in itself, establish a basis on which to continue with the practice of permitting the usage of intermittent donated leave. Indeed, when the DEP ultimately took steps to ensure compliance, it took the reasonable step of permitting employees who were currently in the program to continue to participate until the

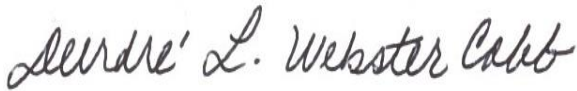
conclusion of the period of time for which previously approved. As noted earlier, there is nothing in the record to indicate that the petitioner had been previously approved to use donated leave on an intermittent basis past April 16, 2016. Thus, when he filed to again participate in the DLP in October 2016, the DEP could not continue to permit him to use intermittent donated leave because the time period for which he had been previously approved expired six months earlier. Moreover, as stated in the prior determination, the petitioner was not returning to work from a prolonged absence as a result of caring for his spouse's condition. As such, he did not meet the criteria for participation in the DLP. Finally, while it appreciates the petitioner's suggestion concerning possibly amending the rules regarding intermittent donated leave, the issue before the Commission in the prior matter was if the DEP properly denied his request to participate in the DLP. However, if the petitioner seeks to amend *N.J.A.C. 4A:6-1.22*, he may file a Notice of Petition for Rulemaking in compliance with *N.J.A.C. 1:30-4.1*.

### ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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  
3<sup>RD</sup> DAY OF OCTOBER 2018



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
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Attachment

c: J.R.  
Deni Gaskill  
Records Center



In the Matter of J.R., Department of  
Environmental Protection

**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC Docket No. 2017-2010

Administrative Appeal

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**ISSUED: MARCH 28, 2018 (CSM)**

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J.R., an Administrative Analyst 1, appeals the decision of the Department of Environmental Protection (DEP), which denied his request to continue to participate in the Donated Leave Program (DLP).

By way of background, the appellant had been approved to participate in the DLP on an intermittent basis since October 22, 2015 to care for his spouse. Subsequent to his approval, in August 2016, the appellant's spouse was diagnosed with cancer with required that she begin a regimen of chemotherapy. However, when he reapplied for the DLP, the DEP denied his request, indicating that it revised its policy in conformance with the Civil Service Commission's decision that intermittent donated leave was not provided for in the rules and that the donated leave program was intended to provide additional leave time for employees expected to require a prolonged absence from work who have exhausted all accrued leave time, but may, in limited circumstances, need additional time to transition back into the workplace after a prolonged absence. *See In the Matter of T.C.* (CSC, decided June 3, 2015).

On appeal, the appellant states that the DEP changed its policy with respect to intermittent donated leave on December 13, 2016, but that he reapplied for intermittent donated leave on October 17, 2016. Therefore, he maintains that he had a reasonable reliance that he was still in the DLP because he had established eligibility prior to the policy change. The appellant notes that the DEP's revised policy indicates that if you were currently approved, continued participation would be permitted until conclusion of the time for which an employee had been previously approved. As such, he argues that he should have been given the next six months to plan for and adapt to the fact that the intermittent use was no longer being

permitted. Additionally, the appellant argues that the application of the interpretation to not permit intermittent donated leave is overreaching, arbitrary and capricious in his case because he has provided medical documentation in support of his request and that *T.C.*, *supra*, fails to define timeframes that differentiate prolonged absence from intermittent absence. In this regard, he states regularly using 3.5 hours of donated leave three times a week for six months is both prolonged and consecutive. He also states that *T.C.* incorrectly implies “intermittent” to mean erratic or characterized by lack of regularity or uniformity and that the rule on donated leave does not specify how it is to be used. The appellant emphasizes that his Family Medical Leave Act (FMLA) leave was approved intermittently and contends that this provides a basis on which to permit intermittent use of donated leave. Further, he states that he never represented that his use of intermittent leave would be indefinite and that the attempt to regulate intermittent use of donated leave impinges on his right to privacy. As such, the appellant contends that he should be permitted to participate in the DLP on an intermittent basis as he has been using the leave judiciously, has been dealing with catastrophic health issues, and was dismissed with absolutely no warning.

## CONCLUSION

*N.J.A.C.* 4A:6-1.22 (Donated Leave Program) states, in pertinent part, that a State employee shall be eligible to receive donated sick or vacation leave if the employee suffers from a catastrophic health condition or injury. A catastrophic health condition or injury is defined as a life threatening condition or combination of conditions *or* a period of disability required by an employee’s mental or physical health or the health of the employee’s fetus which requires the care of a physician who provides a medical verification of the need for the employee’s absence from work for 60 or more work days. *See N.J.A.C.* 4A:6-1.22(b)1. *N.J.A.C.* 4A:6-1.22(a)2 provides that an employee shall be eligible to receive donated leave time if the employee has exhausted all accrued sick, vacation and administrative leave, all sick leave injury benefits, if any, and all compensatory time off.

Initially, in *In the Matter of T.J.* (CSC, decided September 18, 2013), the Civil Service Commission (Commission) emphasized that since “intermittent” donated leave was not provided for in *N.J.A.C.* 4A:6-1.22 and the DLP was intended to provide additional leave time for employees expected to require a prolonged absence from work who have exhausted all accrued leave time, the use of “intermittent” donated leave was not contemplated by the rule. Further, the Commission underscored that in adopting the amendments to the DLP to expand participation to employees who must care for an immediate family member suffering from a catastrophic health condition, the exceptional nature of a catastrophic health condition or injury meant that the DLP would not be that widely used in those situations. The Commission underscored its position that intermittent donated leave is not provided in the rules and should only be approved in very limited situations in June 2015 *T.C.*, *supra*. Thus, since September 2013, the Commission

has held that if intermitted donated leave were to be considered, it should be predicated on if an employee had been continuously out of work for a prolonged period of time and was already receiving donated leave because he or she was unable to work.

In the instant matter, the appellant's circumstances do not meet the established criteria for participation in the DLP. Initially, as stated in the prior Commission decisions, *N.J.A.C. 4A:6-1.22* does *not* provide for "intermittent" donated leave. Rather, the intent of the DLP, since its inception in 1993, was to provide employees the opportunity to donate sick or vacation leave to other employees who are suffering from a catastrophic health condition or injury which is expected to *require a prolonged absence from work* and who had exhausted all of their accrued leave time. *See 24 N.J.R. 3590*. In other words, receipt of donated leave requires the employee's prolonged absence from work as a condition precedent to considering a request for donated leave. This does not mean, as the appellant suggests, use of 3.5 hours of leave time three days a week over the course of six months, should be considered a prolonged absence from work.

The practice of permitting the *limited* use of "intermittent" donated leave evolved from those cases where an employee who required a prolonged absence from work due to a catastrophic health condition was returned to work and needed additional time to transition back into full-time work. For example, in *In the Matter of A.M.* (Commissioner of Personnel, decided September 17, 1998), an employee diagnosed with rectal cancer received donated leave because her condition required a prolonged absence from work in order to receive chemotherapy and radiation therapy, as well as to undergo two surgical procedures. The employee's condition progressed well and she was permitted to return to work. However, the employee's treating physician recommended that she work no more than four days per week in the coming few months due to her lower level of resistance and stamina. The former Commissioner of Personnel approved the request for an extension of her donated leave so she could take off one or two days per week for a period of two to three months to recuperate. Thus, "intermittent" donated leave was only approved for use *after* an employee returned from a prolonged absence from work and for limited time frames.

Against this backdrop, since "intermittent" donated leave is not provided for in *N.J.A.C. 4A:6-1.22* and the DLP was intended to provide additional leave time for employees expected to require a prolonged absence from work who have exhausted all accrued leave time, the use of "intermittent" donated leave is clearly not contemplated by the rule. Rather, it has evolved based on limited exceptions to the donated leave rule authorized by the former Commissioner of Personnel in those cases where an employee returning from a prolonged leave of absence required an additional, medically defined, finite period of time to transition back into the workplace. Thus, while the use of additional, short-term donated leave upon return

to work *may* be appropriate in limited situations, it should be judiciously approved in compliance with *N.J.A.C.* 4A:6-1.22(b). In this regard, it must be underscored that in adopting amendments to the DLP to expand participation to employees who must care for an immediate family member suffering from a catastrophic health condition, the former Merit System Board emphasized that “the exceptional nature of a catastrophic health condition or injury means that the DLP will not be that widely used” in such situations. *See* 28 *N.J.R.* 3781(a).

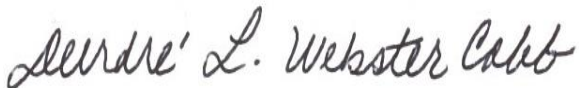
In this case, notwithstanding the fact that the appellant was advised by the DEP that it could not approve intermittent donated leave before it changed its policy regarding intermittent donated leave or that he had received donations prior to the change in policy, it is not the intention of the DLP to provide intermittent donated leave. Indeed, the Commission determined that intermittent donated was not contemplated or provided for in the rules in September 2013, and, albeit delayed, the appointing authority formally changed its policy three years later, in November 2016. In this light, it appears that the appellant has benefited since he was first approved and utilized intermittent donated leave to care for his spouse from October 2015. Rather, as stated earlier, intermittent donated leave is not provided for in the rules governing donated leave and should only be approved in those limited circumstances where an employee is returning to work from a prolonged absence and requires an additional, medically defined, finite period of time to transition back to the workplace. This is not the case in the instant matter. Moreover, while the appellant has provided medical documentation regarding his wife’s condition, the appellant did not return from a prolonged leave of absence as a result of caring for her. Accordingly, the appellant does not meet the regulatory criteria to participate in the DLP.

### ORDER

Therefore, it is ordered that this appeal be denied.

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  
27<sup>TH</sup> DAY OF MARCH, 2018

A handwritten signature in cursive script, reading "Deirdre L. Webster Cobb".

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Deirdre L. Webster Cobb  
Acting Chairperson  
Civil Service Commission



Inquiries  
and  
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c: J.R.  
Deni Gaskill  
Records Center