

NICOLA TASOFF, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF : DECISION

PLEASANTVILLE, ATLANTIC COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner appealed the respondent Board’s denial of monetary compensation for retroactive approval of sick bank leave. Respondent denied petitioner’s request for monetary compensation on the basis that *N.J.S.A.* 18A:30-1 and the Bank Guideline and Rules (Guidelines) did not allow monetary compensation for retroactively approved sick bank leave, rather it only allowed for sick bank leave credit going forward. The Board argued that petitioner fails to state a claim upon which relief can be granted, and therefore dismissal is warranted. Petitioner asserted that her third application for use of sick bank days was ultimately granted based upon her demonstrated need for sick bank days in March/April 2017, not for an unspecified time in the future.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the underlying issue here is whether the Employee Sick Leave Bank Committee (Committee) acted appropriately in granting petitioner sick leave credit going forward rather than compensation for the retroactively approved sick bank days; the Committee failed to follow its own guidelines in reviewing petitioner’s applications for sick bank leave in a timely fashion, which compromised her ability to use sick bank days when she needed them following surgery, *i.e.*, from March 23 through May 4, 2017; the overarching intent behind both *N.J.S.A.* 18A:30-1 and the Guidelines is to make a sick bank leave recipient financially whole; the Board’s argument that there is no authorization for the Committee to award money in lieu of sick bank days is without merit; and petitioner met all of the criteria for receiving sick bank days. The ALJ concluded that under the statute and Guidelines, the Committee’s actions in approving petitioner’s application for twenty-seven sick bank days, but awarding her future sick leave credit instead of monetary reimbursement for the approved sick bank days was improper. Accordingly, respondent’s motion for summary decision was denied, and petitioner’s motion for summary decision was granted.

Upon review, the Commissioner agreed with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. The Board was directed to pay petitioner for twenty-seven sick days.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 00220-18
AGENCY DKT. NO. 277-11/17

NICOLA TASOFF, :
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 PETITIONER, :
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 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY OF : DECISION
 PLEASANTVILLE, ATLANTIC COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that petitioner is entitled to receive payment for the twenty-seven sick bank days that were approved by the Employee Sick Leave Bank Committee for when she was out on unpaid medical leave.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to pay petitioner for twenty-seven sick days.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2018

Date of Mailing: November 2, 2018

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 00220-18

AGENCY DKT. NO. 277-11/17

NICOLA TASOFF,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF PLEASANTVILLE, ATLANTIC
COUNTY,**

Respondent.

Robert P. Merenich, Esq., for petitioner (Gemmel, Todd & Merenich, P.A., attorneys)

Benjamin B. Brenner, Esq., for respondent (The Carroll Law Firm, PLC, attorneys)

Record Closed: September 12, 2018

Decided: September 21, 2018

BEFORE **TAMA B. HUGHES, ALJ:**

STATEMENT OF THE CASE

Nicola Tasoff (petitioner), an employee of the Pleasantville Board of Education (respondent) appeals the Employee Sick Leave Bank Committee (Committee), denial of monetary compensation for retroactive approval of sick bank leave.¹ Respondent denied petitioner's request for monetary compensation on the basis that N.J.S.A. 18A:30-1 and the Bank Guideline and Rules (Guidelines) did not allow monetary compensation for retroactively approved of sick bank leave, it only allowed for sick bank leave credit going forward.

PROCEDURAL HISTORY

On March 14, 2018, respondent filed a Motion to Amend the complaint to add a third-party – the PEA. By Order dated May 17, 2018, the Motion was denied. Thereafter, on July 13, 2018, petitioner filed a Motion for Summary Decision. On this same date, respondent filed a Motion to Dismiss for failure to state a claim, pursuant to N.J.A.C. 6A:3-1.5(g). Upon receipt of supplemental submissions, the record closed on September 12, 2018.

FINDINGS OF FACT

Based on the undisputed documents presented by the parties, I **FIND** the following **FACTS**:

1. In January 2017, petitioner was an employee of respondent and a participant/member of the Employee Sick Leave Bank (Bank).
2. Under Guidelines, the Committee determines whether a member is eligible for sick bank days. (Respondent's Opposition Brief, Exhibit E)
3. The Guidelines state in relevant part that:

¹ The Committee is made up of representatives of respondent and representatives of the Pleasantville Education Association (PEA).

- A member in the Bank must have exhausted all accrued sick, vacation and personal time before they are eligible to receive sick bank days.
- The member must put their request in writing for use of sick bank days to the Committee and clearly state the nature of the illness and the exact leave time requested.
- The written request must be accompanied by an initial medical certificate from a physician that clearly indicates the:
 - a) Cause of Illness;
 - b) Treatment plan;
 - c) Prognosis; and
 - d) Return to work date.
- Failure to provide the correct documentation will result in the delay of processing the leave request.
- The request for sick bank days must be for a catastrophic or life threatening illness or injury and the original leave request must be for thirty days.
- Sick leave may only commence after the Committee grants the request and days can be used starting on the date the initial application was received by the committee.
- After proper documentation is received, a decision will be made within fourteen days.
- Once days are donated by a member, they are non-refundable.

4. On March 2, 2017, petitioner filed an application for use of sick bank days. Submitted as part of the application was an Attending Physician's Statement signed by Dr. Ernest Rosato, M.D. that provided petitioner's: 1) Diagnosis (Cholelithiasis); 2) Treatment (surgery on March 23, 2017 – removal of petitioner's gall bladder); and 3) Anticipated dates petitioner would be unable to work (March 23, 2017 - May 4, 2017). No prognosis was provided (Respondent's Opposition Brief, Exhibit B).

5. On March 16, 2017, the Committee voted to deny petitioner's application. (Respondent's Opposition Brief, Exhibit C) By letter dated April 7, 2017, three weeks after the Committee voted to deny the application, petitioner was formally notified of the Committee's decision, stating "The documentation did not meet the criteria." (Petitioner's Opposition Brief, Exhibit A).

6. On April 13, 2017, petitioner filed a second application for use of sick bank days for the same anticipated duration of March 22, 2017 – May 4, 2017. Attached to the application was a March 23, 2017 “Operative Report” and an Attending Physician’s Statement signed by Dr. Ernest Rosato. (Respondent’s Opposition Brief, Exhibit D) The Attending Physician’s provided petitioners: 1) Diagnosis (Chronic Calculous Cholelithiasis and Rectosigmoid Stricture and Obstruction); 2) Treatment (Surgery – Laparoscopic Cholecystectomy and Laparoscopic Rectosigmoid Resection); and 3) Anticipated dates petitioner would be unable to work (March 22, 2017 - May 4, 2017). No Prognosis was provided. (Respondent’s Opposition Brief, Exhibit D).

7. Almost two months after petitioner filed the second application, on June 12, 2017, the Committee voted to deny the application. On the line next to petitioner’s name were the words “2nd review.” The basis for the denial was that petitioner’s condition was not considered catastrophic or life threatening, and that surgery was voluntary on petitioner’s part. (Respondent’s Opposition Brief, Exhibit E).

8. By letter dated June 13, 2017, petitioner was formally notified of the Committee’s determination which stated: “The documentation did not meet the criteria.” (Petitioner’s Opposition Brief, Exhibit B).

9. Two and a half months later, on August 28, 2017, petitioner filed a third application for use of sick bank days and requested that the Committee reconsider her earlier applications. On this application, petitioner identified the anticipated duration of her illness as six weeks and requested twenty-seven days of sick bank pay – not donor days, which totaled \$8,390.70. The twenty-seven days represented days without pay when she went out on sick leave without pay from March 22 through May 4, 2017. Also attached to the application was a letter from Dr. Ernest Rosato’s, the surgeon who performed the March 23, 2017 surgery. Through this letter, Dr. Rosato outlined petitioner’s medical condition and basis for surgery. (Petitioner’s Brief, Exhibit C).

10. On September 12, 2017, the Committee voted to approve petitioner's request for twenty-seven days of sick bank days. On the line with petitioner's name were the words "3rd review." The approval was for twenty-seven "donor days" - not the value of the twenty-seven days or \$8,390.70 as requested by the petitioner. In the notes/rationale for approval, Dr. Rosato's letter was noted and the Committee's determination that based upon his letter, petitioner's illness was deemed catastrophic. By letter dated September 13, 2017, petitioner was formally notified of the Committee's determination. (Respondent's Supplemental Submission, Exhibit 1).

ANALYSIS AND LEGAL CONCLUSIONS

For the following reasons, respondent's motion to dismiss will be treated as a motion for summary decision. While N.J.A.C. 1:1-12.1 does not specifically limit the types of motions that may be made in administrative hearings, and a motion to dismiss is not otherwise precluded under the Uniform Administrative Procedure Rules, the more common method for resolving a case on the papers without a plenary hearing in administrative proceedings, is by a motion for summary decision under N.J.A.C. 1:1-12.5.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, *i.e.* 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard:

A determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[Id. at 540 (quoting Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. “To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.” Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2:

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

The underlying issue in this matter is whether the Committee acted appropriately in granting petitioner sick leave credit going forward rather than compensation for the retroactively approved sick bank days.

Petitioner asserts that her third application, filed on August 28, 2017 and approved on September 12, 2017, was granted based upon her demonstrated need for sick bank days in March/April 2017 – not for an unspecified time in the future. The argument being that granting of prospective sick bank leave is “illusory” without a

demonstrated “need” and would be contrary to underlying intent of both the statute and the Guidelines. As such, the Committee’s approval of twenty-seven sick bank days was for the unpaid sick leave in March/April 2017 when a “need” had been demonstrated and when the loss of income for unpaid sick leave in the amount of \$8,390.70 had occurred. Petitioner reaches this interpretation by reading N.J.S.A. 18A:30-11 et seq. and Guidelines in their entirety in conjunction with the overarching intent behind both the statute and the Guidelines which is to make a recipient whole.

Respondent argues that the petitioner’s claim fails to state a claim upon which relief can be granted, therefore dismissal of the appeal is warranted. More specifically, respondent asserts that there is no authorization in the statute, regulations or Guidelines that allow the Committee to award a retroactive lump sum award, in lieu of sick bank days.

N.J.S.A. 18A:30-1 (Establishment of Sick Leave Bank for Employees of Board of Education) states in relevant part:

“...[S]ick leave bank may be established for employees of a board of education if both the board and the majority representative or majority representatives of the employees who would be eligible to participate consent to the establishment of the sick leave bank. The purpose of the sick leave bank shall be to enable employees of the board who are entitled to sick leave under chapter 30 of Title 18A of the New Jersey Statutes to draw needed days of sick leave in addition to any days to which they are otherwise entitled. The sick leave days available to a board employee from the sick leave bank shall be leave days previously donated to the bank by board employees. Employees may donate sick leave days or any other leave time as agreed upon by the board and the majority representative. Sick leave drawn from the bank shall be treated for all purposes as if it were accrued sick leave time of the employee who receives it. No employee shall be required to participate in the bank.” [emphasis added]

Administration of the Bank is by a committee. The committee may:

“...establish standards or procedures that it deems appropriate for the operation of the sick leave bank, which may include a

requirement that employees donate leave time to be eligible to draw leave time from the sick leave bank and limitations on the amount of sick leave time which may be drawn or the conditions under which the sick leave time may be drawn. No day of leave which is donated to a sick leave bank by an employee shall be drawn by that employee or any other employee from the sick leave bank unless authorized by the committee in order to provide sick leave.”

N.J.S.A. 18A:30-11

In the instant matter, the Committee administers the Bank and has created Guidelines in accordance with N.J.S.A. 18A:30-11.

It is undisputed that petitioner’s first and second application were denied by the Committee for failure to meet the Guideline criteria for approval of sick bank leave. These findings were based on the medical documentation provided by petitioner with each application and the Committee’s determination on both applications that petitioner’s condition, was not catastrophic or life threatening.

It is also undisputed that the Committee failed to follow its own Guidelines in reviewing petitioner’s first and second application in a timely fashion and notifying her of their decision. Such failure clearly prejudiced petitioner by denying her the choice and/or opportunity to refile sooner had she wished to do so. Having said that, and as noted above, both the first and second denial were based upon the documentation provided by the petitioner. While dilatory, the Committee’s denial was in accordance with the Guidelines based upon the medical information provided by petitioner at that time.

Despite the first and second denial, it appears that the Committee handled petitioner’s second and third application as supplements to her first application. This is evidenced by the verbiage “2nd review” and “3rd review” on the Committee Sign-In Sheets and supported by their ultimate approval of twenty-seven days of donor leave time for the retroactive period of March 23, 2017 through May 4, 2017. Even assuming arguendo that the third application was viewed separately, granting an applicant sick

bank leave credit for an unidentified future medical event would be violative of both the statute and Guidelines – literally and in spirit.

Respondent relies upon Queen v. City of Bridgeton et al (2012 N.J. Super. Unpub. LEXIS 2425) arguing that the petitioner has failed to allege in any manner that the Guidelines and the Committee’s administration of the same were arbitrary and capacious. Further arguing that there is no authorization in the guidelines or statute for the award of money in lieu of sick days.

The instant matter is distinguishable from Queen as that matter involved a claim of discrimination for being denied access to the Bridgeton’s Sick Leave Bank. Plaintiff’s specific argument was that access to the Bridgeton’s Sick Leave Bank was mandated as a reasonable accommodation under the New Jersey Law Against Discrimination even though she failed to take the necessary steps to provide the required documentation to become eligible. These were not the facts or issue in the instant matter.

Regarding respondent’s argument that there is no authorization either by law or in the Guidelines to award money in lieu of sick days, it is mistaken. N.J.S.A. 18A:30-10 and the Guidelines are not silent on: how sick bank days are qualified; when and how a person is eligible for sick bank days; and when and how they are to be used.

As noted above, under the Guidelines, to be eligible to receive sick leave bank days, a member/applicant of the Bank must exhaust all accrued sick, vacation and personal time before they are eligible to receive bank days. Petitioner met this criterion.

An application for use of sick bank days must be filed by the member/applicant, which sets forth the nature of the illness and amount of leave time required. Petitioner met this criterion.

A medical certificate from a physician must accompany the initial application which identifies the cause of the illness, treatment plan, prognosis and anticipated return to work date. Petitioner met this criterion.

A request for sick bank days must be for a catastrophic or life-threatening illness or injury. Petitioner met this criterion.

Petitioner is not seeking compensation for unused sick leave, she is seeking compensation for approved sick bank days which by statute are considered accrued sick leave and available to an applicant/member as needed.² In this case, petitioner demonstrated a “need” and was approved for twenty-seven sick bank days for the unpaid used sick leave period of March 23, 2017 through May 5, 2017.

Had petitioner’s first application been granted, she would have been paid as if the days were accrued sick leave days. The fact that the approved days were for retroactive time does not change the nature of the award and that by statute and under the Guidelines petitioner is entitled to payment for those days.

Based upon the foregoing, I **CONCLUDE** that under the statute and Guidelines, the Committee’s actions in approving petitioner’s application for twenty-seven sick bank days but awarding her future sick leave credit instead of monetary reimbursement for the used and approved sick bank days was improper. Accordingly, respondent’s motion for summary decision is **DENIED**.

I further **CONCLUDE** that petitioner has met her burden and is entitled to receive payment for twenty-seven days of used sick leave as approved by the Committee in

² The issue in this matter is not one of accumulated unused sick leave which by statute, except in limited circumstances, an employee would not be entitled to a lump sum payment. See N.J.S.A. 18A:30-3.2 (Credited With Unused Sick Leave); N.J.S.A. 18A:30-3.5 (Payment for Accumulated Sick Leave by Board of Education); N.J.S.A. 18A:30-3.3 (Certificate Issued Showing Unused Sick Leave) Additionally, N.J.A.C. 4A:6-1.22(e)(2) (Civil Service – Donated Leave Program) which states “upon retirement, the leave recipient shall not be granted supplemental compensation on retirement for any unused sick days which he or she had received through the leave donation program”.

accordance with the Guidelines. For the foregoing reasons, petitioner's motion for Summary Decision is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



September 21, 2018

DATE

TAMA B. HUGHES, ALJ

Date Received at Agency:

Date Mailed to Parties:

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EXHIBITS

For Petitioner:

- 1) Petitioner's Motion for Summary Decision and Attached Exhibits 1 through 3
- 2) Petitioner's Reply Brief to Respondent's Opposition
- 3) Petitioner's Brief in Opposition to Respondent's Motion to Dismiss
- 4) Certification of Nicola Tasoff and Attached Exhibits A and B

For Respondent:

- 1) Respondent's Brief in Opposition to Respondent's Motion for Summary Decision
– Exhibits A through G
- 2) Respondent's Motion to Dismiss and Attached Exhibits A through G
- 3) Certification of Counsel
- 4) Respondent's Reply Brief to Petitioner's Opposition

Respondent's Letter, dated September 11, 2018 with Attachm