SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4723-15T4

STATE OF NEW JERSEY,

Petitioner-Respondent,

v.

NEW JERSEY LAW ENFORCEMENT SUPERVISORS ASSOCIATION,

Respondent-Appellant.

Argued April 27, 2017 – Decided June 6, 2017

Before Judges Lihotz and Mawla.

On appeal from the Public Employment Relations Commission, Docket No. SN-2016-002.

Frank M. Crivelli argued the cause for appellant (Crivelli & Barbati, L.L.C., attorneys; Mr. Crivelli, of counsel and on the brief).

Christopher W. Weber, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Weber, on the brief).

Joseph P. Blaney, Deputy General Counsel, argued the cause for respondent (Robin T. McMahon, General Counsel; Mr. Blaney on the statement in lieu of brief).

PER CURIAM

The New Jersey Law Enforcement Supervisors Association (NJLESA), a union representing supervisor law enforcement officers, appeals from a decision by the Public Employment Relations Commission (PERC) restraining arbitration of grievances filed by two of its members against the Department of Corrections (DOC).

Both grievants are correctional officers who suffered work-place related injuries while on duty. As a result, each took a leave of absence and collected workers' compensation benefits. Upon returning to work, the grievants learned they did not accrue sick and vacation days during their absences. The grievants challenged the determination, and their appeals through the DOC's administrative process were denied. The State and the NJLESA are parties to the collective negotiations agreement (CNA). As a result, they sought to arbitrate the dispute as provided by the provisions of the CNA. The State filed a scope petition, arguing prorations were required by N.J.A.C. 4A:6-1.5(b), and not negotiable under the CNA. PERC granted the State's petition and restrained arbitration of the grievances.

The issue before us is whether an employee who is out of work and receiving workers' compensation is considered on leave of absence without pay; if so the issue is not arbitrable. Following review of the record and applicable law, we affirm PERC's determination holding an employee on leave collecting workers' compensation is on leave without pay. The plain language and purpose of N.J.A.C. 4A:6-1.5(b) and the Civil Service Act support this conclusion.

Before addressing the parties' arguments on appeal, a brief recapitulation of the grievants' claims and the procedural history is necessary.

On April 3, 2013, Sergeant James Pruzinski suffered injuries while on duty as a corrections officer at East Jersey State Prison when responding to a Code 33, signifying "an inmate disturbance and/or other emergency at the facility." Sergeant Pruzinski received workers' compensation benefits during his absence and returned to work on May 3, 2013. The DOC, relying on N.J.A.C. 4A:6-1.5(b), authorized reduced benefits after accounting for the accumulated leave time, which specifically deducted one and one-half vacation days and one and one-half sick days from time that would accumulate during this period.

The NJLESA filed a grievance on Sergeant Pruzinski's behalf seeking reversal of the reduction of sick and vacation days,

arguing the DOC's actions were in violation of the CNA. It also argued the DOC violated the applicable regulation, N.J.A.C. 4A:6-1.5, along with a statute addressing payroll deductions for pension purposes for workers out on leave. See N.J.S.A. 43:16A-15.2(a). The grievance was denied resulting in the NJLESA filing a request for arbitration with PERC, which appointed an arbitrator, and a hearing was scheduled. Before the arbitration hearing, the State filed a scope petition requesting PERC restrain arbitration, arguing Sergeant Pruzinski's grievance was preempted by N.J.A.C. 4A:6-1.5(b) and not subject to arbitration.

The second grievant, Sergeant Eric Hahn, served as a correctional officer at the Albert C. Wagner Youth Correctional Facility. In July 2012, he was injured while on duty, and was unable to return to work until February 2013. During his absence he received workers' compensation benefits. Upon his return, Sergeant Hahn was informed he was placed on "non-pay" status and did not accrue sick or vacation days during his leave of absence pursuant to N.J.A.C. 4A:6-1.5(b).

The NJLESA filed a grievance on Sergeant Hahn's behalf, challenging the DOC's decision. Like Pruzinski's grievance, Sergeant Hahn's grievance was denied at both steps of the grievance process. The NJLESA filed a request for arbitration with PERC, asserting the same legal challenges as in the Pruzinski matter.

PERC permitted the State to amend the Pruzinski scope petition to add Hahn's grievance. Both parties filed submissions, and on May 26, 2016, PERC issued a decision granting the amended scope petition and restraining arbitration of the grievances.

PERC concluded an employee who is out of work and collecting workers' compensation is on leave of absence without pay, and thus the issues grieved were neither mandatory nor permissibly negotiable, and therefore not arbitrable. Relying on N.J.A.C. 4A:3-4.6, PERC concluded the Civil Service Commission considers leave without pay, while receiving workers' compensation, to be a non-pay status. PERC also relied on N.J.A.C. 4A:6-1.5(b), which limits exemption from proration to furlough leaves and furlough extension leaves. PERC also concluded N.J.S.A. 34:15-44, upon which the NJLESA relied, clarified the right of public workers to collect workers' compensation and provided a bookkeeping mechanism for the payment of claims, but no language exempted workers collecting workers' compensation from N.J.A.C. 4A:6-1.5(b). Finally, PERC rejected grievants' argument relying on the workers' compensation statutes exempting proration of benefits because the Civil Service Act serves a different purpose than the workers' compensation laws, and the two cannot be read in pari materia.

We begin by reciting our scope of review. "PERC is charged with administering the New Jersey Employer-Employee Relations Act

(Act), N.J.S.A. 34:13A-1 to -29, and its interpretation of the Act is entitled to substantial deference." Commc'ns Workers of Am., Local 1034 v. N.J. State Policemen's Benevolent Ass'n, Local 201, 412 N.J. Super. 286, 291 (App. Div. 2010). Regarding a state agency such as PERC, "[w]e do not reverse unless the State agency decision is shown to be arbitrary, capricious, or unreasonable, lacking fair support in the evidence, or violative of a legislative policy expressed or implicit in the governing statute." In re Cnty of Atlantic, 445 N.J. Super. 1, 20-21 (App. Div. 2016). "We ask: (1) whether the agency followed the law; (2) whether the agency's decision is supported by substantial evidence in the record; and (3) whether in applying the law to the facts, the agency reached a supportable conclusion." Id. at 21.

"[W]e owe no special deference to PERC's interpretation of the law outside its charge." In re Camden Cty. Prosecutor, 394 N.J. Super. 15, 23 (App. Div. 2007). "[T]he scope of our review of PERC's factual determinations is limited; the evaluation of evidence is the province of PERC rather than of the courts, and when these determinations fall within PERC's special sphere of expertise, we accord them due weight." In re Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322, 329 (1989).

"PERC has primary jurisdiction to make a determination on the merits of the question of whether the subject matter of a

particular dispute is within the scope of collective negotiations." Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 153, 154 (1978). Id. at 155. ("[A] ruling [on the scope of collective negotiations] must [first] be obtained from PERC."). N.J.S.A. 34:13A-5.4(d) describes this process as follows:

> [PERC] shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

"The standard of review of a PERC decision concerning the scope of negotiations is 'thoroughly settled. The administrative determination will stand unless it is clearly demonstrated to be arbitrary or capricious.'" City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 568 (1998) (quoting Hunterdon Cty., supra, 116 N.J. at 329)).

In determining whether a subject is negotiable, law enforcement officers are entitled to a broader scope of negotiation than other state employees, because N.J.S.A. 34:13A-16 allows for permissive categories of negotiations in addition to the usual mandatory categories. Paterson Police PBA No.1 v. City of

Paterson, 87 N.J. 78, 92-93 (1981). According to our Supreme Court in Paterson Police PBA No.1:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined the phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy making powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, it these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.
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> [Ibid. (citations omitted).]

We also must review the regulation relied upon by PERC which states:

> An employee who leaves State service or goes on a leave of absence without pay before the end of the calendar year shall have his or her leave prorated based on time earned, except that the leave of an employee on a voluntary furlough or furlough extension leave shall not be affected. An employee who is on the payroll

> for greater than 23 days shall earn a full month's allowance, and earn one-half month's allowance if he or she is on the payroll from the 9th through the 23rd day of the month.
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> > 1. An employee shall reimburse the appointing authority for paid working days used in excess of his or her prorates and accumulated entitlements.
> >
> > 2. An employee who returns to work from a leave or absence shall not be credited with paid vacation or sick leave until the amount of leave used in excess of the prorated entitlement has been reimbursed.
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> [N.J.A.C. 4A:6-1.5(b).]

PERC held N.J.A.C. 4A:6-1.5(b)(2) preempts arbitration over the issue of proration of leave because the plain language of the regulation exempts only those on furlough or a furlough extension leave. The parties agree N.J.A.C. 4A:6-1.5(b)(2) is preemptive when applicable, but dispute whether it governs employees who are on a leave of absence and collecting workers' compensation benefits.

The NJLESA argues PERC erred in granting the State's scope petition because it improperly determined Sergeants Hahn and Pruzinski were on a leave of absence without pay during the period they were out of work and collecting workers' compensation benefits. It argues both grievants remained on the State's payroll

during this time period and thus the preemptive provisions of N.J.A.C. 4A:6-1.5(b) were inapplicable.

The NJLESA asserts an employee out of work on workers' compensation should not be treated as if on a leave of absence without pay. Instead, it argues Sergeants Pruzinski and Hahn should have been classified as on active service and on the State's payroll during the time they were unable to work due to their on-the-job injuries.

To properly address the parties' claims under the regulation, we must understand the Legislature's intent. "We interpret a regulation in the same manner we would interpret a statute." US BANK, N.A. v. Hough, 210 N.J. 187, 199 (2012). We begin our analysis with the plain language of the regulation in question. See State v. Gelman, 195 N.J. 475, 482 (2008) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero, supra, 183 N.J. at 492. To discover that intent, we give the words of the regulation their "ordinary and common significance." Lane v. Holderman, 23 N.J. 304, 313 (1957). "Only if the statutory language is susceptible to 'more than one plausible interpretation' do we turn to such extrinsic aids as

legislative history for help in deciphering what the Legislature intended." Gelman, supra, 195 N.J. at 482.

Here, a plain reading of N.J.A.C. 4A:6-1.5(b) requires the proration of vacation and sick days in only two situations, where an individual: (1) leaves state service; or (2) takes a leave of absence without pay. N.J.A.C. 4A:6-1.5(b). Further, the use of the word "shall" affords no discretion and thus the regulation is mandatory.

The NJLESA contests whether N.J.A.C. 4A:6-1.5(b)'s language "on a leave of absence without pay before the end of the calendar year" applies to Sergeants Pruzinski and Hahn while they were collecting workers' compensation benefits. A leave of absence is generally considered without pay "unless otherwise provided by statute." N.J.A.C. 4A:6-1.10(a). This regulation allows an employer to provide an injured employee unpaid leave of absence. Nothing in these regulations exempts absent workers receiving workers' compensation benefits from the term "on leave of absence without pay" contained in N.J.A.C. 4A:6-1.5(b). Further, as PERC noted, N.J.A.C. 4A:6-1.5(b) explicitly exempts only those employees on furlough leave. Thus, the plain language of the regulation, PERC's conclusion "the Commission intended all other unpaid leaves to trigger the proration requirement" which is not arbitrary, capricious or unreasonable.

We also agree PERC's decision was supported by the regulatory purpose of N.J.A.C. 4A:6-1.5(b), a civil service regulation, rather than the other non-civil service statutory provisions the NJLESA relies upon. Specifically, the NJLESA cites N.J.S.A. 34:15-44, entitled "Names of Public Employees Carried on Pay Roll" which states:

> When any payment of compensation under this chapter shall be due to any public employee, the name of the injured employee, or in case of his death, the names of the persons to whom payment is to be made as his dependents, shall be carried upon the pay roll, and payment shall be made in the same manner and from the same source in which and from which the wages of the injured employee were paid.

The NJLESA argues because N.J.S.A. 34:15-44 statutorily defines employees who collect workers' compensation benefits on a leave of absence as "on the payroll," it is determinative of the regulatory term of "on a leave of absence without pay" contained in N.J.A.C. 4A:6-1.5(b).

The NJLESA also points to N.J.S.A. 43:16A-15.2, entitled "Periodic Benefits Payable Under Workers' Compensation Law; Salary Deductions Paid by Employer; Retirement Benefits Application," which states:

> If any member of the retirement system receives periodic benefits payable under the Workers' Compensation Law during the course of his active service, in lieu of his normal compensation, his regular salary deductions

> shall be paid to the retirement system by his employer. . . . The moneys paid by the employer shall be credited to the member's account in the annuity savings fund and shall be treated as employee contributions for all purposes. . . .
>
> [N.J.S.A. 43:16A-15.2(a).]

The NJLESA argues a plain reading of this statute states a member who is receiving workers' compensation benefits shall be considered as if the member were in active service for pension purposes. Although the NJLESA concedes N.J.S.A. 34:15-44 and N.J.S.A. 43:16A-15.2 are pension statutes inapplicable to PERC, it argues they should be read in pari materia with N.J.A.C. 4A:6-1.5(b), to support the conclusion Sergeants Pruzinski and Hahn were on the payroll and not "on a leave of absence without pay." Again, we disagree.

Neither N.J.S.A. 34:15-44 nor N.J.S.A. 43:16A-15.2(a) are binding on the Civil Service Commission. The Civil Service Act supersedes any other law inconsistent with its provisions. N.J.S.A. 11A:12-1. Moreover, relying on our decision in Morreale v. State, Civil Service Commission, 166 N.J. Super. 536, 539 (App. Div. 1979), PERC found an in pari materia reading of the regulation and statute was not possible because the purpose of the workers' compensation statute differs from the civil service regulation.

In Morreale, the appellant, a state employee, was injured away from work during an early lunch break, taken as a result of a bomb scare causing the evacuation of her office. Ibid. The appellant in Morreale argued the sick leave regulations and the workers' compensation statute should be read in pari materia to provide disability sick leave because the lunch time accident should be considered a work accident. Ibid. We rejected the invitation to read the sick leave regulation in pari materia with the workers' compensation statute as "unsound" because we found the statutes had wholly different purposes. Ibid. Specifically, we stated:

> [The] workers' compensation statute is considered by our courts as 'human social legislation designed to place the cost of worker-connected injury on the employer who may readily provide for it as an operating expense. . . . [Whereas] Title 11 of the Revised Statutes ("Civil Service") has the different objective of achieving an efficient public service system for the welfare of all citizens by establishment of a merit system of appointment with built-in security features.
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> [Ibid.]

In Novak v. Camden County Health Services Center Board of Managers, 255 N.J. Super. 93 (App. Div. 1992), we reversed a trial court finding a public employee out of work receiving workers' compensation could not be discharged from employment as a result

of a general workforce reduction. Id. at 99. There as well we concluded the purpose of the workers' compensation statute was separate from the civil service regulation, which permitted the government to take reasonable measures to achieve economy by a workforce reduction completely unrelated to the reasons for the employee's receipt of workers' compensation. Id. at 96. In Novak we took the opportunity to elucidate and contrast the purpose of the workers' compensation laws and the Civil Service Act. We stated:

> N.J.S.A. 34:15-44 was designed to clarify the right of public employees to collect workers' compensation and to provide a bookkeeping mechanism for the payment of appropriate claims. . . . In contrast . . . [t]he primary object of the Civil Service Act is to 'secure efficient public service at all levels of government.'
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> [Novak, supra, 255 N.J. Super. at 97-98 (quoting Malone v. Fender, 80 N.J. 129, 140, (1979)).]

Here, relying on our decisions, PERC concluded the in pari materia reading sought by the NJLESA was, as in Morreale, "unsound." PERC stated: "We discern no intent from the statute or any other provision of the workers' compensation law that State employees on leave while receiving workers' compensation benefits should be exempt from the proration mandate of N.J.A.C. 4A:6-1.5(b)." We are unable to conclude this reasoning is arbitrary,

capricious or unreasonable, let alone inconsistent with the intent of the Legislature.

As noted by PERC, other civil service regulations addressing leave without pay while receiving workers' compensation draw a closer analogy to N.J.A.C. 4A:6-1.5(b) than the statutes relied upon by the NJLESA. Indeed, PERC concluded that N.J.A.C. 4A:3-4.6, which states "a leave without pay while receiving workers' compensation benefits" is a form of "non-pay" status for purposes of calculating anniversary dates, more indicative of the regulatory intent of N.J.A.C. 4A:6-1.5(b) than N.J.S.A. 43:16A-15.2(a). We find no basis to conclude this aspect of PERC's determination was arbitrary, capricious or unreasonable.

Lastly, the NJLESA argues affirming PERC's ruling would punish Sergeants Pruzinski and Hahn for being out of work due to work-related injuries, and its decision "runs afoul not only of the applicable law, but common sense as well." As we stated in Morreale and Novak, the purpose of the Civil Service Act is to secure efficient public service for the welfare of all citizens as opposed to secure the rights of individual employees. It is natural for the enforcement of such regulations to leave the impression of unfair treatment of the employees who serve in dangerous and difficult jobs as the grievants do here. But, as noted by PERC, the NJLESA's remedy is to seek modification of the

regulation from the Civil Service Commission because it "has been delegated the authority 'to designate the types of leaves and adopt rules for State employees . . . regarding procedures for sick leave, vacation leave and other designated leaves with or without pay as the Civil Service Commission may designate.'" In State v. State Supervisory Employees Association, 78 N.J. 54, 82 (1978), our Supreme Court held "[i]f the subject matter is covered by a specific Civil Service regulation and the parties are dissatisfied, their recourse is to seek a modification of such regulation through the administrative process."

Because we agree N.J.A.C. 4A:6-1.5(b) applies and thus does not permit arbitration of the grievants' claims, their best course of relief is to revisit the regulation directly with the Civil Service Commission.

Affirmed.