In the Matter of Woodbridge Fire District #1 Sick Leave Policy
CSC Docket No. 2010-1829
(Civil Service Commission, decided January 13, 2010)

The matter of whether the sick leave policy for Woodbridge Fire District #1 (Fire District) comports with Civil Service law and rules has been referred to the Civil Service Commission (Commission) for review.

As background, at the request of the State Comptroller, the Division of State and Local Operations (SLO) reviewed the sick leave provisions contained in the current[1] collective negotiations agreement between the Fire District and the International Association of Firefighters Local 290 (Local 290) to determine whether it comported with Civil Service law and rules. Based on its review, SLO indicated that Article VIII, Section 1.13 of the agreement which stated that "[s]ick days are intended to be used by the employee for purposes of illness or to conduct personal business," may be in violation of *N.J.A.C.* 4A:6-1.3(g). Accordingly, SLO requested that the Fire District provide further information on the matter.

In response, the Fire District, represented by Brian W. Kronick, Esq., argued that the contract provision was lawful and did not violate *N.J.A.C.* 4A:6-1.3(g). Initially, it stated that the language of *N.J.A.C.* 4A:6-1.3(g) is permissive in what types of situations justify the use of sick leave. Further, it contended that even if *N.J.A.C.* 4A:6-1.3(g) is in conflict with Article VIII, Section 1.13 of the contract, it does not apply. In this regard, it presented that *N.J.A.C.* 4A:6-1.1(a)4 specifically exempts firefighters from the provisions of *N.J.A.C.* 4A:6-1.3(g), since that rule indicates that "[v]acation and sick leaves for police and firefighters are established by local ordinance." Further, it argued that such a contract provision is permissible under *N.J.S.A.* 40A:14-81.1, which allows a fire district to determine the terms and fix the compensation for all paid positions within the fire district. Local 290, represented by Raymond G. Heineman, Esq., also argues that firefighters are exempted from the provisions of *N.J.A.C.* 4A:6-1.3(g) by *N.J.A.C.* 4A:6-1.1(a)4. Moreover, it contends that sick time and paid leave are subject to mandatory negotiations pursuant to the New Jersey Employer-Employee Relations Act. *See N.J.S.A.* 34:13A-1 *et seq.*

Based on this response, SLO referred the matter to the Division of Merit System Practices and Labor Relations for presentation of the issue to the Commission. The parties[2] in this matter were then provided the opportunity to present further arguments and submissions.

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[1] The agreement runs from January 1, 2007 through December 31, 2010.

[2] The parties identified were the Fire District proper, Local 290, and Kenneth Gardner, a Commissioner with the Fire District. Gardner was identified as a separate party since he

In response, the Fire District requests that the Commission hold its inquiry into this matter in abeyance since the Fire District and Local 290 "will be working towards resolving the issue through good faith negotiations for the successor collective negotiations agreement." The Fire District indicates that negotiations for the successor agreement would begin in the near future. It also indicates that the current contract, which allows for only 15 days of sick leave, is more restrictive than the past contract which allowed for unlimited sick leave. In this regard, the Fire District asserts that if the current sick leave policy regarding using leave for personal business is invalidated, Local 290 may seek unlimited sick leave in the upcoming agreement. Local 290 reiterates its previous arguments, and notes that the previous contract provided for unlimited sick leave, and that the current provision represents a compromise reached between the parties through negotiations. No other responses were received.

CONCLUSION

Initially, the Commission rejects the Fire District's request to hold this matter in abeyance. The issue of a possible violation of Civil Service law and rules cannot be ignored by the Commission, and remedying such a violation should not be delayed. To hold the current issue until a new collective negotiations agreement is reached would potentially allow an illegal practice to continue until at least the expiration date of the current contract between the parties, which is not until December 31, 2010. Moreover, other than the representation of the Fire District, there is no guarantee that the new agreement would not perpetuate the violation.

In this matter, the Commission must first address the threshold issue of jurisdiction. It is clear that the Commission has no jurisdiction over issues which arise under a collective negotiations agreement that are outside the statutory and regulatory requirements found in Title 11A of the New Jersey Statutes and Title 4A of the New Jersey Administrative Code. *See In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson,* Docket No. A-1980-99T1 (App. Div., May 8, 2001. For example, a contractual term setting forth a bidding procedure for work shifts or job assignments, or a term in a local government contract pertaining to additional compensation for longevity as well as a myriad of other terms and conditions of employment which are properly negotiated clearly fall outside the purview of the Commission. The proper forum to bring disputes on such concerns is the Public Employment Relations Commission. *See N.J.S.A.* 34:13A-5.3 and

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first brought the matter to the attention of the State Comptroller and specifically indicated his disagreement with the majority of the Fire District regarding the validity of Article VIII, Section 1.13.

N.J.S.A. 34:13A-5.4(c). However, it is equally clear that contractual provisions cannot violate statutory provisions. *See generally, Bassett v. Board of Education of Borough of Oakland, Bergen County*, 223 *N.J. Super*. 136 (App. Div. 1988); *Board of Education of Township of Piscataway v. Piscataway Maintenance & Custodial Association*, 152 *N.J. Super*. 235 (App. Div. 1977). Where a contractual provision violates a statutory provision, the statutory provision must prevail. Moreover, New Jersey courts have held that matters covered under Civil Service statutes or regulations supersede contractual provisions and are not negotiable. *See State v. State Supervisory Employees Association, State v. Local 195, IFPTE and Local 518, SEIU*, 78 *N.J.* 54 (1978); *See also, N.J.S.A.* 34:13A-8.1. Accordingly, in this matter, for the reasons set forth below, the Commission maintains jurisdiction over this matter.

N.J.S.A. 11A:6-1 generally indicates that Civil Service political subdivisions shall prepare "procedures" regarding sick leave. *N.J.S.A.* 11A:6-5 states that political subdivision employees shall receive a sick leave credit of no less than 15 working days per year. *N.J.S.A.* 11A:6-9 states that "[l]eaves of absence for police officer and fire fighter titles shall be governed by applicable provisions of Title 40A of the New Jersey Statutes . . . ." Consistent with and expanding on these statutory provisions are the rules regarding sick leave found under Title 4A.

N.J.A.C. 4A:6-1.1 states, in pertinent part:

> (a) In local service, appointing authorities shall establish types of leaves and procedures for leaves of absence.
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> 1. Pursuant to this subchapter, employees in local service shall also be entitled to vacation leave (*N.J.A.C.* 4A:6-1.2(b) through (h)); sick leave (*N.J.A.C.* 4A:6-1.3(a) through (h)) . . .
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> 4. Vacation and sick leaves for police officers and firefighters are established by local ordinance. *See N.J.S.A.* 40A:14-7 and 40A:14-118.

N.J.A.C. 4A:6-1.1(e) states that where leave procedures are not set by this subchapter, appointing authorities shall establish such procedures subject to applicable negotiations requirements.

N.J.A.C. 4A:6-1.3 states, in pertinent part:

(a) Full-time State employees shall be entitled to annual paid sick leave as set forth in (a)1 and 2 below. Full-time local employees shall be entitled to a minimum of annual paid sick leave as follows:

* * *

2. After the initial month of employment and up to the end of the first calendar year, employees shall be credited with one working day for each month of service. Thereafter, at the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days.

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(g) Sick leave may be used by employees who are unable to work because of:

1. Personal illness or injury (*See N.J.A.C.* 4A:6-21B for Federal family and medical leave);
2. Exposure to contagious disease (*See N.J.A.C.* 4A:6-1.21B for Federal family and medical leave);
3. Care, for a reasonable period of time, of a seriously ill member of the employee's immediate family (*See N.J.A.C.* 4A:1-1.3 for definition of immediate family, *See N.J.A.C.* 4A:6-1.21A for family leave under State law and *See N.J.A.C.* 4A:6-1.21B for Federal family and medical leave); or
4. Death in the employee's immediate family, for a reasonable period of time.

Additionally, the relevant portion of Title 40A of the New Jersey Statutes includes *N.J.S.A.* 40A:14-81.1, which states, in pertinent part:

a. The commissioners of any fire district may, by resolution, establish paid positions within the fire department, or for the fire district, as such position shall be determined by the commissioners to be required for the purposes of the fire district. The commissioners shall, by resolution, appoint persons to, determine the terms of, fix the compensation for, and prescribe the powers, functions and duties of all paid positions so established. For the purposes of this section, a paid position

> shall mean any position for which any compensation is provided by the fire district other than reimbursement for expenses and losses actually incurred in the performance of duties.

There is no provision in current Civil Service statutes that serves to specifically define "sick leave" or for that matter, what constitutes being "sick."[3] While such definitions certainly could have been provided (and indeed, the term "sick leave" was specifically defined in the former Title 11[4]), it appears that in the absence of these definitions, the legislature is content to allow the Commission to provide such definitions in its rules. This is a reasonable interpretation of the legislative intent of the omission of such definitions in the current statutes since, had statutory definitions been provided, no dispute as to what would be permissible uses of sick leave would exist. The analysis into what constitutes "sick leave" must begin by looking at the plain meaning of these words. In this regard, *Webster's II New College Dictionary* (2001) presents the following relevant definitions of the word "sick:" Afflicted with a physical illness; Nauseated; Mentally ill; Unsound. The relevant definition of the word "leave" is: Official permission to be absent from work or duty. Further, as indicated above, *N.J.A.C.* 4A:6-1.3(g)1 through (g)4 defines appropriate uses of sick leave. However, the following questions are presented in this matter: are the definitions presented in (g)1 through (g)4 the limits of what constitutes sick leave for Civil Service employees; and, if not, what is permitted as sick leave under the rule?

The Fire District's initial argument that *N.J.A.C.* 4A:6-1.3(g) is permissive, while technically correct, is misguided. In this regard, it is clear that the word "may" in that rule is properly utilized to express the specific conditions, (g)1 through g(4), where sick leave would be properly used, and in

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[3] Interestingly, the statutes governing officers and employees performing educational functions under Title 18A of the New Jersey Statutes provide a definition for "sick leave." Specifically, *N.J.S.A.* 18A:30-1 defines sick leave as "the absence from his or her post or duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or by being quarantined for such a disease in his or her immediate household."

[4] Former *N.J.S.A.* 11:14-2, repealed and replaced by *N.J.S.A.* 11A:6-1 on September 25, 1986, specifically defined sick leave as:

> [A]bsence from post of duty of an employee because of illness, accident, exposure to contagious disease, attendance upon a member of the employee's immediate family seriously ill requiring the care or attendance of such employee, or absence caused by death in the immediate family of said employee.

fact, is required to be allowed given their express inclusion in the rule.[5] However, that verbiage does not, therefore, mean that leave for any other non-sick leave related purpose would fall under this provision. Given the definition of the word "sick" presented above, and the fact that Civil Service rules specifically allow a local appointing authority to provide for other types of paid leave without limit, it would be incongruous to conclude that the rule providing for sick leave could be utilized for reasons other than something at least in some way *related* to what is commonly accepted as constituting sickness. An example of the permissible use of sick leave not specifically contained in (g)1 through (g)4 can actually be found in the same collective negotiations agreement between the parties, where a separate provision states that sick leave "may also be taken for medical and dental appointments," which are oftentimes preventative or "wellness" related. However, it is completely unreasonable to conclude that the permissive "may" in the rule means that other types of leave which are not related to the express purpose of the rule itself, namely *sick* leave, would be permitted either by appointing authority fiat or via a negotiated agreement. *See In the Matter of Danny Glenn* (CSC, decided March 11, 2009), *aff'd on reconsideration*, *In the Matter of Danny Glenn* (CSC, decided January 13, 2010) (Commission determined that use of sick leave for personal business by Public Works Inspector impermissible and in violation of *N.J.A.C.* 4A:6-1.3(g)).

Important in the above reasoning is the fact that the Commission is in no way attempting to limit the ability of the Fire District and Local 290 from negotiating the amount of personal leave time, or sick leave time for that matter, that would be permitted. In fact, as alluded to above, Civil Service rules essentially permit a local appointing authority, via negotiated agreement or otherwise, *carte blanche* in permitting other types of paid leave besides sick leave and providing more than 15 days per year of sick leave. For example, the contract between Vineland and FMBA Local 249 permits 72 hours of personal leave annually along with providing, after the first calendar year of employment, 180 hours for specifically defined sick leave. Many similar examples can be found throughout contracts between municipalities

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[5] Further, it is noted that if the provisions found in (g)1 through (g)4 were statutory definitions, or the words "shall" or "must" were used in the rule instead of "may," <u>only</u> the reasons expressed in (g)1 through (g)4 of the rule could be validly used as sick leave. Additionally, it would not be inconsistent to also interpret the "may" to indicate that employees who meet the conditions outlined in (g)1 through (g)4, *may* use sick leave for such absences, or *may* opt for other types of leave, if available, instead of using paid sick leave, such as leave without pay, family and medical leave, *etc*. For example, an individual who has a death in the immediate family and is seeking to be out of work for one week, and requests a leave of absence without pay, *instead* of using available paid sick leave, *may* be permitted to do so by an appointing authority.

and employee representatives.[6] In this regard, as indicated in *N.J.A.C.* 4A:6-1.1(a), other than the minimum vacation and sick leave entitlements, a local appointing authority is not constrained by any Civil Service law or rule regarding establishing and implementing other types of paid leave for its employees, including leave for personal business.[7] Accordingly, based on the above reasoning, it would be illogical as well as not in accord with the tenets of statutory and regulatory construction and interpretation to find that sick leave could be used for personal business.

Further, the Commission rejects the Fire District's and Local 290's contention that *N.J.A.C.* 4A:6-1.3(g) does not apply since it is superseded by *N.J.A.C.* 4A:6-1.1(a)4. *See also, N.J.S.A.* 11A:6-9. Clearly, *N.J.A.C.* 4A:6-1.1(a)4 provides that the appointing authority must enact provisions for sick leave for firefighters by ordinance. However, that rule does not permit such ordinances to contravene Civil Service law and rules regarding what constitutes sick leave. Further, the Commission is not persuaded by the Fire District's contentions regarding *N.J.S.A.* 40A:14-81.1. In this regard, while *N.J.S.A.* 40A:14-81.1 allows for the Fire District to fix the compensation, *etc.*, of its members, it **does not**, either expressly or implicitly, allow it to enact ordinances or rules or enter into contractual agreements that would be inconsistent with any other laws or rules, such as is the case in this matter.

Accordingly, the Commission finds that the provision in Article VIII, Section 1.13 of the collective negotiations agreement between the Fire District and Local 290 permitting sick leave to be used for personal business is in contravention of Civil Services rules. The Fire District should immediately desist from permitting its employees to use sick leave for any purposes not permitted in Civil Service rules or any otherwise valid purposes for use of sick leave. Additionally, the parties are advised that any future collective negotiations agreements providing for paid leave that is otherwise not provided for in Civil Service rules, be clearly named and defined as such to ensure that this issue does not occur again.

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[6] For further examples, go to www.perc.state.nj.us/publicsectorcontracts.nsf.

[7] Conversely, the statute and rules specifically provide State employees with a yearly allotment of three days of Administrative leave, which may be used for a variety of purposes. *See N.J.S.A.* 11A:6-6 and *N.J.A.C.* 4A:6-1.9. Additionally, the Commission is not expressly authorizing or endorsing the Fire District's, or any local appointing authority's, granting of benefits far above what is permitted for State employees in the rules, especially in light of recent information regarding such abuses in local government. In this regard, the Fire District's contention that Local 290 will likely seek unlimited sick leave in the next contract should the current provision be deemed invalid, while permissible, seems extraordinarily unreasonable in these austere fiscal times. For further information, see the recent report of the State Commission of Investigation, "*The Beat Goes On: Waste and Abuse in Local Government Employee Compensation and Benefits*" issued in December 2009. To access this report, go to www.state.nj.us/sci.

Finally, given that the Commission has provided clarification regarding *N.J.A.C.* 4A:6-1.3, it is appropriate for the Division of Merit System Practices and Labor Relations to prepare rule amendments for the Commission's consideration to ensure that its rules regarding sick leave conform with this determination.

ORDER

Therefore, the Civil Service Commission determines that the portion of the provision in Article VIII, Section 1.13 of the collective negotiations agreement between the Fire District and Local 290 permitting sick leave to be used for personal business is in contravention of Civil Service rules.

It is further ordered that the Fire District should immediately desist from permitting its employees to use sick leave for any purposes not permitted in Civil Service rules or any otherwise valid purposes for use of sick leave. Additionally, the parties are advised that any future collective negotiations agreements providing for paid leave that is otherwise not provided for in Civil Service rules, be clearly named and defined as such to ensure that this issue does not occur again.

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