



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).

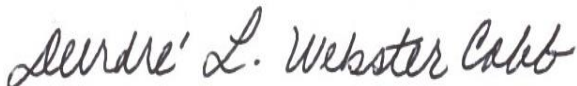
In this case, notwithstanding the fact that the appellant was advised by the DEP that it could not approve intermittent donated leave before it changed its policy regarding intermittent donated leave or that he had received donations prior to the change in policy, it is not the intention of the DLP to 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



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