

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1110-10T3

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO; AMERICAN
FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-
CIO, COUNCIL 1; and LOCAL 195,
INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, AFL-CIO,

Appellants,

v.

NEW JERSEY CIVIL SERVICE
COMMISSION,

Respondent.

Argued September 27, 2011 - Decided January 18, 2012

Before Judges Messano, Yannotti and
Espinosa.

On appeal from the Final Administrative
Action of the Civil Service Commission.

Ira W. Mintz argued the cause for appellants
(Weissman & Mintz, LLC and Zazzali, Fagella,
Nowak, Kleinbaum & Friedman and Oxfeld
Cohen, attorneys; Mr. Mintz, Sidney H.
Lehmann and Arnold Shep Cohen, on the
brief).

Todd A. Wigder, Deputy Attorney General
argued the cause for respondent (Paula T.
Dow, Attorney General, attorney; Lewis A.
Scheindlin, Assistant Attorney General, of
counsel; Mr. Wigder, on the brief).

PER CURIAM

The Communication Workers of America, AFL-CIO, the American Federation of State, County, and Municipal Employees, AFL-CIO, Council 1, and Local 195, International Federation of Professional and Technical Engineers, AFL-CIO (collectively, the Unions), appeal the Civil Service Commission's (CSC) adoption of an amendment to N.J.A.C. 4A:6-1.2, the regulation governing vacation leave for State workers. The amendment authorized the use of paid leave bank days (PLB days), which were created by memoranda of agreement (MOAs) between the Unions and the Governor's Office of Employee Relations (the State). The negotiated MOAs were intended to avoid layoffs and compensate State employees for wages lost during a mandatory furlough period and the deferral of scheduled wage increases. We provide some background leading up to the adoption of the amended regulation.

In April 2009, the CSC adopted emergency rule N.J.A.C. 4A:8-1.1A, permitting temporary layoffs for economy and efficiency. Several unions immediately challenged the regulation, and in an unpublished opinion, we upheld the CSC's ability to promulgate the emergency rule. In re Emergency Temporary Layoff Rule, Nos. A-3636-08, A-3627-08, A-3656-08, A-3657-08 (App. Div. Apr. 17, 2009). We concluded that adoption

of the rule "complied with the statutory requirements" of N.J.S.A. 52:14B-4(c).¹ Id. (slip op. at 3). We also held that the State could "lay off all employees in a layoff unit," but declined to address whether "staggered layoffs" -- "[a] layoff of each employee in a layoff unit for one or more [workdays] over a defined period" -- could be implemented by regulation. Id. (slip op. at 4-5). We referred that issue to the Public Employment Relations Commission (PERC). Id. (slip op. at 4).

PERC subsequently declined to restrict the regulation's scope. Negotiations began between the Unions and the State to avoid widespread layoffs.

In June 2009, those negotiations were finalized in a series of MOAs, which stated purposes were to "facilitate the accomplishment of vital government policies and objectives, including the avoidance of layoffs, the delivery of needed public services, and the achievement of substantial budgetary

¹ That statute provides:

If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing its reasons for that finding, and the Governor concurs in writing that an imminent peril exists, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it finds practicable, to adopt the rule.

savings." The MOAs alleviated the need for the emergency regulation, and the State and the Unions agreed to request its rescission by the CSC. Each MOA provided that "if any provision[] of th[e] MOA require[d] legislation or regulation to be effective, the parties w[ould] jointly seek the enactment of such legislation or the promulgation of such regulations."

The MOAs included deferral to January 2011 of "[t]he 3.5% across-the-board increase to annual base salaries" scheduled for 2009 under the then-current collective bargaining agreements. The Unions also agreed to the use by their employees of ten unpaid furlough days prior to July 1, 2010.

In exchange, the State agreed there would be no layoffs during the period of wage deferral. The State also agreed to establish a "Paid Leave Bank" for each Union employee. Each employee was credited with one PLB day on July 1, 2009, one additional PLB day for every two days of furlough used, and one PLB day on June 30, 2010. In other words, an employee using ten furlough days would be credited with seven PLB days.

The MOAs provided:

The PLB days will be maintained separate and apart from banks of other paid leave and there will be no limitations on the carry over of days in the PLBs. Specifically, the carry over restrictions that are applicable to paid vacation and administrative leave days will not be applicable to the PLBs.

On August 5, 2009, "[i]n an effort to provide parity for as many State employees as possible," the CSC issued an order adopting a pilot program for unrepresented State employees. The pilot program effectuated a Paid Leave Bank for these employees that mirrored those established by the MOAs. It provided that "[u]nlike the carryover restriction[s] for vacation leave and administrative leave" found in applicable statutes and regulations, "there w[ould] be no limitations on the carryover of days credited to the Paid Leave Bank." The CSC believed the pilot program was "necessary since there [was] no statutory or regulatory authority for the provision of unpaid leave of this nature or for the establishment of additional leave days other than those . . . statutorily prescribed." Because no regulation authorized the establishment of PLB days, the CSC indicated that "rules w[ould] be promulgated to govern the specifics regarding the administration of Paid Leave Banks."

On May 19, 2010, the CSC filed a proposed amendment to N.J.A.C. 4A:6-1.2, the vacation leave regulation, "adding a new subsection (1) to codify the PLB program." 42 N.J.R. 1116(a) (June 21, 2010). The proposed amendment categorized PLB days as vacation days subject to the restrictions of N.J.S.A. 11A:6-2(f) ("Vacation not taken in a given year because of business demands

shall accumulate and be granted during the next succeeding year only."). In salient part, the proposed regulation provided:

These additional paid leave days may be used beginning July 1, 2010 through June 30, 2011, subject to operational needs. . . . If not taken in a given year because of business demands, these days shall accumulate and be granted during the next succeeding year only. In no case shall any such additional paid leave be carried beyond June 30, 2012.

[42 N.J.R. 1116(a) (June 21, 2010) (codified at N.J.A.C. 4A:6-1.2(1)(5)).]

Any employee leaving State service would be paid for unused PLB days, and salary for unused PLB days would be paid to any employee's estate upon death.

The CSC acknowledged that the restriction was contrary to the MOAs but claimed it was required by statute.

While the MOA states that these unused, additional days may be used for the duration of the employee's service with the State, this provision is inconsistent with the statutory limitation regarding the carry-over of vacation leave (see N.J.S.A. 11A:6-2). Further, the MOA expires on June 30, 2011. Therefore, any additional, unused days are to be carried over for one year only, so that none of these days may be carried beyond June 30, 2012.

On July 13, 2010, a public hearing was held on the proposed amended regulation; written comments were solicited until August 20, 2010. See 42 N.J.R. 1116(a) (June 21, 2010). The leadership of the Unions and non-union employees urged rejection

of the proposed rule because it was inconsistent with the MOA provisions permitting unlimited carry-over of PLB days. The CSC responded that it,

believe[d] . . . codifying the PLB program under the vacation leave rules [wa]s both appropriate and necessary. Specifically, the [CSC] is bound by statute, and the only type of leave authorized by statute that provides for time off with pay without a specific purpose (such as sick leave, jury leave or military leave) is vacation leave.

On August 20, 2010, in conjunction with the Unions, the director of the Governor's Office of Employee Relations, David Cohen, submitted a letter to the CSC requesting "elimination, in the rule, of the carryover restriction regarding the use of PLB days." The CSC responded by restating its belief that such a provision for PLB days was "beyond [its] regulatory authority."

On September 15, 2010, the CSC adopted the proposed amendment without change. 42 N.J.R. 2400(b) (Oct. 18, 2010). This appeal followed.

Before us, the Unions raise the following arguments:

Point I

THE STANDARD OF REVIEW REQUIRES THAT THERE BE SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE AGENCY'S ACTION.

Point II

THE CIVIL SERVICE COMMISSION WAS NOT REQUIRED TO TREAT PLB DAYS AS VACATION LEAVE

Point III
THE CSC'S TREATMENT OF PLB DAYS CONTRAVENES
THE PUBLIC POLICY OF THIS STATE

We have considered these arguments in light of the record and applicable legal standards. We reverse and remand the matter to the CSC for further consideration.

We recently stated the standards that govern our review of a challenge to agency rulemaking.

Agency regulations "are accorded a presumption of validity." N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999). Our courts give "great deference" to administrative agencies when they adopt rules implementing their enabling statutes. N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008). However, the "presumption of validity does not attach if the regulation on its face reveals that the agency exceeded the power delegated to it by the Legislature." In re N.J. Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1 et seq., 179 N.J. 570, 579 (2004).

"[A] regulation can only be set aside if it is proved to be arbitrary or capricious, plainly transgresses the statute it purports to effectuate, or alters the terms of the statute and frustrates the policy embodied in it." In re Adopted Amendments to N.J.A.C. 7:7A-2.4, 365 N.J. Super. 255, 265 (App. Div. 2003). The party challenging the rulemaking has the burden of demonstrating that the rulemaking was arbitrary, unreasonable, or capricious. In re N.J. Individual Health, supra, 179 N.J. at 579; In re Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 & 4.3, 305 N.J. Super. 389, 401-02 (App. Div. 1997).

[N.J. Ass'n of Sch. Adm'rs v. Schundler, 414 N.J. Super. 530, 545-46 (App. Div. 2010) (alteration in original) (parallel citations omitted), certif. granted, 205 N.J. 519 (2011).]

The Court has characterized the "search for arbitrary or unreasonable agency action," as limited to "three inquiries":

(1) whether the agency's action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.

[In re Petitions for Rulemaking, 117 N.J. 311, 325 (1989).]

The Unions' argument is essentially that the CSC was not required by statute to characterize PLB days as vacation days and to treat them similarly. However, contrary to Point I of the Unions' brief, consideration of that argument does not require us to evaluate "whether there [was] substantial evidence in the record to support" the CSC's factual findings because none were made. Instead, the issues presented are purely legal in nature: first, whether the regulation, as adopted, violated or frustrated the legislative policies undergirding the CSC's

enabling legislation; second, whether the regulation otherwise contravenes the public policy of the State.²

"Overall, the . . . goal [of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6] 'is to secure the appointment and advancement of civil service employees based on their merit and abilities[,] and to effectuate 'the purpose of the Act, which is to ensure efficient public service for state, county, and municipal government.'" Headen v. Jersey City Bd. of Educ., 420 N.J. Super. 105, 111-12 (App. Div.) (second alteration in original) (quoting Commc'ns Workers v. N.J. Dep't of Pers., 154 N.J. 121, 126 (1998)), certif. granted, 208 N.J. 370 (2011). N.J.S.A. 11A:6-1 provides, in relevant part:

The [CSC] shall designate the types of leaves and adopt rules for State employees . . . regarding procedures for sick leave,

² For the first time in their reply brief, the Unions argue that the CSC "promulgat[ed] a regulation that impaired contractual obligations," a contention premised on the contracts clauses of the United States and New Jersey Constitutions. See U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3; see also State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 64 (1991) (discussing what constitutes an "unconstitutional impairment of contracts"). The constitutional argument was not raised before the CSC, and it is improper to raise the issue for the first time in a reply brief. Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 387 (App. Div.), certif. denied, 200 N.J. 502 (2009). Although the matter presented is of significant public interest and might otherwise justify exercise of our discretion and consideration of the issue on its merits, ibid., we decline the opportunity having concluded a remand is necessary. The Unions, of course, are free to present the issue to the CSC upon remand.

vacation leave and other designated leaves with or without pay as the [CSC] may designate.

The Legislature expressly created certain types of leaves for employees in State service, set limits upon the accumulation of such leave time, and provided for disposition of unused leave time upon retirement or death.

For example, N.J.S.A. 11A:6-2 sets forth how vacation leave is accrued and limits its accumulation to the next "succeeding year only"; N.J.S.A. 11A:6-4 provides for payment to "[t]he estate of a deceased employee" of "accumulated annual vacation leave." N.J.S.A. 11A:6-5 defines how sick leave is accrued, and provides that "[u]nused sick leave shall accumulate without limit." N.J.S.A. 11A:6-16 provides for the lump-sum payment of "supplemental compensation for . . . accumulated sick leave," "upon retirement," not to exceed \$15,000, N.J.S.A. 11A:6-19. Administrative leave is authorized by N.J.S.A. 11A:6-6, which also provides that "[a]dministrative leave shall not be cumulative and any administrative leave unused by an employee at the end of any year shall be cancelled." Other particularized and limited leaves were expressly created by the Legislature. See, e.g., N.J.S.A. 11A:6-10 (convention leave); N.J.S.A. 11A:6-13 (gubernatorial appointment leave); N.J.S.A. 11A:6-14 (leave for elective office). In each instance, the CSC has adopted

regulations that implement the statutorily-granted leaves. See, e.g., N.J.A.C. 4A:6-1.2 (vacation leave); -1.3 and 1.4 (sick leave); -1.9 (administrative leave).

In adopting the amended regulation, the CSC concluded that it had no authority to create a type of leave not expressly enacted by the Legislature. Since PLB days could be used at the discretion of the employee for any or no reason, subject only to the business demands of the State agency, the CSC deemed them to be most similar to vacation days.

The Unions argue that N.J.S.A. 11A:6-1 confers broad discretion upon the CSC to establish "other designated leaves with or without pay as the [CSC] may designate," and, therefore, nothing compelled the CSC to treat PLB days as vacation days. (Emphasis added). Citing N.J.A.C. 4A:6-1.14, the regulation governing education leave, the Unions also argue that the CSC has previously adopted regulations governing leaves that are not statutorily-created. Furthermore, contrary to the CSC's determination that "the only type of leave authorized by statute that provides for time off with pay without a specific purpose . . . is vacation leave," the Unions contend that other statutorily-enacted leave, e.g., administrative leave, does not require that the employee supply a "specific purpose" when requesting the use of leave. See N.J.S.A. 11A:6-6 (allowing use

of administrative leave for "personal reasons"); see also N.J.A.C. 4A:6-1.9 (granting administrative leave for "personal business, including emergencies and religious holidays").

"As the administrative agency empowered to promulgate and enforce the Civil Service Act, the Commission's construction of the act and its regulations is entitled to great weight." Appleby v. State Civil Serv. Comm'n, 190 N.J. Super. 249, 255 (App. Div. 1983). "On the question of interpretation, courts normally defer to agency determinations and their enabling act so long as the interpretation is reasonably debatable." In re Musick, 143 N.J. 206, 217 (1996).

Under our standard of review, it is not for us to decide whether the CSC should have adopted an entirely new regulation dealing with the PLB days, included them within the vacation leave regulation and not have restricted their carryover, chosen to address the issue in some other way, or not have addressed the problem at all absent action by the Legislature. We have said, "The fundamental consideration in reviewing agency actions is that a court may not substitute its judgment for the expertise of an agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable." In re Adopted Amendments to N.J.A.C. 7:7A-2.4,

supra, 365 N.J. Super. at 264 (emphasis added) (citation and internal quotation marks omitted)).

In adopting subsection (1) of N.J.A.C. 4A:6-1.2, and limiting the carryover of PLB days in the same manner as vacation leave, the CSC clearly did not "exceed[] the power delegated to it by the Legislature." In re N.J. Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1 et seq., 179 N.J. 570, 579 (2004). As already noted, N.J.S.A. 11A:6-1 accords the CSC substantial discretion in adopting necessary regulations governing various types of leave. Nor did the amendment of the regulation "plainly transgress[] the statute it purports to effectuate, or alter[] the terms of the statute and frustrate[] the policy embodied in it." In re Adopted Amendments to N.J.A.C. 7:7A-2.4, supra, 365 N.J. Super. at 265.

However, the CSC determined it was powerless to classify the PLB days as anything other than vacation days and limit their carryover in a similar fashion because, despite the existence of the negotiated MOAs, there was no statutory authority to grant employees such leaves. The inconsistency of that position is obvious. Indeed, if the CSC believed there was no statutory authority permitting such leaves, we fail to see why it adopted any regulation in the first instance.

We are, therefore, compelled to remand the matter to the CSC for further consideration of the issue. We provide some guidance in this regard.

First, the CSC must consider whether the creation of the PLB banks in the MOAs was contrary to existing law and cannot be implemented without Legislative action. The Unions have not addressed that point since they seek only to overturn that portion of the proposed amendment that prohibits the carryover of PLB days; nor has the CSC specifically addressed this issue. In this regard, however, we note that both the Unions and the State specifically included provisions in the MOAs that obligated them to "jointly seek the enactment of such legislation or the promulgation of such regulations" as necessary.

If the CSC concludes that despite Legislative inactivity, PLB days may nonetheless be provided to State workers, it shall consider whether other provisions of the Civil Service Act and the CSC's own regulations permit adoption of a regulation that mirrors the provisions of the MOAs. As the Unions have argued, the public policies that undergird the Civil Service Act are contained in N.J.S.A. 11A:1-2. Importantly, the Legislature declared, among other things,

It is the public policy of this State to provide public officials with appropriate

appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities;

. . . .

It is the public policy of this State . . . to ensure the recognition of such bargaining and other rights as are secured pursuant to other statutes and the collective negotiations law.

[N.J.S.A. 11A:1-2(b) and (e).]

In Communications Workers, supra, 154 N.J. at 123-25, the Court considered whether the Commissioner, under her power to adopt pilot programs pursuant to N.J.S.A. 11A:2-11(i), could adopt two programs that directly conflicted with provisions of the Civil Service Act -- in particular, the so-called rule of three, N.J.S.A. 11A:4-8, and the working test period following regular appointment, N.J.S.A. 11A:4-15(a). The Court concluded that the pilot programs were "consistent with the broad purposes of the Act," and furthered its objectives. Id. at 130-31. Among other things, the Court cited N.J.A.C. 4A:1-1.2(c), which provides "[t]he Commissioner . . . may relax these rules for good cause in a particular situation . . . in order to effectuate the purposes of Title 11A," as justification for adoption of the pilot program. Id. at 127.

While the circumstances here are quite different factually, we believe that the CSC must consider the overriding public

purposes of the Civil Service Act in promulgating any regulation specifically designed to implement provisions of agreements collectively-bargained between the Unions and the State.

Lastly, as noted above, the Unions may present evidence that any limitation of the carryover of PLB days would substantially impair the bargained-for contractual rights under the MOAs. The issue was not raised before the CSC, and the appellate record provides no evidence, for example, of the financial impact the regulation would have upon the membership of the Unions.

We reverse the CSC's adoption of N.J.A.C. 4A:6-1.2(1), and remand the matter to the CSC for further consideration. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION