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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of D.W., Judiciary

CSC Docket No. 2016-629

Administrative Appeal

ISSUED: OCT 23 2015 (DASV)

D.W., a Court Executive 2A with the Judiciary,¹ requests that she be permitted to use donated leave on an intermittent basis.

By way of background, the petitioner's mother² sustained a serious spinal cord injury in October 2014, which required three surgeries and more than three months of hospitalization and care in rehabilitation centers and nursing homes.³ The petitioner was approved as a donated leave participant based on her mother's condition. Subsequently, the petitioner inquired as to the use of intermittent donated leave. The appointing authority advised that Civil Service regulations did not permit intermittent donated leave, except in very limited circumstances, and therefore could not approve petitioner's use of such leave.

In her request to the Civil Service Commission (Commission), the petitioner explains her mother's condition and indicates that her mother's care had fallen on

¹ The petitioner serves in an unclassified position. As such, her vacation leave entitlement may differ from that of a career service employee. See *N.J.A.C.* 4A:6-1.1(b) and *N.J.A.C.* 4A:6-1.2(a). Additionally, *N.J.A.C.* 4A:6-1.9(b) states that unclassified employees may be granted up to three days of administrative leave in each calendar year, at the discretion of the appointing authority. However, sick leave and donated leave entitlements apply to all employees in State service. See *N.J.A.C.* 4A:6-1.3 and *N.J.A.C.* 4A:6-1.22.

² The petitioner's mother was 84 years old at the time of the petitioner's request to the Civil Service Commission in July 2015. She has since passed away.

³ The petitioner indicates that her mother also underwent knee replacement surgery in May 2015.

her and her small family, as other family members do not live in New Jersey. The petitioner questions the rationale behind not allowing donated leave to be taken intermittently since intermittent leave under the federal Family and Medical Leave Act (FMLA) may be taken. She emphasizes that she had already been approved to participate in the Donated Leave Program (DLP) and had been taking intermittent leave under FMLA. In regard to the latter, the petitioner indicates that her agency had been working on some critical projects in August 2014 and she returned to work. Her mother was also at a point that she could provide some level of care for herself on some days. Moreover, the petitioner requests clarification as to the interaction between FMLA and donated leave. She asks why donated leave is not available to be used whenever the employee is out for the purpose for which the leave was donated. The petitioner also asserts that it is unfair to require employees to use their leave time that is "not truly earned when they had donated leave on the books" and then require the employees to pay back the unearned leave time if the employees have to leave State service for some reason. Thus, she asks whether leave time is actually accrued or not. Further, the petitioner claims that employees who attempt to balance the needs of their organizations with their ill family members are penalized. In support of her request, the petitioner submits medical documentation certifying that her mother needed "self-care help," such as bathing, cooking, feeding, and ambulatory assistance, two or three days per week. The period of incapacity was estimated to be from October 2015 to July 2016. However the duration of the condition was noted as possibly lifetime.

In response, the appointing authority initially notes that it is not in a position to administer donated leave inconsistent with Civil Service rules. It also indicates that an employee must exhaust all accrued personal leave prior to utilizing donated leave. The appointing authority submits that as of August 7, 2015, the petitioner had 24 hours of available sick leave, 63 hours of vacation leave, and 21 hours of administrative leave for the 2015 calendar year. The appointing authority states that the petitioner was advised that her leave time would be prorated if she commenced a leave of absence and donated leave may be used after exhausting all of her earned leave time.

CONCLUSION

N.J.A.C. 4A:6-1.22(a) 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, is needed to provide care to a member of the employee's immediate family who is suffering from a catastrophic health condition or injury, or requires absence from work due to the donation of an organ. Additionally, *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. Moreover, *N.J.A.C. 4A:6-1.22(e)* indicates that while using donated leave time in

State service, the leave recipient shall accrue sick leave and vacation leave and be entitled to retain such leave upon his or her return to work.

Initially, although the petitioner was previously approved for participation in the DLP, she would not have currently been eligible to receive donated leave until all of her earned leave time was exhausted. As of August 7, 2015, the petitioner still had earned leave that had not been fully utilized. Therefore, participation in the DLP would have been denied on that basis. However, the petitioner asserts that it is unfair to require employees to use their leave time that is "not truly earned when they had donated leave on the books" and then require the employees to pay back unearned leave time that has been used if the employees have to leave State service for some reason. Thus, she asks whether leave time is actually accrued or not. First, an employee does not have "donated leave on the books." It is only when the employee meets the eligibility requirements that the employee can receive donated leave. Second, pursuant to *N.J.A.C. 4A:6-1.22(e)*, an individual on donated leave continues to accrue sick and vacation leave. For example, an employee does not have any leave days carried over from a previous year and meets the other requirements to participate in the DLP. The employee then takes a leave of absence from January 1 through March 31 using donated leave and returns to work on April 1. Pursuant to *N.J.A.C. 4A:6-1.22(e)*, and because a leave of absence utilizing donated leave is with pay, the employee has available upon his or her return the full leave entitlement for the year. If the employee needs to take another leave of absence beginning May 1, the employee must exhaust his or her accrued leave time up to that point prior to being eligible for donated leave again. In other words, as explained by the appointing authority, leave time is prorated and an employee is only expected to exhaust earned leave prior to receipt of donated leave. Furthermore, *N.J.A.C. 4A:6-1.5(a)* states that employees in State service are liable for vacation and sick leave days taken in excess of their entitlements. In addition, *N.J.A.C. 4A:6-1.5(b)1* provides, in part, that 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. An employee shall reimburse the appointing authority for paid working days used in excess of his or her prorated and accumulated entitlements. Therefore, by rule, an employee must pay back any used unearned leave time if the employee leaves State service during the calendar year. While the petitioner may disagree with some or all of these provisions, she has not established that they have been misapplied in her case.

Moreover, even assuming that the petitioner's leave time was exhausted, the petitioner's circumstance does not meet the established criteria. 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*. Further, 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 Board⁴ 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 other words, intermittent leave was not contemplated by the rule. Accordingly, *N.J.A.C.* 4A:6-1.22 does not provide for intermittent donated leave.

Nonetheless, the practice of permitting the *limited* use of intermittent donated leave evolved by rule relaxation 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. There has not been a similar allowance for an employee to care for a family member, since it is not the employee who personally must transition back to work. While there may be a unique circumstance which would warrant such approval, the petitioner’s situation is not comparable. The medical documentation she submits does not reflect a short-term transition period. Rather, the period of incapacity was estimated to be from October 2015 to July 2016, and the duration of her mother’s condition was noted as possibly lifetime.⁵ Accordingly, while the Commission is deeply sympathetic to the petitioner’s situation, it does not meet the criteria for intermitted use of donated leave.

Moreover, the petitioner requests clarification as to the interaction between FMLA and donated leave. Initially, it must be emphasized that the DLP is a distinct and limited program separate from FMLA. FMLA does provide that leave may be taken intermittently or on a reduced leave schedule when medically necessary in the case of an employee who has a serious health condition or in the case of a child, spouse or parent who has a serious health condition. See *N.J.A.C.* 4A:6-1.21B(f). In contrast, as explained above, the DLP rule does not provide for intermittent leave

⁴ On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission.

⁵ And, as noted previously, since the petitioner’s mother has unfortunately passed away, any request for intermittent leave starting in October 2015 has been rendered moot.

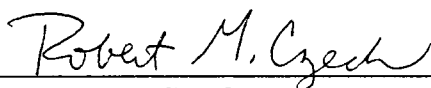
and is only permitted in limited circumstances. Therefore, donated leave cannot be used whenever the employee is out on FMLA leave, despite that the employee has previously been approved to participate in the DLP. For the reasons set forth above, intermittent donated leave is only available in very limited circumstances and the petitioner's situation is not applicable.

ORDER

Therefore, it is ordered that this request 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 21ST DAY OF OCTOBER, 2015



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