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THE APPROVAL OF THE COMMITTEE ON OPINIONS

PAUL BARILA, WILLIAM J. LUDWIG. CANDACE R. KANTOR, & DANIS ENRICO *Plaintiffs,* v. BOARD OF EDUCATION OF CLIFFSIDE PARK, BERGEN COUNTY *Defendant.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART BERGEN COUNTY DOCKET No. BER-C-161-16 CIVIL ACTION OPINION

Argued: May 9, 2017
Decided: May 16, 2017

Honorable Robert P. Contillo, P.J.Ch.

Richard A. Friedman, Esq. appearing on behalf of the plaintiffs, Paul Barila, William J. Ludwig, Candace R. Kantor, and Danis Enrico. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.).

Stephen R. Fogarty, Esq. appearing on behalf of the defendant, the Board of Education of Cliffside Park, Bergen County. (Fogarty & Hara, Esqs.).

OPINION

I. Statement of the Case

Before the Court are competing Motions for Summary Judgment. The plaintiffs, Paul Barila, William J. Ludwig, Candace R. Kantor, and Danis Enrico (collectively "Plaintiffs"), filed their Motion for Summary Judgment on March 22, 2017. On April 13, 2017, the defendant, Board of Education of Cliffside Park, Bergen County (the "Board" or "Defendant"), filed its

Opposition and Cross-Motion for Summary Judgment. Plaintiffs filed their Reply on April 26, 2017. Oral argument was had on May 9, 2017.

This action concerns a collective bargaining agreement negotiated by the Board and the collective bargaining representative for all teaching staff members employed by the Cliffside Park School District. The material facts are not in dispute. Indeed, the parties jointly filed a Stipulation of Facts on March 1, 2017 (the "Stipulation"), which the Court adopts as part of its analysis.

Plaintiffs are teachers and/or former teachers employed by the Defendant Board of Education of Cliffside Park. Stipulation at ¶ 1. Each Plaintiff was employed by the Board prior to July 1, 2015, and had worked for the Board for at least ten years as of July 1, 2015. Id. at ¶ 2. Plaintiffs are in the bargaining unit and are also members of the Cliffside Park Education Association (the "Association"), which is the exclusive collective bargaining representative for all teaching staff members employed by the Cliffside Park School District. Id. at ¶ 3.

Plaintiffs, the Board, and the Association were all parties to a collective negotiation agreement that was in effect from July 1, 2012, through June 30, 2015 (the "2012 Agreement"). Id. at ¶ 4; Ex. A. to Stipulation. Article VIII of the 2012 Agreement, which addressed sick leave, provided: "In accordance with the provisions of N.J.S.A. 18A:30-2, each Teacher shall be entitled to ten (10) sick leave days with full pay in each school year. Unused sick leave days shall, in accordance with the provisions of N.J.S.A. 18A:30-3, be accumulated from year to year with no maximum limit." Ex. A. to Stipulation. Article VIII of the 2012 Agreement provided further:

> Any teacher, who, as of the end of any school year beginning with 09-10, has either served the District at least ten (10) years and has retired under the Teachers' Pension and Annuity Fund upon such retirement or has served the District at

twenty-five (25) years and leaves the employ of the Board for any reason, shall be paid according to the table:

Formula for unused sick leave:

First 100 days	x	$125.00/day
Second 100 days	x	$0.00/day
Up to next 72 days	x	$1.75/day
Maximum is $25,000.00		

Ibid.

Accordingly, any teacher, who had either been employed by the Board for at least ten years and retired under the Teachers' Pension and Annuity Fund, or who had been employed by the Defendant for twenty-five years and left the employ of the Board for any reason, was entitled to compensation, as calculated by a specified formula, for accumulated but unused sick leave, up to a maximum amount of $25,000.00. Stipulation at ¶ 5. Although the 2012 Agreement specifies that the compensation for accumulated, unused sick leave was to begin with the 2009-2010 school year, the parties agree that an identical provision has appeared in previous collective negotiation agreements for at least the past twenty years. Id. at ¶ 6.

As the 2012 Agreement expired at the end of June 2015, the Association and the Board negotiated a successor collective negotiation agreement, which became effective on July 1, 2015 (the "2015 Agreement"). Id. at ¶ 7; Ex. C. to Stipulation. The 2015 Agreement modified Article VIII in two significant ways. First, the 2015 Agreement changed the formula for unused sick leave by providing for up to a maximum of 100 days at the rate of $150.00/day. Ex. C. to Stipulation. Consequently, the maximum amount of compensation that a teacher could receive for accumulated but unused sick leave upon retirement under the Teachers' Pension and Annuity Fund after at least ten years of employment, or after twenty-five years of employment, was $15,000.00. Id.; Stipulation at ¶ 8. Accordingly, the 2015 Agreement decreased the maximum amount of compensation from $25,000.00 to $15,000.00, decreased the maximum amount of

accumulated, but unused, days for which teachers could be compensated to 100 days, but increased the rate per day for these 100 days from $125.00 to $150.00. Ex. C. to Stipulation; Stipulation at ¶¶ 8, 9.

The parties agree that the Association knowingly bargained for the modified accumulated sick leave provision in the 2015 Agreement. Stipulation at ¶ 10. The parties also agree that the Association did not seek or secure Plaintiffs' permission prior to negotiating the modification to Article VIII. Id. at ¶ 11. To the contrary, several teachers, including Plaintiffs, objected to the modifications upon learning of the changes to Article VIII. Id. at ¶ 12. Notwithstanding these objections, the Association ratified the 2015 Agreement. Id. at ¶ 13. To be precise, none of the Plaintiffs voted to ratify the 2015 Agreement and continued to object to the new Article VIII. Id. at ¶ 14.

In response to Plaintiffs' objections, the Association requested the Board's permission to have Plaintiffs and other members of the teaching staff be "grandfathered" under the accumulated sick leave provisions in the 2012 Agreement. Id. at ¶ 15. This proposal called for the payment of any unused sick leave accumulated prior to July 1, 2015, be capped at $25,000.00 instead of $15,000.00. Ibid. The Board agreed to this proposal, provided that the Association renegotiate the salary guides in the 2015 Agreement or reduce the amount for tuition credit reimbursement. Id. at ¶ 16. The parties explain that these changes would have affected the membership as a whole, and not just those members who sought to be "grandfathered" under the 2012 Agreement. Ibid. Ultimately, the Association rejected the Board's counteroffer, and the Board subsequently ratified the 2015 Agreement, including Article VIII as ratified by the Association, by adopting a resolution approving of same on April 27, 2016. Id. at ¶ 17.

Additionally, the parties stipulate as to the particular impact of Article VIII of the 2015 Agreement on each of the Plaintiffs. Id. at ¶¶ 19–22. Prior to July 1, 2015, Plaintiff Kanto had accrued 233 sick days, which equated to $18,275.00 under the 2012 Agreement. Id. at ¶ 19. Plaintiff Barila had accrued 308.5 sick days, which equated to $25,000.00 under the 2012 Agreement. Id. at ¶ 20. Plaintiff Enrico had accumulated 282.5 sick days, which equated to $25,000.00 under the 2012 Agreement. Id. at ¶ 21. Likewise, Plaintiff Ludwig accumulated 263 sick days, which equated to $25,000.00 under the 2012 Agreement. Id. at ¶ 22. Since this litigation was commenced, Plaintiffs Kantor and Barila have retired and were paid for their unused accumulated sick leave pursuant to the formula set forth in Article VIII of the 2015 Agreement. Id. at ¶ 23. The Board has taken the position that when Plaintiffs Enrico and Ludwig retire they too will be compensated for their unused accumulated sick leave pursuant to the formula set forth in Article VIII of the 2015 Agreement. Id. at ¶ 24.

II. Procedural History

Following the Board's adoption of a resolution approving the 2015 Agreement, Plaintiffs commenced this litigation by filing a Complaint on June 9, 2016. Defendant subsequently filed a Motion to Dismiss for failure to state a claim pursuant to R. 4:6-2(e) on July 27, 2016. Notably, Defendant did not argue that Count I should be dismissed for lack of subject matter jurisdiction. The Court heard oral argument on September 16, 2016, following which the Court reserved decision. On September 19, 2016, the Court entered an order denying Defendant's Motion to Dismiss.

Plaintiffs filed an Amended Complaint on September 29, 2016. The Amended Complaint asserts two Counts. Count I alleges that Defendant has deprived Plaintiffs of their vested contractual rights, whereas Count II alleges that Defendant has violated Article IV, Section VII,

Paragraph 3 of the New Jersey State Constitution and the New Jersey Civil Rights Act by impairing the earned, vested, and constitutionally protected contractual rights of Plaintiffs. Thereafter, pursuant to an agreed-upon process, the parties jointly filed a Stipulation of Facts and the within motions.

III. Plaintiffs' Argument

It is Plaintiffs' position that they are entitled to summary judgment because (i) there are no genuine issues of material fact requiring a trial in this action; (ii) Plaintiffs did not waive their vested right to compensation for unused accrued sick leave; and (iii) in the absence of such a waiver, the Association and the Board were prohibited from retroactively modifying Plaintiff's vested right to such deferred compensation in a successor agreement. Brief at 10–19.

In so arguing, Plaintiffs assert that the law is well-settled that contractual provisions that provide compensation for unused accumulated sick leave at retirement constitute "a form of deferred compensation" that cannot be divested "absent a knowing and intentional waiver by the persons adversely affected." Id. at 10–12 (internal quotation marks omitted) (quoting, citing, and discussing In re Morris School District Bd. Of Educ. and Educ. Assoc. of Morris, 310 N.J. Super. 332, 345–48 (App. Div. 1998)) (other citations omitted). Plaintiffs also assert that this right becomes "vested upon the date that plaintiff[s] fulfilled the service condition." Id. at 12 (quoting Morris School District, supra, at 346–47). Accordingly, Plaintiffs maintain that they acquired a vested right to deferred compensation in an amount of up to $25,000.00 for any unused sick leave that had accrued prior to July 1, 2015. Id.

Plaintiffs argue further that New Jersey case law holds that a contractual right to accrued sick leave contained in a collective negotiation agreement "constitute[s] remuneration for services rendered during the periods covered by the prior collective bargaining agreements,"

which survives the terms of those agreements. Id. (internal quotation marks omitted) (quoting Morris School District, supra, at 345) (citing Caponegro v. State Operated Sch. Dist. Of City of Newark, Essex Cty., 330 N.J. Super. 148, 156 (App. Div. 2000)). Nor can these rights be divested "absent a knowing and intentional waiver by the persons adversely affected." Id. at 12–13 (quoting Morris School District, supra, at 347).

Because compensation for accumulated sick leave is based on "services rendered during the periods covered by the prior collective bargaining agreements," Plaintiffs maintain that a collective bargaining representative is legally unable to "negotiate away" compensation that has already been earned by its individual members. Id. at 13 (discussing Morris School District, supra, at 345–48). In further support of its position that a collective bargaining representative's authority to negotiate on behalf of its members is not absolute, Plaintiffs analogize their right to unused and accrued sick days to the rights conferred under Title VII, which similarly cannot be negotiated during the collective bargaining process absent a valid waiver. Id. at 13–14 (quoting and discussing Alexander v. Gardner-Denver, 415 U.S. 36 (1974)).

In applying these principles to this action, Plaintiffs argue that the stipulated facts establish that Plaintiffs hold a vested right to deferred compensation as set out in a collective negotiation agreement ("CNA"). Id. at 14. Pursuant to the Appellate Division's holding in Morris, Plaintiffs contend that the Association and the Board lacked the authority to divest Plaintiffs of that vested right absent a knowing and intentional waiver by each of them.[1] Ibid. Accordingly, the thrust of Plaintiff's argument is that the Board unlawfully adopted a resolution, which retroactively divested Plaintiffs of their accrued right to unused sick leave. Ibid. In the

[1] Plaintiffs argue further that, even assuming, for the sake of argument, that the Appellate Division's statements requiring a "knowing" and "voluntary" waiver by the adversely affected individuals are dictum, this Court would nonetheless be bound by such dictum. Brief at 15 n.3 (citation omitted) (citing In re A.D., 441 N.J. Super. 403, 422 (App. Div. 2015)).

absence of any evidence that Plaintiffs knowingly and intentionally waived their right to deferred compensation, Plaintiffs submit that they are entitled to judgment as a matter of law. Id. at 14–15.

Additionally, Plaintiffs emphasize that the parties have stipulated to the facts that the Association never consulted Plaintiffs, nor obtained their approval, prior to negotiating sick leave provisions. Id. at 15. If there was any doubt as to Plaintiff's position, such doubt was clarified by Plaintiffs' objection to the modifications and subsequent vote against ratifying the 2015 Agreement. Ibid. In light of these undisputed facts, Plaintiffs assert that Defendants cannot proffer any evidence from which a reasonable juror would conclude that Plaintiffs voluntarily and knowingly waived their right to deferred compensation under the prior agreements. Id. at 15–16. Consequently, the issue of waiver must be resolved in Plaintiff's favor. Id. at 16.

Lastly, Plaintiffs address Count II of the Amended Complaint. Id. at 16–19. In particular, Plaintiffs argue that the Board's ratification of the 2015 Agreement constitutes a violation of the Contracts Clause of the New Jersey State Constitution as a result of Plaintiffs' failure to knowingly and intentionally waive their vested right to deferred compensation. Ibid. Article IV, Section VII of the New Jersey Constitution provides that "[t]he Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." Id. at 12 (internal quotation marks omitted) (quoting N.J. Const. art. IV, § VII, ¶ 3). Plaintiffs assert that our courts apply a three-part test to determine whether a violation of the Contracts Clause has occurred. Id. A court must assess "whether there is a contractual relationship, whether a change in a law impairs that contractual relationship, and whether the

impairment is substantial." Id. (internal quotation marks omitted) (quoting N.J. Educ. Ass'n v. State, 412 N.J. Super. 192, 206 (App. Div.), certif. denied, 202 N.J. 347 (2010)).

Plaintiffs submit that there is no version of the stipulated facts that would permit a reasonable factfinder to conclude that the Board's resolution, which ratifying the 2015 Agreement, did not substantially impair Plaintiff's vested contractual rights in violation of the Contracts Clause. Id. at 17. In support, Plaintiff emphasize that they each possessed a vested right to compensation for their accumulated sick leave in an amount of up to $25,000.00 under the 2012 Agreement. Ibid. Nor is it disputed that the Board's resolution substantially impaired these rights. Ibid. Furthermore, Plaintiffs assert that the Board's adoption of a resolution, which purports to retroactively cap the amount of compensation for accrued sick leave, constitutes a "law impairing the obligation of contracts" in violation of the Contracts Clause. Id. (citing Daniel v. Borough of Oakland, 124 N.J. Super. 69 (App. Div. 1973)). Based on the foregoing, Plaintiffs submit that they are entitled to summary judgment on Count II of their Amended Complaint as well. Id.

Finally, Plaintiffs address the particular relief sought under Count II of the Amended Complaint, namely, costs and fees pursuant to the New Jersey Civil Rights Act (the "CRA"). Id. at 17–19. Plaintiffs contend that the rights asserted by Plaintiff in this action are conferred upon them by the Contracts Clause of the New Jersey State Constitution. Id. at 18. Plaintiffs argue further that the CRA was designed to ensure that the burden of fees falls upon the party who violated such rights. Ibid. Consistent with this purpose, the CRA provides that a plaintiff who prevails in litigation pursued under a New Jersey statute that authorizes fee-shifting is entitled to receive fees "as a matter of course in the absence of special circumstances." Id. (internal

quotation marks omitted) (quoting Dunn v. N.J. Department of Human Services, 312 N.J. Super. 321, 333 (App. Div. 1998)).

In applying these principles to this action, Plaintiffs contend that they have demonstrated that the Board—a State actor—interfered with and deprived Plaintiffs of their vested rights to deferred compensation, which they earned under the 2012 Agreement. Id. at 19. Because such retroactive legislation is prohibited by the New Jersey State Constitution, Plaintiffs maintain that they have demonstrated a violation of the CRA. Ibid. Accordingly, Plaintiffs submit that an award of fees and costs is appropriate here. Ibid.

IV. Defendant's Argument

Defendant asserts three overarching arguments in opposition to Plaintiffs' Motion for Summary Judgment and in support of its Motion for Summary Judgment. First, Defendant argues that Count I of the Amended Complaint must be dismissed because the Court lacks subject matter jurisdiction to determine whether the accumulated sick leave provisions fall within the scope of the Association's and the Board's negotiations. Opposition Brief at 5–9. Second, Defendant argues that, assuming that the Court has subject matter jurisdiction, Count I should nonetheless be dismissed because Plaintiffs have failed to state a claim that the accumulated sick leave provision creates a vested right to payment in an amount greater than $15,000. Id. at 9–26. Third, Defendant argues that Count II of the Amended Complaint must be dismissed because Plaintiffs are unable to establish that the Board has violated the Contracts Clause of the New Jersey Constitution. Id. at 27–34.

First, Defendant argues that Count I, though phrased as a violation of contractually vested rights, is actually a challenge to the Board's and the Association's ability to negotiate the adopted changes to the accumulated sick leave provisions and to allow the changes to apply

retroactively. Id. at 5–6. Essentially, Plaintiffs claim that the Board and the Association were not permitted to negotiation these provisions. Id. at 6. As such, Defendant asserts that Count I concerns the scope of negotiations, which is a subject that falls within the exclusive jurisdiction of PERC. Ibid. Because only PERC is authorized to entertain issues regarding the negotiability of the accumulated sick leave provisions, Defendant contends that this Court must dismiss Count I. Ibid.

In support of its position, Defendant discusses the Supreme Court's decision in State v. State Supervisory Emps. Ass'n, 78 N.J. 54 (1978). Id. at 7. In that case, the Supreme Court announced that, pursuant to N.J.S.A. 34:13A-5.4(d), "PERC is the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations. . . . No court of this State is empowered to make [the scope of negotiations determination." Id. (internal quotation marks and citations omitted) (quoting State Supervisory Emps. Ass'n, supra, 78 N.J. at 83). Defendant argues further that the Supreme Court's decision was followed by the Appellate Division in Morris School District, supra, which action was dismissed on the ground that PERC "had primary jurisdiction concerning the retroactive application of the caps was outside the scope of negotiations." Id. at 8 (internal quotation marks omitted) (quoting Morris School District, supra, 310 N.J. Super. at 335–36). Defendant contends that here, just as in Morris School District, Plaintiffs' claim is a scope of negotiations issue that must be considered by PERC in the first instance. Id. Because PERC must first determine the scope of negotiations issue, this Court has no jurisdiction to make that determination in this action. Id. at 8–9.

Second, Defendant argues that, even if this Court has subject matter jurisdiction over this action, Plaintiffs have no vested rights that the Board and the Association were prohibited to negotiate away. Id. at 9–26. Accordingly, Defendant asserts that Count I fails for three reasons:

(i) there is no law precluding collective negotiations of accumulated sick leave; (ii) Plaintiffs do not have a vested contractual right to a certain amount of compensation for accumulated sick leave; and (iii) even assuming the existence of such vested rights, there is no authority that prevents the Association from negotiating such rights away in exchange for concessions from the Board. Ibid.

As to the argument that there is no law that prohibits collective negotiations over accumulated sick leave provisions, Defendant begins by attacking Plaintiffs' reliance on Morris School District. Id. at 9–14. Defendant explains that Plaintiffs' entire argument rests on a single sentence found in the final paragraph of the Appellate Division's decision, which reads: "Although these decisions are not directly on point, they support the policy adopted by [PERC] barring the divestment of accumulated sick leave compensation absent a knowing and intentional waiver by the persons adversely affected." Id. at 10 (quoting Morris School District, supra, 310 N.J. super. at 347). Plaintiffs contend that this statement establishes that only they, and not the Association, are able to waive their right to compensation for accumulated but unused sick leave. Id. However, Defendant asserts that a close reading of the Appellate Division's decision demonstrates otherwise. Ibid.

Defendant stresses that in Morris School District a factfinder was appointed after the school district and the union reached an impasse in their negotiations over a successor collective bargaining agreement. Id. at 10–11 (citing Morris School District, supra, at 335). The factfinder then recommended that the successor agreement include a retroactive cap on compensation for accrued sick leave, which was adopted as a result of the union's prior agreement to be bound by the factfinder's recommendations. Id. at 11 (citing Morris School District, supra, at 335–36). The union subsequently sought a scope of negotiations determination from PERC, which

concluded that the cap must be entered into knowingly, meaning that the union was aware that a retroactive cap was being negotiated. Id. (citing In re Morris Sch. Dist. Bd. of Educ., 23 NJPER ¶ 28150, 1997 WL 34821116 (Hearing Examiner May 9, 1997)). Defendant emphasizes that PERC did not hold that the individual members of the collective bargaining unit had to knowingly and intentionally waive their rights. Id. at 12 (citing In re Morris Sch. Dist. Bd. of Educ., 23 NJPER ¶ 28200, 1997 WL 34821116 (PERC May 30, 1997)).

On appeal, the Appellate Division found that "the Association's negotiators and the employees they represented entered into the factfinding proceeding with the reasonable expectation that whatever the new proposal the factfinder might urge, the right to earn deferred compensation would not be jeopardized." Id. (citing Morris School District, supra, at 347–48). Accordingly, the Appellate Division adopted PERC's conclusion that the union—not the individual members—had to knowingly and intentionally negotiate the accumulated sick leave provisions. Id.

Consequently, Defendant submits that the Appellate Division incorrectly stated that PERC's policy "barr[ed] the divestment of accumulated sick leave absent a knowing and intentional waiver by the persons adversely affected." Id. at 12–13 (internal quotation marks omitted) (quoting Morris School District, supra, at 347). To the contrary, Defendant maintains that PERC expressly refused to decide this issue, which the Appellate Division recognized earlier in its opinion when it stated that PERC "chose not to decide whether a union could bargain away the accrued wages and benefits of some of its members." Id. at 13 (internal quotation marks omitted) (quoting Morris School District, supra, at 336–37).

Notwithstanding the foregoing, Defendant argues that the Appellate Division's misstatement of PERC's conclusions has no precedential value and cannot bind this Court. Id. at

13. Plaintiffs maintain that this Court is bound by the Appellate Division's dictum even though it is clear that the Appellate Division did not hold that the knowing and intentional wavier of the individually affected members was required. Ibid. Instead of supporting their position with case law that holds that trial courts are bound by the opinions of the Appellate Division, Plaintiffs rely on cases holding that Supreme Court dicta is binding on the Appellate Division. Ibid. Defendant submits that this logical leap is contrary to the law, which is that trial courts are only obligated to follow "carefully considered" Appellate Division dicta. Id. at 13–14 (citing Peters v. Marriott Corp., 278 N.J. Super. 327, 339 (Law Div. 1994); State v. Allen, 212 N.J. Super. 276, 279 (Law Div. 1986); State v. Sorensen, 439 N.J. Super. 471, 488 (App. Div. 2015)). Because the two PERC decisions that preceded the Appellate Division's decision demonstrate that the Appellate Division's statement was not carefully considered, this Court is not bound by it. Ibid.

Lastly, Defendant argues that the two cases Plaintiffs rely upon offer no support for Plaintiffs' arguments that the Association could not bargain away a portion of its members' compensation for accumulated sick leave. Id. at 14–17. Defendant explains that the first case, Caponegro v. State Operated School District of Newark, 330 N.J. Super. 148 (App. Div. 2000), "stands for the unremarkable and undisputed proposition that the employer cannot unilaterally divest payment for accumulated sick leave." Id. at 14–15. In differentiating the operative facts from those in Caponegro, Defendant states only that "[t]his is a starkly different situation". Id. at 15. Defendant argues that the second case, Lawrence v. Bd. of Educ. of School District 189, 503 N.E.2d 1201 (Ill. App. 1987), which the court in Morris School District discussed at length, is equally distinguishable. Id. at 15–16. Defendant explains that the plaintiff in Lawrence was lead to believe for years that he would receive payment for his accrued sick leave upon his retirement, then his suddenly employer reversed course two days prior to his retirement, and the plaintiff

received no compensation whatsoever. Ibid. Here, Plaintiffs have not alleged that they were misled by the Board, nor do they claim that they retired with the expectation of received compensation for their accrued sick leave in an amount over $15,000.00. Id. at 16.

Because Plaintiffs have not offered any authority demonstrating that there is no legal bar to negotiating over the maximum amount of compensation for accumulated sick leave, and because the parties agree that the Association knowingly negotiated the retroactive cap, Defendant urges the Court to look to general contract principles to determine whether the contract provided Plaintiffs with a vested right to a given amount of sick leave compensation. Id. at 16–17. Defendant contends that such a review establishes that the 2012 Agreement, by its terms, provides for no such vested right. Id. at 17–18. There is no mention of vesting other than by retiring after ten years of service, terminating employment for any reason after twenty-five years, or death while the teacher would have qualified to receive payment. Id. at 18. Because these are the only three methods by which any right to accumulated sick leave could vest under the 2012 Agreement, and because nothing in the 2012 Agreement indicates that the parties intended the accumulated sick leave provisions to provide for a vested right, Defendant maintains that no such intention was ever manifested by the parties. Id. at 18–20.

In further support of this position, Defendant cites to a so-called "duration provision" of the 2012 Agreement. Id. at 18–19. This "duration provision" states: "This Agreement shall constitute in full force and effect with all attendant benefits and obligations until a successor Agreement is ratified by the Board and the Association." Id. at 18. Defendant argues that the "duration provision" is consistent with the principle of contract law that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." Id. at 18–19

(internal quotation marks omitted) (quoting M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015)) (citations omitted).

Additionally, Defendant contends that the fact that the 2015 Agreement modified the accumulated sick leave provisions prospectively and retroactively is evidence that the Board and the Association believed these provisions could be modified through future negotiations. Id. at 19–20. Defendant avers that if the Board and the Association believed that the provisions granted vested rights to Plaintiffs, they would never have negotiated the new maximum to apply retroactively. Id. at 20 (citing Brooklyn Life Ins. Co. of N.Y. v. Dutcher, 95 U.S. 269, 273 (1877)). Because the Board and the Association could not have made their intent clearer, Defendant submits that an interpretation of the 2012 provisions as surviving the expiration of the 2012 Agreement would require this Court to disregard the parties' expressed intentions. Id. (citation omitted).

Accordingly, it is Defendant's position that the accumulated sick leave provisions of the 2012 Agreement provided for three specific opportunities for vesting, none of which applied to employees who continued to be employed by the Board beyond the expiration of the 2012 Agreement. Id. at 21. Thus, for the right to compensation for accrued sick leave to vest, an employee would must have accumulated the requisite number of unused sick days, and either retired or left the Board's employ (or have died while otherwise qualified had they retired or quit at the time of death). Ibid. Because the parties never expressed a contrary intent, and the 2012 Agreement contains an integration clause, Defendant maintains that there is no way for Plaintiffs to establish a claim for breach of a vested right, as there is no such right. Id. at 21–22.

With respect to its final argument on this point, Defendant contends that, even if Plaintiffs have vested contractual rights, the existence of same, by itself, does not prevent the

Association from all negotiations regarding those vested rights. Id. at 22–26. In support, Defendant explains that while the Association lacks the authority to negotiate away its members' constitutional and statutory rights, there is no such obstacle to negotiating away its members' contractual rights. Id. at 22–23 (citations omitted). Defendant asserts that this is consistent with the goal of collective negotiations—to modify the contractual rights and duties of the parties. Id. at 23. If an individual employee's contractual rights could not be modified without his consent, then it would be impossible for the Association to fulfill its obligations. Ibid.

Defendant argues further that courts have held that unions are permitted to "extinguish" members' vested contractual rights. Id. at 23–24 (citations omitted) (quoting and discussing Int'l Longshoremen's & Warehousemen's Union v. Kuntz, 334 F.2d 165, 171 (9th Cir. 1964)). Accordingly, Defendant asserts that Plaintiffs' disagreement with the Association and their dissatisfaction with the 2015 Agreement are insufficient to void the sick leave provisions challenged here. Id. at 24 (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)). Defendant similarly argues that Plaintiffs are bound by the 2015 Agreement as negotiated by the Association and should not be allowed to pick and choose those aspects of the 2015 Agreement of which they approve. Id. at 24–25 (citing Futterman v. Bd. of Review, Dep't of Labor, 421 N.J. Super. 281, 289 (App. Div. 2011); Schact v. City of New York, 36 N.E.2d 518, 519 (N.Y. 1976)). Furthermore, if Plaintiffs disapprove of certain provisions, their recourse is against the Association for potentially violating its duty of fair representation and is not against the Board for breach of contract. Id. at 25.

Defendant maintains that it was reasonable for the Board to accept the Associations' representation that its members approve of the agreement. Id. at 25–26. If the Association was required to and failed to obtain the consent of its members yet informed the Board that the

contract was ratified, Defendant asserts that the Association, not the Board, should bear any liability for the members' missing consent. Id. at 26. It is thus the Board's position that "[i]t is fundamentally unfair to hold the Board liable for a decision made by the Association." Ibid.

Lastly, Defendant argues that Count II of the Amended Complaint must be dismissed because Plaintiffs are unable to establish that the Board has violated the Contracts Clause of the New Jersey Constitution. Id. at 27–34. Defendant agrees that the Contracts Clause prohibits the passage of a law that impairs the obligation of contracts and that courts apply a three-part test for determining whether such a violation of the Contracts Clause has occurred. Id. at 27–28 (citations omitted). However, Defendant contends that Count II nonetheless fails for three reasons: (i) the Board's resolution is not a law; (ii) the Board lacks the authority to enact law, and therefore cannot take any action that would violate the Contracts Clause; and (iii) even if the Board's resolution is law, the Board has not violated the Contracts Clause because the resolution has not eliminated Plaintiffs' remedy for breach of contract. Id. at 29–34. Each of Defendant's arguments is addressed in turn.

With respect to its contention that the Board's resolution is not a law, Defendant argues that Plaintiffs mistakenly assume that a resolution is a law. Id. at 29–30. Defendant specifies that Plaintiffs incorrectly reason that since an ordinance is a law, and a resolution is the equivalent of an ordinance, then a resolution must be a law. Id. at 29. In support, Defendant distinguishes ordinances from resolutions. Id. at 29–30. To that end, Defendant explains that "the term 'ordinance' encompasses matters legislative in character, while 'resolution' refers to matters administrative or procedural in nature." Id. at 29 (internal quotation marks omitted) (quoting Albigese v. Jersey City, 129 N.J. Super. 567, 569 (App. Div. 1974)). Defendant explains further that New Jersey courts have consistently held that a resolution "is simply an

expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance," and is not a legislative act. Id. at 29–30 (quoting and discussing Inganamort v. Borough of Fort Lee, 72 N.J. 412, 418 (1977)).

As applied to this case, Defendant contends that the Board's resolution ratifying the 2015 Agreement is an expression of its approval of the agreement. Id. at 30. Defendant maintains that there is no indication that the resolution is a legislative act that could to trigger the application of the Contracts Clause. Id. at 30–31. As a result, Defendant submits that the resolution is not a law, and is legally insufficient as Plaintiffs' basis of its Contracts Clause Claim. Id. at 31.

Additionally, Defendant argues that the conclusion that the Board's resolution is not law is even clearer after analyzing the Board's delegated legislative authority, which does not include the authority to enact laws. Id. at 31–33. Defendant explains that there must first be legislation for there to be a change in law that impairs a contractual relationship. Id. at 31 (citing Nobrega v. Edison Glen Assocs., 167 N.J. 520, 538 (2001)). Defendant explains further that the New Jersey Constitution vests all legislative power in the Senate and General Assembly; however, the Legislature may delegate some of its legislative power to boards of education. Id. Despite the ability to so delegate its legislative power, Defendant asserts the statutory provision concerning boards of education makes no mention of a delegation of legislative power. Id. (citing N.J.S.A. 18A:11-1).

Defendant argues that the failure to delegate any authority to enact laws to boards of education is crucial because boards of education are permitted to exercise only those powers which are expressly granted by the Legislature and those powers that are necessary or implied by the Legislature. Id. at 31–32 (quoting Elizabeth Bd. of Educ. v. N.J. Transit Corp., 342 N.J. Super. 262, 268 (App. Div. 2001) (internal citations omitted)). Because boards of education

have no statutory authority to enact laws, Defendant submits that the Board, in this case, could not have violated the Contracts Clause. Id. at 32.

In further support of this position, Defendant contrasts the authority expressly delegated to boards of education with the authority expressly delegated to municipalities. Ibid. Defendant specifies that the Legislature has expressly granted municipalities the ability to enact ordinances concerning certain identified topics as wells as ordinances "deem[ed] necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health safety and welfare of the municipality and its inhabitants [. . .]." Id. (quoting N.J.S.A. 40:48-2) (citing N.J.S.A. 40:48-1). In contrast, the Legislature has made so similar delineation or enumeration of legislative power to boards of education. Id. Accordingly, Defendant argues that this Court must hold that the Legislature granted boards of education legislative power by implication in order to accept Plaintiffs' position. Ibid. Defendant asserts that such a holding would contravene the Legislature's practice of specifically enumerating the topics that municipalities have authority to legislate on. Id. at 33.

Finally, Defendant argues that, even if the Board had the requisite legislative authority and assuming that the resolution ratifying the 2015 Agreement is a law, Plaintiffs still cannot succeed on a Contracts Clause theory. Id. at 33–34. Defendant specifies that "Plaintiffs' claim is one for breach of contract, and the mere involvement of a subdivision of the State does not raise it to a Contracts Clause case." Id. at 33. Defendant explains that this is so because, if the law were otherwise, then "every breach of contract by a state or municipality [would be turned] into a violation of the federal Constitution." Id. at 33–34 (internal quotation marks omitted) (quoting Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th Cir. 1996)). Accordingly, Defendant asserts that a court's inquiry focuses on "whether the governmental

entity used the passage of a law to set up a defense that prevents the other party from obtaining damages for a breach of contract." Id. at 34 (citing Horwitz-Matthew, Inc., supra, at 1251). Defendant submits that there is no impairment of the obligation of a state's contract where there is no impact on the promisee's remedy. Ibid.

Because Plaintiffs have not claimed that the Board has taken legislative action to foreclose their ability to recover in breach of contract, Defendant contends that Count II must fail. Id. at 34. Defendant explains that, even if the court finds that Plaintiffs possess a vested right, Plaintiffs have a claim for breach of contract and could recover damages therefor. Ibid. Defendant argues further that the Board has not taken any action that would impair this potential remedy. Ibid. Consequently, there is no Board action that transforms Plaintiffs' breach of contract claim into a violation of the Contracts Clause. Ibid.

V. Plaintiff's Reply

First, Plaintiffs reiterate their argument that the Association and the Board could not legally agree to retroactively divest Plaintiffs of their deferred compensation already earned under prior collective bargaining agreements. Reply Brief at 3–8. In so doing, Plaintiffs contend that, even if those portions of the opinion in Morris School District upon which Plaintiffs rely are merely dictum, the Appellate Division's decision should nonetheless be afforded significant weight, as they are in accord with the recent decisions issued by the Appellate Division and Supreme Court in New Jersey Ass'n of School Adm'rs v. Schunder, 414 N.J. Super. 530 (App. Div. 2010). Id. at 4. Plaintiffs assert that both courts recognized that unused, accumulated sick leave constitutes a protectable property interest and accordingly held that a statute or regulation cannot retroactively cap the amount of compensation for accrued sick leave. Id. at 4–6.

Plaintiffs proceed by challenging Defendant's characterizations of applicable New Jersey case law. Id. at 6–8. For example, Plaintiffs contend that Defendant's attempt to distinguish Caponego and Lawrence, upon which the Morris School District court relied, are ineffective. Id. at 6. Plaintiffs explain that each of these decisions recognized sick leave as a form of deferred compensation that is earned at the time of service. Ibid. Consistent with this principle, it is irrelevant what the Board and the Association here intended during negotiations. Ibid. The only issue is whether the Board and the Association could legally agree to modify the accumulated sick leave provisions in such a way as to retroactively divest Plaintiffs of the sick leave they already earned without Plaintiff's knowledge or assent. Ibid. It is Plaintiffs' position that precedent, such as Morris School District and Schundler, supra, preclude such provisions from having a retroactive effect. Ibid.

Similarly, Plaintiffs challenge Defendant's reliance on Owens v. Press Publishing Co., 20 N.J. 537 (1956), for the proposition that contractual agreements cease upon the expiration date of the contract. Ibid. Plaintiffs explain that, in Owens, the New Jersey Supreme Court held that this principles does not apply to deferred compensation in the collective bargaining context. Ibid. Accordingly, the Owens court concluded that the plaintiffs' right to severance pay was earned during the term of the agreement that provided for such pay and that this right survived the expiration of the agreement. Id. at 6–7.

Plaintiffs argue that they, like the plaintiffs in Owens, earned the sick leave at issue during terms of the prior agreements, all of which provided that the Board would pay Plaintiffs a maximum of $25,000.00 for their accrued, unused sick leave upon retirement. Id. at 7 (citing Owens, supra, 20 N.J. at 547; Caponegro, supra, 330 N.J. Super. at 156). Based on the foregoing, Plaintiffs maintain that they possess a vested right to deferred compensation as

provided for in a collectively negotiated agreement, which the Board had no authority to divest absent a knowing an intentional waiver by each Plaintiff. Id. at 7–8.

Second, Plaintiffs argue that the Board's adoption of a resolution ratifying the collective negotiations agreement constitutes a "legislative act" in violation of the Contracts Clause of the New Jersey State Constitution. Id. at 8–12. More specifically, Plaintiffs contend that Defendant's arguments that a resolution is not a "legislative act" and that a school board has no authority to engage in "legislative acts" must be rejected in light of the New Jersey Supreme Court's decision in Rall v. Bd. Of Educ. of the City of Bayonne, 54 N.J. 373 (1969). Id. at 8.

Plaintiffs explain that, in Rall, the Supreme Court held that a school board's resolution reducing the amount of time necessary to acquire tenure constituted a legislative act that fell within the statutory grant of power authorizing the board to "fix[]" the period for the acquisition of tenure for superintendents of schools. Id. (internal quotation marks omitted). In so holding, the Court recognized that boards of education routinely engage in legislative acts pursuant to various statutory grants of power and that such the adoption of resolutions is one of such acts. Id. at 10. Based on the foregoing, Plaintiffs aver that Rall stands for the proposition that a board of education engages in a "legislative act" when it adopts a resolution pursuant to a statutory grant of power. Ibid. When applying the Supreme Court's holding in Rall to this case, Plaintiffs maintain that the Board's resolution ratifying the 2015 Agreement qualifies as a legislative that that substantially impaired Plaintiffs' existing contractual rights. Id. at 11. Defendant's arguments must accordingly be rejected. Id. at 10.

Additionally, Plaintiffs argue that the Board improperly relies upon Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248 (7th Cir. 1996), for the proposition that Plaintiffs cannot sustain their claim under the Contracts Clause because they have an adequate remedy for breach

of contract. Id. at 11. Plaintiffs explain that, firstly, Horwitz-Matthews, Inc., involved a claim brought under the Contracts Clause of the U.S. Constitution, not the New Jersey State Constitution. Ibid. Secondly, no New Jersey court has held that breach of contract claims and claims brought under the New Jersey Constitution's Contract Clause are mutually exclusive. Ibid. Finally, the facts of Horwitz-Matthews, Inc. establish that that case is inapposite to the case at bar. Ibid. Plaintiffs explain that the agreement at issue in Horwitz-Matthews, Inc. contained a force majeure clause and the only question presented was whether the City's failure to perform under the agreement was a breach of contract as well as a constitutional violation. Id. at 11–12.

Plaintiffs emphasize that here, in contrast, the Board adopted a resolution that ratified a successor agreement, which retroactively divested the vested property rights earned under prior collective bargaining agreements. Id. at 12. Plaintiffs maintain that "[s]uch action clearly constitutes a violation of the contract clause prohibiting the impairment of contracts, and the fact that some of the Plaintiffs may also have a remedy for breach of contract, does not vitiate this claim." Ibid.

Finally, Plaintiffs argue that this Court has jurisdiction to adjudicate Plaintiffs' claims. Id. at 12–14. In particular, Plaintiffs contend that Defendant's argument that the Court lacks subject matter jurisdiction over Count I, because it concerns the scope of negotiations, demonstrates that Defendant misconstrues Plaintiffs' claims and the scope of PERC jurisdiction. Id. at 12. Plaintiffs explain that the Amended Complaint clearly signals that Plaintiffs are alleging that certain contractual rights were violated and does not raise any negotiability issues. Id. at 13. Nor does Count I allege that the Board and the Association were barred from negotiating an accumulated sick leave provision. Ibid. Plaintiffs claim only that any such

negotiated provision may only apply prospectively as a matter of law and cannot alter the value of accumulated, unused sick leave earned under prior agreements. Ibid.

With respect to PERC's jurisdiction over public employment disputes, Plaintiffs explain that, pursuant to N.J.S.A. 34:13A-5.4(d) and N.J.A.C. 19:13-2.1, PERC has primary jurisdiction over negotiability disputes that arise between the public employer and the representative. Ibid. As such, individual employees are not permitted to initiate a scope of negotiations proceeding before PERC. Ibid. Therefore, even if Plaintiffs' Amended Complaint raised a negotiability issue, PERC would not have jurisdiction over Plaintiffs' claims. Id. at 13–14 (citing Petersen v. Twp. of Raritan, 418 N.J. Super. 125 (App. Div. 2011); Jersey City v. Jersey City Police Officers Benevolent Association, et al., 2013 N.J. Super. Unpub. LEXIS 1863 (App. Div. 2013)). Plaintiffs argue further that the aforementioned statues are consistent with the extensive body of case law, which stands for the proposition that a collective bargaining representative may pursue a grievance on behalf of a member while the member concurrently "pursues a private remedial alternative available in another forum." Id. at 14 (internal quotation marks omitted) (quoting Bd. of Educ. Of the Borough of Fair Lawn v. Fair Lawn Educ. Ass'n, 174 N.J. Super. 554, 559 (App. Div. 1980)). Based on the foregoing, Plaintiffs submit that Defendant's arguments that Plaintiffs' claims are precluded from seeking the relief of this Court are inaccurate as a matter of law and must be rejected. Id.

VI. Analysis

A. Subject Matter Jurisdiction

The first issue before the Court is whether this Court lacks subject matter jurisdiction to hear the parties' dispute pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(d), which establishes "PERC [a]s the forum for the initial determination of whether a

matter in dispute is within the scope of collective negotiations." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 83 (1978).

It is Defendant's position that Count I, though phrased as a violation of contractually vested rights, is actually a challenge to the Board's and the Association's ability to negotiate the adopted changes to the accumulated sick leave provisions and to allow the changes to apply retroactively. Id. at 5–6. Essentially, Plaintiffs claim that the Board and the Association were not permitted to negotiation these provisions. Id. at 6. As such, Defendant asserts that Count I concerns the scope of negotiations, which is a subject that falls within the exclusive jurisdiction of PERC. Ibid. Because only PERC is authorized to entertain issues regarding the negotiability of the accumulated sick leave provisions, Defendant contends that this Court must dismiss Count I for lack of subject matter jurisdiction. Ibid.

Plaintiffs challenge Defendant's position by arguing that the Amended Complaint alleges that certain vested contractual rights were violated and does not raise any negotiability issues. Id. at 13. Plaintiffs do not allege that the Board and the Association were barred from negotiating an accumulated sick leave provision. Ibid. Rather, Plaintiffs claim that any such negotiated provision may only apply prospectively as a matter of law and cannot alter the value of accumulated, unused sick leave earned under prior agreements. Ibid. Additionally, Plaintiffs maintain that PERC has primary jurisdiction over negotiability disputes that arise between the public employer and the representative. In contrast, an individual employee is not permitted to initiate a scope of negotiations proceeding before PERC. With respect to PERC's jurisdiction over public employment disputes, Plaintiffs explain that, pursuant to N.J.S.A. 34:13A-5.4(d) and N.J.A.C. 19:13-2.1, PERC has primary jurisdiction over negotiability disputes that arise between

the public employer and the representative. Ibid. As such, individual employees are not permitted to initiate a scope of negotiations proceeding before PERC.

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(d) provides: "The commission 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." As a result, our courts have routinely held that "PERC's jurisdiction [over the negotiable terms and conditions of employment] is primary." State Supervisory Employees Ass'n, supra, 78 N.J. at 83. Furthermore, "working hours, compensation, physical arrangement and facilities and customary fringe benefits [are considered] the essential components of terms and conditions of employment." Id. at 67 (citing Board of Education v. Englewood Teachers Ass'n, 64 N.J. 1, 6–7 (1973)). Accordingly, when a controversy "concerns the propriety of the parties negotiating and agreeing on the item in dispute, [the trial judge] should refrain from passing on the merits of the issue," because "PERC has primary jurisdiction." Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 153–54 (1978).

The issues presented by the parties herein are (i) whether Count I of the Amended Complaint presents a scope-of-negotiations question; and (ii) who may initiate a scope-of-negotiations action before PERC. The Court addresses the latter issue first.

Although it is well-settled that the New Jersey Employer-Employee Relations Act confers exclusive jurisdiction upon PERC to determine whether a particular subject falls within the scope of collective negotiations, the question of whom may initiate such an inquiry is not as clear. At least one court has explicitly found that N.J.S.A. 34:13A-5.4(d) "allows only public employers and majority representatives to request scope-of-negotiation decisions." Loigman v.

Township Committee of the Tp. of Middletown, 297 N.J. Super. 287, 303 (App. Div. 1997). This finding has been implicitly recognized by at least two other courts. Petersen v. Township of Raritan, 418 N.J. Super. 125 (App. Div. 2011) (where an individual plaintiff was permitted to sue his employer, the defendant township, alleging that that defendant's elimination of traditional health care benefits to retirees violated a 1997-1999 collective negotiations agreement); City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 2013 N.J. Super. Unpub. LEXIS 1863 (App. Div. July 25, 2013) (explaining that "Peterson was an action brought by an individual, rather than an action commenced by a bargaining unit on behalf of its members, as are the circumstances here"). However, none of these authorities address the narrower question of whether a public employer may bring a scope-of-negotiations dispute before PERC where that dispute is between the public employer and four of its employees—not their representative—and where the individual employees, the plaintiffs, do not want PERC as their forum.

Notwithstanding this ambiguity, there is no dispute that that Plaintiffs could not file such an action with PERC. New Jersey case law also demonstrates that the Board could have initiated a proceeding before PERC during the pendency of this action to test its theory that PERC and only PERC can adjudicate the propriety of the Association's and the Board's agreement to deprive Plaintiffs—retroactively—of vested sick pay they had already earned. However, the Board, at least as of this date, has not elected to initiate such a process. Additionally, the Association has expressed no interest in initiating any such process. Nor has it sought to intervene in this case.

Though well-argued, and not without appeal, the Court finds unpersuasive Defendant's argument that Count I alleges a scope-of-negotiations issue. The parties agree that the Board and the Association were and are authorized to negotiate over accumulated sick leave provisions to

apply prospectively. The question presented by Count I is whether the Board and the Association could retroactively divest Plaintiffs of their vested rights to deferred compensation in an amount that exceeds $15,000.00. The fact that Plaintiffs assert, as part of their argument, that their vested rights were non-negotiable, because they had vested, does not in my view convert Plaintiffs' claim into a scope-of-negotiations issue. To the contrary, at the heart of Plaintiffs' Amended Complaint is whether the Board could negotiate away their vested, individual, contractual rights, the Association's complicity notwithstanding.[2] At this stage, the Court will proceed with its analysis of Count I.

B. Count I

Defendant argues that Count I fails for three reasons: (i) there is no law precluding collective negotiations of accumulated sick leave; (ii) Plaintiffs do not have a vested contractual right to a certain amount of compensation for accumulated sick leave; and (iii) even assuming the existence of such vested rights, there is no authority that prevents the Association from negotiating such rights away in exchange for concessions from the Board.

Plaintiffs admit that the Board has the authority to negotiate accumulated sick leave provisions, provided that they are to apply prospectively. Indeed, our courts have held that a board of education may authorize payment of retirement benefits based upon accumulated sick leave. Maywood Education Ass'n v. Maywood Board of Education, 131 N.J. Super. 551, 555 (Ch. 1974). Equally clear is that whether and to what extent sick leave compensation is paid upon retirement are matters that are subject to 'collective negotiation.'" Morris School District, supra, 310 N.J. Super. at 342 (citing Maywood Educ. Ass'n, supra, at 555). This case is law is consistent with various statutory provisions, including N.J.S.A. 18A:30-1 to -7.

[2] Query: Under the Board's theory, would an argument that a board of education and a collective bargaining unit are unauthorized to negotiate away earned tenure of some of the unit's members automatically convert the dispute into a scope-of-negotiations issue?

To that end, New Jersey law also recognizes payment for accumulated sick leave as a form of deferred compensation that is to be protected. Morris School District, supra, 310 N.J. Super. at 345 ("[T]he teachers' right to accumulated sick leave compensation—like the health insurance benefits in Gauer, the retroactive pay increase in State Troopers Fraternal Ass'n, and the severance pay in Owens—in a real sense constituted remuneration for services rendered during the periods covered by the prior collective bargaining agreements and was deserving of special protection."); Schundler, supra, 211 N.J. at 550 (upholding N.J.A.C. 6A:23A-3.1(a) and N.J.S.A. 18A:30-3.5, a legislative cap on sick leave payments, in part, because the rules and regulations apply "purely prospectively" and did "not affect existing agreements or alter terms of employment retroactively"); Caponegro, supra, 330 N.J. Super. at 156 ("We have no quarrel with the conclusion that Section a employees were not intended to have these prospective benefits upon termination, and, indeed, they do not argue to the contrary. But the benefits of accumulated vacation days and sick leave stand on an altogether different footing. As we pointed out in [Morris School District], a contractual right to compensable accumulated leave is typically characterized as deferred compensation since it constitutes remuneration for services already rendered and, to the extent already earned, is not subject to unilateral divestment by the employer."); Morris School District, supra, 310 N.J. Super. at 347 (quoting and endorsing Lawrence v. Board of Education of School District 189, 152 Ill. App. 3d 187, 203 (1987) ("We conclude that the retirement benefit sought by plaintiff can be characterized as a form of deferred compensation in that plaintiff worked days when he was ill in order to accumulate the sick leave days as a retirement benefit[.]")). It is also undisputed that, for over twenty years, the Board has allowed the accumulation of sick leave to be exchanged as a form of deferred compensation upon retirement, and, in certain circumstances, upon leaving the Board's employ for any reason.

Based on the foregoing, it is clear that the Board was authorized to negotiate over the accumulated sick leave provisions prospectively, or going forward. In contrast, a board of education is generally not permitted to divest teachers of their vested rights earned under prior collective negotiation agreements. Accordingly, two questions are presented by Count I: (i) did Plaintiffs' rights under the 2012 Agreement and its predecessors vest; and, if so, (ii) was the Board permitted to negotiate away Plaintiffs' vested rights without their individual approval.

The accumulated sick leave provisions of the 2012 Agreement stated that any teacher, who, had either been employed by the Board for at least ten years and retired under the Teachers' Pension and Annuity Fund, or who had been employed by the Defendant for twenty-five years and left the employ of the Board for any reason, was entitled to compensation, as calculated by a specified formula, for accumulated but unused sick leave, up to a maximum amount of $25,000.00. Stipulation at ¶ 5. Although the 2012 Agreement specifies that the compensation for accumulated, unused sick leave was to begin with the 2009-2010 school year, the parties agree that an identical provision has appeared in previous collective negotiations agreements for at least the past twenty years. The 2015 Agreement modified the formula used to calculate a teacher's compensation and capped the maximum amount of compensation at $15,000.00.

Like the school board in Morris School District, the Defendant herein

> contends that the teachers had no guaranty their right to fringe benefits would extend beyond the period governed by the previous collective bargaining agreement. [The Board] argues that under prior agreements, retirement was the condition that triggered the right to obtain deferred compensation. The Board thus asserts that absent retirement during the period governed by the previous collective bargaining agreement, the teachers had a mere expectancy that was subject to negotiation.

Morris School District, supra, 310 N.J. Super. at 342–43. Although the Appellate Division did not address in Morris School District whether the teachers' rights to deferred compensation

vested, the Supreme Court, in Owens v. Press Publishing Co., 20 N.J. 537, 548 (1956), held that severance pay, as a form of deferred compensation "was not conditioned upon the employee's discharge from service within the term of the collective bargaining agreement." In so holding, the Supreme Court explained:

> [T]he right to such pay can "arise" only during the subsistence of the contract so providing, and not after its termination; but once the right thus comes into being it will survive the termination of the agreement. Discharge from service during the term of the contract is not a condition sine qua non to the enforcement of the accrued right.

Ibid. Pursuant to the Court's holding, the employees' rights to severance pay became vested upon fulfillment of the service conditions as provided for in the CNA. Ibid. Because the rights vested once the fringe benefit was earned, the employees' vested rights survived the expiration of the collective bargaining agreement. Ibid.

As such, the holding and rationale of Owens is in accord with the case law holding that compensation for accumulated sick leave upon retirement is a form of deferred compensation. The rationale underlying those decisions is that compensation for accumulated sick leave is "earned" during the service performed by the teachers during the term of any particular collective negotiation agreement. Indeed, the connection between the compensation and the teachers' service is essential to a finding that accumulated sick leave constitutes a customary fringe benefit. Fair Lawn Education Asso. v. Fair Lawn Board of Education, 79 N.J. 574, 580 (1979) ("[T]he provisions of the Employer-Employee Relations Act do not operate to confer authority upon the Board to agree to compensation schemes which bear no relation to the amount and quality of the services which its teaching employees have rendered. We therefore conclude that the Board has not been delegated the power to agree to or make the payments called for by the ERR plan here at issue. These payments, being unrelated to service, do not constitute

'compensation' or 'customary fringe benefits' with respect to which negotiation is permissible.").

It is also consistent with case law holding that such vested rights endure even after a collective negotiation agreement terminates. Morris School District, supra, 310 N.J. Super. at 347 (quoting Lawrence, supra, at 203) ("[We] find that the 'merit pay' for accumulated sick leave days under the previous terms of the collective bargaining agreements vested upon the date that plaintiff fulfilled the service condition. Once that service condition was fulfilled, the benefit derived from plaintiff's term of service was vested and could only be divested by failure to satisfy the eligibility requirements.").

Additionally, in Owens, the Supreme Court declined plaintiffs' claims for severance pay allegedly earned during the period between the expiration of the collective bargaining agreement and their discharge. In so doing, the Court recognized that:

> When the contract under which the right to severance pay arose expired of its own limitation, the right itself came to an end save as to the pay that had accrued during the contract term. [. . .] It is of the very nature of the collective agreement that once it expires of its own limitation it is no longer an integral part of the direct contract of hire between the employer and the employee, unless there be explicit provision otherwise. A contract arises and subsists by the consent of the parties. Severance pay was a term of the particular employment contract only so long as the collective agreement so provided.

As a result, this Court concludes that a teacher's right to accumulated sick leave becomes vested upon fulfilling the service conditions and that these rights survive the expiration of a collective negotiation agreement. Even though the right to deferred compensation is earned pursuant to the terms of a particular agreement, this right becomes vested as a result of the teacher's service and endures beyond the life of the agreement. However, boards of education are at liberty to alter, amend, or even eliminate such provisions and rights from future agreements, but not retroactively.

Applying these principles to this case, it becomes clear that Plaintiffs' rights to compensation for accumulated sick leave upon retirement, as set forth in the 2012 Agreement, vested upon Plaintiff's fulfillment of the service conditions therein. Contrary to Defendant's position, Plaintiffs were not required to retire, or otherwise leave the Board's employ, during the term of the 2012 Agreement or else surrender the deferred compensation that they had earned over the course of several years. Moreover, by virtue of the fact that Plaintiffs worked to earn each accumulated sick day, Plaintiffs' vested right survived the expiration of the 2012 Agreement. Despite Defendant's argument that the 2015 Agreement demonstrates the Board's and the Association's shared intent, the fact that nearly identical accumulated sick leave provisions remained in the CNA's between the Board and the Association for over twenty years suggests that the parties intended these vested rights to endure beyond the terms of the individual agreements. Even if one were to conclude that the bargaining parties intended to deprive certain teachers of already earned and vested rights, the resulting Agreement is nonetheless ineffective in achieving said intended result.

The only remaining issue is whether the Association and the Board were able to negotiate away Plaintiffs' vested rights to deferred compensation without receiving their individual approval. Plaintiffs place much stock in those provisions of the decision in Morris School District in which the Appellate Division states that the employees could not be divested of their "accumulated sick leave compensation absent a knowing and intentional waiver by the persons adversely affected." Id. at 347. Defendant maintains that Plaintiffs' reliance is misplaced because if Morris School District stands for anything, it is only that the individual members need not individually waive their vested rights. To the contrary, the representative of a unit's members is permitted to waive members' rights provided the waiver is knowing and voluntary.

Because the Association here knowingly and intentionally waived Plaintiffs' rights, the Board submits that the 2015 Agreement was a permissible exercise of authority.

Defendant correctly observes that in Morris School District the Commission declined to decide whether a majority representative had the authority to waive contractually acquired rights to deferred compensation. Id. at 347. However, in so arguing, Defendant neglects a body of case law that stands for the proposition that "a union has no authority on behalf of its membership to bargain away various forms of deferred compensation earned during the terms of prior collective bargaining agreements absent knowing consent by those who would be adversely affected." Id. at 345 (citing numerous cases from multiple jurisdictions) (citations omitted). In the Court's view, Plaintiffs cannot be found to have waived the right to contest an agreement reached by and between the Association, of which they are members, and the Board, by which they are or were employed, to retroactively strip them of benefits already earned by them.

C. Count II

Count II of the Amended Complaint alleges that Defendant has violated Article IV, Section VII, Paragraph 3 of the New Jersey Constitution and the New Jersey Civil Rights Act by impairing the earned, vested, and constitutionally protected contractual rights of Plaintiffs. Article IV, Section VII, Paragraph 3 of the New Jersey Constitution, otherwise known as the "Contracts Clause" provides: "The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." The parties agree that New Jersey courts apply a three-part test to determine whether a violation of the Contracts Clause has occurred. In particular, a court must assess "whether there is a contractual relationship, whether a change in a law impairs that contractual relationship, and whether the impairment is

substantial." N.J. Educ. Ass'n v. State, 412 N.J. Super. 192, 206 (App. Div.), certif. denied, 202 N.J. 347 (2010).

It is readily apparent that the Board and Plaintiffs stood in a contractual relationship pursuant to the 2015 Agreement, 2012 Agreement, and all prior collective negotiation agreements. See N.J. State Firefighters' Mut. Benevolent Ass'n v. State, 2011 N.J. Super. Unpub. LEXIS 154 (Law Div. January 19, 2011) (quoting Brentwood Med. Assoc. v. United Mines Workers of Am., 396 F.3d 237, 240 (3d Cir. 2005) ("As to the first prong of the test—-whether a contractual relationship exists—there is little doubt that a CNA can constitute a 'contractual accord reached between an employer and its employees.'"). Accordingly, the parties do not precisely address this question. Nor do the parties devote much discussion to whether the impairment is substantial.[3] Instead, the parties dispute whether the resolution adopted by the Board on April 27, 2016, ratifying the 2015 Agreement constitutes a "law" that impaired the parties' contractual relationship.

The Legislature has empowered boards of education to set terms and conditions of employees' employment. N.J.S.A. 18A:27-4 ("Each board of education may make rules [. . .] governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district [. . .]."); Fair Lawn Education Asso. v. Fair Lawn Board of Education, 79 N.J. 574, 580 (1979) ("[N.J.S.A. 18A:27-4]'s use of the word 'salaries' indicates that the Legislature intended to grant boards the power to set the 'time and mode of payment' only of compensation which bears some

[3] Plaintiffs maintain that the divestment of their vested rights to accumulated sick leave in the amount of up to $25,000 upon leaving the employ of the Board, by reason of death, retirement or otherwise, is substantial. Defendant's position is that any impairment is not substantial because Plaintiffs' retain potential breach of contract remedies.

relation to the rendition of past or present services."); Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969).

It is equally clear that a resolution adopted by a board of education pursuant to its delegated authority is a legislatively authorized act. Board of Education v. Maas, 56 N.J. Super. 245, 262–63 (App. Div. 1959) ("The enabling statute, N.J.S.A. 18:14-64.2, does not provide a procedure by which a local board of education must act. Where a statute is silent on the method by which the actions of a municipal body are to be manifested, the delegated power may be exercised by resolution."). However, there is a distinction between legislatively authorized acts and a legislative act. Defendant correctly observes that a board of education is not engaging in a legislative act, as contemplated by the Contracts Clause, when it approves of a collective negotiation agreement, notwithstanding that the Legislature empowered boards of education to pass resolutions approving collective negotiation agreements.

The foregoing authorities do not support the position that a resolution adopted by a board of education ratifying a CNA, to which it is a party, constitutes a law that could violate the Contracts Clause. Despite decades of litigation between teachers, unions, and boards of education over collective negotiation agreements, none of the parties have presented the Court with a case that stands for the proposition that a successor CNA, which improperly purports to divest teachers of their vested rights to deferred compensation, violates the Contracts Clause of the New Jersey Constitution. Nor has the Court been able to locate any such precedent in this State.

Looking beyond this jurisdiction, Waltz v. Bd. of Educ., 1:12-CV-0507, 2013 U.S. Dist. LEXIS 129089 (N.D.N.Y. September 10, 2013), is precisely on point. That case presented the question of whether the execution of a collective bargaining agreement is a legislative action for

purposes of a claim brought under the Contracts Clause of the U.S. Constitution.[4,5] In particular, the plaintiffs argued that the School District's adoption of a 2010-2015 collective bargaining agreement constituted legislative action as contemplated by the Contacts Clause, whereas the defendants contended that the School District's power to approve of the agreement is administrative, not legislative, and therefore does not implicate the Contracts Clause. The District Court noted that the plaintiffs relied upon a series of cases where federal courts have held that municipal governments interfered with the contractual health benefits of retirees in violation of the Contracts Clause, then explained:

> However, each of those cases involved a municipal ordinance which has the force and effect of law. "[M]unicipal legislation which is passed under supposed legislative authority from the state" is legislative action within the ambit of the Contract Clause. Ritzie v. City Univ. of New York, 703 F. Supp. 271, 277 (S.D.N.Y. 1989) (citing Northern Pac. Ry. Co. v. State of Minn. ex rel. City of Duluth, 208 U.S. 583, 590 (1908)). By contrast, courts have held that actions taken by School Districts through votes of the Board of Education are not legislative actions within the meaning of the Contract Clause. See Chaffer v. Bd. of Educ. of Long Beach Sch. Dist., 229 F. Supp. 2d 185, 191 (E.D.N.Y. 2002) (finding vote by the Board of Education to terminate plaintiff's employment was not legislative action under the Contract Clause); Montauk Bus Co., 30 F. Supp. 2d at 319 (finding that votes by a Board of Education to reject bids or award contracts do not constitute legislative acts for Contract Clause purposes). It follows, therefore, that when, as here, a School District approves a collective bargaining agreement, such action is administrative, not legislative.

Because the District Court found that the plaintiffs failed to allege legislative action, their Contracts Clause claim was dismissed.

Absent any authority, either from this jurisdiction or elsewhere, demonstrating that a resolution or any action taken by a board of education to ratify or otherwise approve of a

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[4] The Federal Contracts Clause provides: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[5] Our Supreme Court has recognized that "[b]oth the New Jersey and Federal Constitutions prohibit the passage of laws impairing the obligation of contracts" and "provide parallel guarantees." Burgos v. State, 222 N.J. 175, 193 (2015) (internal quotation marks and citations omitted).

collective negotiation agreement constitutes the type of legislative action contemplated by the New Jersey Constitution's Contract Clause, this Court cannot conclude that the resolution or the Board's approval of the 2015 Agreement violates the Contract Clause. Accordingly, Defendant is entitled to summary judgment with respect to Count II of the Amended Complaint.

VII. Conclusion

For the foregoing reasons, the Court grants in part and denies in part Plaintiffs' Motion for Summary Judgment and grants in part and denies in part Defendant's Motion for Summary Judgment. Plaintiffs are granted Summary Judgment as to Count 1. Defendant is granted Summary Judgment as to Count 2.

Orders accompany this Decision.

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ROBERT P. CONTILLO, P.J.CH.