P.E.R.C. NO. 2012-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COMMUNITY COLLEGE,

Petitioner,

-and- Docket No. SN-2011-010

SALEM COMMUNITY COLLEGE
FACULTY ASSOCIATION/NJEA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Salem Community College for a restraint of binding arbitration of a grievance filed by the Salem Community College Faculty Association/NJEA. The grievance asserts that the College violated the parties' collective negotiations agreement when it required an employee to take leave pursuant to the Federal Family Medical Leave Act, 29 U.S.C. ¶2601 at the onset of his sick leave. The Commission holds that the College does not have a preemptive right to force the grievant to take FMLA leave.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Capehart & Scatchard, attorneys (Joseph Betley, of counsel, Lauren B. Peltzman, on the brief)

For the Respondent, Selikoff & Cohen, attorneys (Keith Waldman, of counsel)

DECISION

On August 9, 2010, Salem Community College ("College") petitioned for a scope of negotiations determination. The College seeks a restraint of binding arbitration of a grievance filed by the Salem Community College Faculty Association/NJEA ("Association"). The grievance asserts that the College violated the parties' collective negotiations agreement when it required an employee to take a leave pursuant to the federal Family Medical Leave Act, 29 U.S.C. ¶2601 et seq., ("FMLA"), at the onset of his sick leave. We deny the College's request.

The parties have filed briefs and exhibits. These facts appear.

The Association represents a negotiations unit of the College's full-time faculty and professional staff holding designated titles. The parties' collective negotiations agreement is effective from July 1, 2009 through June 30, 2012. Paragraph K of Article X is entitled Leaves and Absences. Paragraph K8 provides for the taking, charging, and accumulating of sick leave days. Paragraph K9 covers unpaid leaves of absence. Paragraph K10 provides:

> Employees shall be entitled to such benefits as are provided pursuant to the Family and Medical Leave Act of 1993, as amended.

The contractual grievance procedure ends in binding arbitration.

On April 22, 2010, the Association's president submitted a grievance to the College's provost. The grievance stated, in part:

> The Faculty Association disagrees with the college's mandatory application of the Family Medical Leave Act from the onset of an employee's extended sick leave as has recently occurred during my own sick leave. Article X, Paragraph K, 10 of the Collective Agreement does not provide for this benefit to be mandatorily applied at the onset of a leave.

Specifically, the Association contends that such an application of the FMLA would first have to be negotiated between the Board of Trustees and the Association. The Association believes that its position is supported by our decision in Lumberton Ed. Ass'n

v. Lumberton Bd. of Ed., 28 NJPER 427 (¶33156 App. Div. 2002), aff'g P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001).

On April 27, 2010, the grievance was summarily denied "based on procedural and substantive grounds." On May 3, the Association appealed the grievance denial to the College's president asserting that the College's application of the FMLA was negotiable under Lumberton and could significantly reduce an employee's available sick leave. On May 17, the president denied the grievance finding it untimely and concluding that the College had a prerogative under the FMLA to designate leave as FMLA-covered if the illness met the FMLA's definition of a "serious health condition." The president noted that the College had not required the grievant to use any of his contractual paid leave benefits during his sick leave.

On June 1, 2010, the Association appealed the president's decision to the Chair of the College's Board of Trustees. The appeal stated, in part:

> The administration's application of the FMLA
>
> could significantly reduce an employee's sick leave availability because it requires personal sick leave and FMLA leave to be used concurrently rather than consecutively. The Association does not agree that concurrent usage was intended by the FMLA in instances where the employees are covered by a Collective Bargaining Agreement, and the Association believes that the Public Employment Relations Commission has addressed this matter in the Lumberton Case decision.

On June 24, 2010, the College's solicitor informed the Association that the Board of Trustees had denied the grievance for the reasons stated by the president. On July 2, the Association demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.
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> [Id. at 154]

Thus, we do not consider the contractual merits of this grievance, the timeliness of the grievance, or any other contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere

> with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

In general, paid and unpaid leaves of absence intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, Burlington Cty. College, 64 N.J. 10, 14 (1973); Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (1977); Lumberton; Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd NJPER Supp.2d 113 (¶95 App. Div. 1982), app. dism. 93 N.J. 263 (1983). However, negotiations or arbitration over a sick leave benefit will be preempted if a statute or regulation expressly, specifically, and comprehensively sets an employment condition and divests an employer of all discretion to grant the benefit being requested. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Morris School Dist. Bd. of Ed. and the Ed. Ass'n of Morris, 310 N.J. Super. 332, 341-342 (App. Div. 1998), certif. den. 156 N.J. 407 (1998); Lumberton. Moreover, if a statute or regulation mandates a minimum level of benefits but does not bar

the employer from affording a more generous benefit, employees may seek that greater benefit through a negotiated agreement enforceable through binding arbitration. Bethlehem; Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2006-97, 32 NJPER 232 (¶97 2006).

The FMLA entitles eligible employees to a total of 12 workweeks of unpaid leave during any 12-month period for the birth and care of a son or daughter or for a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. ¶2612. See also Gerety v. Atlantic City Hilton Casino Resort, 184 N.J. 391 (2005). The College argues that the FMLA mandates that it designate the illness as a serious health condition and that it require use of unpaid FMLA benefits at the outset of any leave of absence.[1/] The Association responds that the FMLA does not mandate that use of FMLA benefits for the leave of absence and that the order in which FMLA benefits and other sick leave benefits are used is negotiable under Lumberton and other cases.

The College's argument rests on the federal regulations implementing the FMLA and requiring it to provide certain notices to employees. See 29 C.F.R. ¶825.300. In particular, 29 C.F.R. ¶800.325(b) requires an employer to notify an employee of his or

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1/ Under this approach, if the grievant wanted to take paid leave at the beginning of his absence from work, he apparently would have to use his paid leave concurrently with the FMLA leave and the overall amount of time he could be on leave would thus be reduced.

her eligibility to take FMLA leave "when an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason." 29 C.F.R. ¶800.325(d) further directs an employer to issue a "designation notice" to the employee. This regulation provides, in part:

> The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.

29 C.F.R. ¶800.325(e) subjects an employer to specified penalties for failing to provide the notices required by 29 C.F.R. ¶800.325.

We agree with the College that 29 C.F.R. ¶800.325(b) mandates that it notify an employee with a serious health condition of his or her eligibility to take an FMLA leave. On that question, the regulation speaks in the imperative and coincides with the regulation's evident objective of ensuring that employees know what their rights are and can invoke them if they see fit. But we do not agree with the College that an employee with a serious health condition is required to take FMLA leave when that employee may have recourse to other negotiated

benefits. On that question, the regulation does not speak in the imperative or indicate any intent to diminish employee benefits. The College's argument that the grievant must take FMLA leave given his serious health condition rests on two weak premises. Neither one warrants accepting this argument.

The first is an unpublished and non-precedential opinion issued by a federal district court. Harvender v. Norton Co., 96-CV-653, 1997 U.S. Dist. LEXIS 21467 (N.D.N.Y. 1997). There, a pregnant lab technician objected to being placed on FMLA leave instead of being allowed to continue working. The employer refused to allow her to continue working during her pregnancy because the employee's duties exposed her to chemicals; the employee's doctor had certified that she should not be exposed to chemicals; and no light-duty work was available. Concluding that the employee could not perform her essential job functions given the restriction against exposure to chemicals, the Court rejected the employee's assertion that she was entitled to keep working and held that the employer could properly require her to take an FMLA leave. In that circumscribed context, the Court reasoned that the FMLA does not require that an employee request an FMLA leave before an employer designates a leave as an FMLA leave. This case does not mandate that an employee be forced to take an FMLA leave when other forms of leave may be available nor does it

preclude a majority representative from negotiating other forms of leave that may be invoked before an FMLA leave is taken.

The second weak assertion is an opinion letter issued on July 21, 1995 by a Deputy Assistant Administrator of the Wage and Hour Division of the United States Department of Labor. This letter states, in part:

> The first question is whether an employer can count an absence for sickness or injury as an FMLA absence if an employee does not request that it be counted as such. So long as the employer is a covered employer, the employee is an eligible employee, and the reason for the absence meets one of the conditions described in the definitions of "serious health conditions" under the FMLA, the employer may designate (and so advise the employee) and count the absence against the employee's 12-week FMLA entitlement even if the employee has not requested that it be counted as such.
>
> Your second question concerns a negotiated leave of absence policy that was in effect prior to FMLA. Under this policy, employees are not required to use up all of their accrued vacation, sick time, personal time, and any other compensated time before their leave begins. You indicate that, especially in maternity situations, employees may consider this leave preferable to FMLA leave. The FMLA Regulations, 29 CFR Part 825, provide that an employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by FMLA. (See Regulations 825.700) There is not enough information in your letter to determine conclusively if the negotiated leave of absence policy provides a greater benefit. If it in fact does, the employer may not cite FMLA as a reason not to adhere to the employer's established policy.

First, the letter itself does not speak in the imperative: it says that the employer may count an absence against a non-requesting employee's FMLA entitlement, not that it must. Further, the letter provides no details about the setting in which the request arose and thus no basis for concluding that the FMLA mandates that employees with serious health conditions be immediately placed on FMLA leave regardless of whether other benefits have been or might be negotiated. Finally, the letter also addresses a second question involving a negotiated leave of absence policy in effect before the FMLA. The letter recognizes that employees may consider other forms of leave preferable to FMLA leave and concludes that if the negotiated leave of absence provides a greater benefit than the FMLA, "the employer may not cite FMLA as a reason not to adhere to the employer's established policy."

While the College's argument rests on weak support, the Association's response rests upon a solid base of Commission cases and judicial affirmances. Given the precedents we will now discuss, we hold that the College does not have a preemptive right to force the grievant to take FMLA leave and we decline to restrain arbitration.

In Lumberton, a school board adopted a policy requiring employees to use paid leave concurrently with FMLA leave. The board argued that the FMLA empowered it to adopt such a policy,

but the Commission and the Appellate Division disagreed and concluded that the issue of stacking FMLA leave and other leaves is mandatorily negotiable. Noting FMLA provisions preserving greater benefits accorded by negotiated agreements and encouraging employers to provide more generous benefits, 29 U.S.C. ¶2652(a) and ¶2653, the Court discerned a congressional intent "that the exact nature of the implementation of the FMLA would be the subject of negotiations when employees are covered by a CBA." 28 NJPER at 427-428. While the issue of notifying employees of their FMLA rights is not negotiable under 29 C.F.R. ¶800.325(b) and (d), the question of whether an employee must take an FMLA leave is a negotiable issue of FMLA implementation under Lumberton.

In Hillsborough, a school board required employees who took approved FMLA leaves but did not return to work to reimburse the board for the health care premiums it paid during the leave. The board argued that the FMLA preempted negotiations over this policy, but the Commission disagreed and held that this issue was negotiable given the board's discretion not to seek reimbursement. Like Lumberton, Hillsborough supports holding the FMLA implementation issue in this case to be negotiable.

Lastly, in Parsippany-Troy Hills Tp. and Parsippany Public Employees Local 1, P.E.R.C. No. 2011-18, 36 NJPER 326 (¶127 2010), aff'd 419 N.J. Super. 512 (App. Div. 2011), the Commission held and an Appellate Division panel agreed that the FMLA did not

mandate that an employer demand a medical certification from an employee caring for a sick relative where the parties had not agreed to concurrent use of FMLA and paid leaves and the employee did not want to take FMLA leave. The Commission concluded that the FMLA regulations do not address an employer's duty to designate leave as FMLA-qualifying when an employee declines FMLA leave and wishes to use paid leave instead. The Court agreed with this conclusion and added that an employer could not be liable for not informing an employee of his or her FMLA rights if the employee had unequivocally stated that he or she did not want to take an FMLA leave. Parsippany-Troy Hills makes clear that the FMLA does not require the College to force the grievant to take an FMLA leave he does not want to take or subject the College to liability for not designating his leave as an FMLA leave.

ORDER

The request of Salem Community College for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: September 22, 2011

Trenton, New Jersey