P.E.R.C. NO. 2019-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (STATE POLICE),

Petitioner,

-and- Docket No. SN-2019-009

STATE TROOPERS FRATERNAL ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (State Police) for a restraint of binding arbitration of a grievance filed by the State Troopers Fraternal Order of Police. The grievance challenged the State's decision to deny the grievant's request to substitute paid sick leave for unpaid leave under the Family Leave Act and Family Medical Leave Act for childbirth/bonding purposes with his new-born and/or to care for his fiancée following childbirth. The Commission holds that the grievance is not mandatorily negotiable because the grievant's request is preempted by N.J.A.C. 4A:6-1(j) and 4A:6-1.3(g).

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, Gurbir S. Grewal, Attorney General (Emily M. Bisnauth, Deputy Attorney General, on the brief)

For the Respondent, Loccke, Correia & Bukosky, attorneys (Michael A. Bukosky, of counsel and on the brief)

DECISION

On July 20, 2018, the State of New Jersey (State) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the State Troopers Fraternal Association (STFA). The grievance asserts that the State denied the grievant leave under the New Jersey Family Leave Act (FLA), N.J.S.A. 34:11B-1 et seq., and the federal Family Medical Leave Act (FMLA), 29 U.S.C.A. § 2601 et seq.

The State filed briefs, exhibits, and the certification of Personnel Assistant, Brooke J. Loftus. The STFA filed a brief with exhibits, and the certification of its counsel to authenticate the exhibits. The STFA did not support any

pertinent facts with a certification based upon personal knowledge per N.J.A.C. 19:13-3.6(f). These facts appear.

The STFA represents all Troopers in the Division of State Police but excluding Sergeants, Lieutenants, Captains, Majors, Lieutenant Colonels, and the Colonel. The State and STFA were parties to a collective negotiations agreement (CNA) in effect from July 1, 2008 through June 30, 2012. The grievance procedure ends in binding arbitration.

The grievant sought leave in connection with his fiancee giving birth to his child. The State is subject to Civil Service statutes and regulations. Loftus works in the Time and Leave Management Unit of the New Jersey State Police. She is responsible for processing family leave applications under both the FLA and the FMLA. She certifies that by email to the grievant dated January 3, 2017 and by letter to his counsel dated January 9, they were informed that the grievant's request for family leave was not denied. According to Loftus, the grievant was entitled to up to twelve weeks of family leave for childbirth/bonding. However, Loftus certifies that the grievant sought to use his unlimited sick time to compensate him during a family leave. She explained to the grievant that New Jersey law does not allow the use of sick leave for childbirth/bonding. She certifies that caring for a seriously ill member of an employee's immediate family is an appropriate use of sick time, but that the

grievant never alleged nor provided information to support his child being ill. The grievant was advised that he could use vacation or administrative time for a leave for childbirth/bonding. Loftus also certifies that the grievant initially requested family leave to care for his fiancee after childbirth. The grievant was advised that under N.J.A.C. 4A:6-1.21, his fiancee does not qualify as an immediate family member for family leave.

On February 2, 2017, the STFA filed a Phase 1 grievance which the employer denied on September 7. On December 27, the STFA filed a request for submission of a panel of arbitrators. 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.

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

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER

Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The State asserts that the subject of the grievance is preempted because neither the FMLA and FLA, nor N.J.A.C. 4A:6-1.3, allow employees to use sick leave for childbirth/bonding. It notes that the grievant could only have applied his sick leave towards care of his child (an immediate family member) if the child were seriously ill. The State asserts that the grievant was never denied FMLA or FLA leave and was notified that he could use his accrued personal or vacation leave time to compensate him during FMLA/FLA leave due to the childbirth/bonding.

The STFA asserts that the FMLA and FLA do not preempt the payment of sick leave for childbirth/bonding. It also argues that the grievant's fiancee should be considered a "family member" with a "serious health condition" due to the birth of his child that qualifies the grievant to use sick leave to care for her. The STFA asserts that in the event that the grievant's fiancee would not be considered an eligible person who would qualify as a source for the grievant's sick leave benefits, then the grievant should have been eligible to use family leave with

paid sick leave for the birth of his child. It argues that the child being born is itself a "serious health condition" that should qualify the grievant for paid sick leave. Finally, the STFA asserts that the State violated the New Jersey Law Against Discrimination (LAD) by discriminating against the grievant based on his unmarried status because the mother of his child was not treated as a spouse/partner for sick leave.

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The FMLA entitles an eligible employee to take up to twelve weeks of leave during a twelve month period for certain types of family and medical related events. 29 U.S.C.A. § 2612(a)(1); 29 C.F.R. § 825.112; N.J.A.C. 4A:6-1.21B(d).[1/] Specifically, FMLA leave may be used for: (A) birth of child (and to care for such child); (B) placement of child for adoption or foster care; (C)

1/ "For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115." 29 C.F.R. § 825.113(a).

to care for a spouse, son, daughter, or parent with serious health condition; (D) because of the employee's own serious health condition; and (E) because of qualifying exigency due to immediate family member's active duty in the Armed Forces. 29 U.S.C.A. § 2612(a)(1)(A-E). FMLA leave may be unpaid, paid, or a combination of both depending on whether and which of the law's paid leave provisions are applicable to the type of FMLA leave being used and how much eligible paid leave an employee has available to use towards their FMLA leave period. 29 U.S.C.A. § 2612(c)-(d).

The substitution of paid leave for FMLA leave is governed by 29 U.S.C.A. § 2612(d)(2), which states, in pertinent part:

> (2) Substitution of paid leave.
>
> (A) In general.
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.
>
> (B) Serious health condition.
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under each subsection, except that nothing in this title [29 U.S.C.S. §§ 2611 et

> seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

Thus, only accrued paid vacation leave, personal leave, or family leave can be used towards childbirth/bonding. Paid sick leave is absent from the list of paid leaves that may be applied towards childbirth/bonding. By contrast, the "serious health condition" paid leave section of the FMLA quoted above includes paid sick leave as a type of paid leave that may be applied to FMLA leave, but only to care for a spouse, son, daughter, or parent with serious health condition, or for the employee's own serious health condition. 29 U.S.C.A. § 2612(d)(2)(B).

However, just because the FMLA does not entitle employees to use sick leave for the childbirth/bonding does not necessarily mean that it would prohibit an employer from agreeing through collective negotiations to allow paid sick leave to be utilized towards FMLA leave for childbirth/bonding. 29 U.S.C.A. § 2652(a) states that nothing in the FMLA "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement . . . that provides greater family and medical leave rights to employees than the rights established under this Act. . . ." and 29 U.S.C.A. § 2653 states that nothing in the FMLA "shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any

amendment made by this Act." See Lumberton Ed. Ass'n and Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd, 28 NJPER 427 (¶33156 App. Div. 2002) (the FMLA sets a floor of minimum family/leave benefits and does not eliminate all employer discretion to negotiate with union for greater benefits, so FMLA unpaid leave and accrued paid leave could be run consecutively instead of concurrently).

Therefore, if the FMLA were the only applicable law on the issue of whether employees can utilize paid sick leave towards FMLA leave for childbirth/bonding, it would not by itself be preemptive because the terms and conditions of the employer's paid leave policy would be negotiable to the extent that they could provide greater family and medical leave benefits than the rights established by the FMLA. However, as this case involves a Civil Service jurisdiction, we must also consider the effects of Civil Service laws and regulations on an employee's ability to apply paid sick leave towards FMLA for childbirth/bonding.

The applicable New Jersey Civil Service regulations on the federal FMLA state that: "An employer may designate an employee's paid leave as FMLA leave if the employee provides information to the employer indicating an entitlement to such leave." N.J.A.C. 4A:6-1.21B(i). Whether the grievant was entitled to sick leave is, in turn, governed by N.J.A.C. 4A:6-1.3(g), which provides for the following uses of sick leave by State employees: personal

illness or injury; exposure to contagious disease; care of a seriously ill member of the employee's immediate family; or death in the employee's immediate family. Childbirth/bonding is not included in the list of allowable uses of paid sick leave for State employees.[2/] Therefore, the grievant's request to substitute paid sick leave for unpaid FMLA leave for the birth of his child is preempted by N.J.A.C. 4A:6-1.21B(i) and N.J.A.C. 4A:6-1.3(g).

The state FLA likewise does not provide for paid sick leave to be applied towards the type of family leave at issue here. The FLA entitles an eligible employee to twelve weeks of leave in a 24-month period for the birth or placement of a child, or for the serious health condition of a family member. N.J.S.A. 34:11B-4. Regarding the relationship between paid leave and FLA leave, N.J.A.C. 4A:6-1.21A(j) provides:

> An employee may, at his or her option, use paid leave for family leave purposes. An employee who chooses to use paid leave (vacation, sick or administrative) must meet the requirements set forth in this subchapter for the type of leave requested.
>
> [N.J.A.C. 4A:6-1.21A(j); emphasis added.]

Those requirements, again, as for the analogous FMLA regulations, are the specifically enumerated permitted uses for sick leave set

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2/ The Civil Service categorizes child care leave as unpaid, stating that "child care leave may be granted to State employees under the same terms and conditions as all other leaves without pay." N.J.A.C. 4A:6-1.8(b).

forth in N.J.A.C. 4A:6-1.3(g), which do not include childbirth/bonding. Therefore, the grievant's request to substitute paid sick leave for unpaid FLA leave for the birth of his child is preempted by N.J.A.C. 4A:6-1.21A(j) and N.J.A.C. 4A:6-1.3(g).

Our preemption holding here is consistent with the Appellate Division's decision in Hackensack Bd. of Ed., 184 N.J. Super. 311 (App. Div. 1982), which was based not on the Civil Service sick leave regulations, but on the analogous provisions of the education laws applicable to teaching staff. In Hackensack, the grievant teacher sought to use accumulated sick leave days for child-rearing after the birth of her child. Reversing PERC's decision that had found the issue negotiable, the Court cited the following definition of sick leave set forth in N.J.S.A. 18A:30-1 as preemptive of using sick leave for any other purpose:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of contagious disease or of being quarantined for such a disease in his or her immediate household.

Next, we find no legal support for the STFA's contention that the child's birth automatically qualifies as a "serious health condition" under FMLA or FLA or "seriously ill" for sick leave purposes. Under both the FMLA and FLA, family leave for

the birth of a child/child bonding is a distinct type of family leave that is separate from family leave to care for the serious health condition of an immediate family member, and regular childbirth and care for a newborn are not included in the definitions of serious health conditions as to the child. See, e.g., 29 U.S.C.A. § 2612(a)(1); N.J.S.A. 34:11B-3; 29 C.F.R. § 825.112-115, 120; N.J.A.C. 4A:6-1.21A; N.J.A.C. 4A:6-1.21B. Moreover, the STFA has provided no certifications or evidence suggesting that the grievant's newborn child was seriously ill or that the grievant ever requested family leave for the serious health condition of his child, rather than for childbirth/bonding.

Furthermore, we reject the STFA's contention that the State could have approved paid sick leave for the grievant to care for a serious health condition of the mother of his newborn child. The grievant's relationship status with the mother of his child (also identified as his fiancee) does not meet the FMLA or FLA definitions of family member or the definition of "immediate

family member" for purposes of sick leave under N.J.A.C. 4A:1-1.3.[3/][4/][5/]

Finally, we decline to consider the STFA's claim that the State violated the NJ LAD by allegedly discriminating against the grievant for his unmarried status. Consistent with Commission and judicial precedent, a claim of discrimination under the LAD does not transform a non-negotiable subject into a mandatorily negotiable and arbitrable subject, and discrimination claims must be pursued in the appropriate forum. See, e.g., Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 2005-74, 31 NJPER 145 (¶64 2005); Morris County (Morris View Nursing Home), P.E.R.C. No. 2002-11, 27 NJPER 369 (¶32134 2001).

3/ FMLA qualifying relationships for leave for serious health conditions include spouse, child, or parent. 29 U.S.C.A. § 2612(a)(1)(C); 29 C.F.R. § 825.112(a)(3). The FLA defines "family member" as "a child, parent, spouse, or one partner in a civil union couple." N.J.S.A. 34:11B-3(j).

4/ "Immediate family" is defined as: "an employee's spouse, domestic partner (see section 4 of P.L. 2003, c.246), child, legal ward, grandchild, foster child, father, mother, legal guardian, grandfather, grandmother, brother, sister, father-in-law, mother-in-law, and other relatives residing in the employee's household."

5/ While the STFA argues that the grievant's fiancee could be considered a "domestic partner", it failed to provide any evidence that the relationship meets the requirments of the New Jersey Domestic Partnership Act, N.J.S.A. 26:8A-1, et seq.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Papero abstained. Commissioner Bonanni was not present.

ISSUED: February 28, 2019

Trenton, New Jersey