

P.E.R.C. NO. 2019-43

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 denies the motion of the State Troopers Fraternal Association (STFA) for reconsideration of P.E.R.C. No. 2019-30, in which the Commission granted the request of the State of New Jersey (State Police) for a restraint of binding arbitration of a grievance challenging the State's decision to deny the substitution of paid sick leave for unpaid leave under the NJFLA and FMLA, for childbirth/bonding and/or to care for the grievant's fiancée following childbirth. The Commission finds that, in raising new arguments for the first time and otherwise repeating arguments that the Commission previously considered and rejected, the STFA has not met its burden under N.J.A.C. 19:13-3.12(a) to demonstrate extraordinary circumstances and exceptional importance warranting reconsideration. The Commission further finds that proposed rule changes by the Civil Service Commission that would modify the definition of "immediate family" under the NJFLA provide no basis for reconsideration given that this dispute is associated with the birth of the grievant's child two years prior to the announcement of the proposed rule change. Moreover, the proposed rule changes have no retroactivity provision.

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 March 13, 2019, the State Troopers Fraternal Association (STFA) moved for reconsideration of P.E.R.C. No. 2019-30, 45 NJPER 304 (¶79 2019). In that decision we granted the request of the State of New Jersey (State) for a restraint of binding arbitration of a grievance filed by the STFA which challenged the State's decision to deny the grievant's request to substitute paid sick leave for unpaid 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., for childbirth/bonding and/or to care for his fiancée following

childbirth. We found the grievance is not mandatorily negotiable because the grievant's request is preempted by N.J.A.C. §§ 4A:6-1.21B(I),^{1/} 4A:6-1.3(g),^{2/} and 4A:6-1.21A(j).^{3/} The STFA has filed a brief in support of its motion. The State has filed an opposition brief.

Reconsideration "will only be granted based on a demonstration of extraordinary circumstances and exceptional importance. The movant shall specify and bear the burden of establishing the grounds warranting reconsideration." N.J.A.C. 19:13-3.12(a). We will not consider arguments raised for the first time through a motion for reconsideration. Camden County Sheriff, P.E.R.C. No. 2004-65, 30 NJPER 133 (¶50 2004); accord State of New Jersey (OER), P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987) (holding that a party cannot raise a claim for the first time on a motion for reconsideration). See also, Mercer

1/ N.J.A.C. 4A:6-1.21B(I) provides, "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."

2/ N.J.A.C. 4A:6-1.3(g) 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.

3/ 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."

County Sheriff's Office, P.E.R.C. No. 2017-15, 43 NJPER 114 (¶33 2016); In re Toolen, P.E.R.C. No. 2018-36, 44 NJPER 329 (¶94 2018).

The STFA argues that reconsideration is warranted because our decision overlooked its right to have an interpretation of a negotiable term specifically mandated by N.J.S.A. 34:11b-14. The STFA further argues that N.J.A.C. 4A:6-21A(j) and 4A:6-1.3(g) may be inapplicable to unclassified State employees such as State Troopers, and we should remand or transfer this question to the Civil Service Commission (CSC) for its consideration. The STFA further argues that even if the cited regulations are applicable to State Troopers, they have never been interpreted by the CSC to be preemptive in any manner. Finally, the STFA argues that we should reopen the record to allow the parties an opportunity to present evidence on the CSC's proposed changes to N.J.A.C. 4A:1-1.3, that, if adopted, may qualify the grievant's fiancée as a member of his "immediate family".

The State counters that we may not consider arguments made by the STFA in support of its motion for reconsideration that it never previously advanced, and that contradict its position in the scope proceeding. These include the STFA's arguments that the Civil Service regulations may not apply to State Troopers, and that the CSC's proposed rule changes mandate a re-opening, re-hearing or holding this matter in abeyance. The State also

argues that the CSC's proposed new rule modifications are not binding, do not cover the grievance at issue, and even if adopted would not apply absent an express retroactivity provision.

For the reasons that follow, we find that the STFA has not demonstrated extraordinary circumstances and exceptional importance warranting reconsideration of our prior decision. We note as a threshold matter that the issue in dispute addressed the grievant's ability to substitute paid sick leave for FMLA or FLA leave only. The grievant's eligibility for FMLA or FLA is not in dispute.

The STFA first argues that the use of paid sick leave to substitute for unpaid FMLA/FLA leave is permitted by N.J.S.A. 34:11b-14. That statute provides as follows:

No provision of this act [the FLA] shall be deemed to justify an employer in reducing employment benefits provided by the employer or required by a collective bargaining agreement which are in excess of those required by this act. Nor shall any provision of this act, or any regulations promulgated to implement or enforce this act, be construed to prohibit the negotiation and provision through collective bargaining agreements of leave policies or benefit programs which provide benefits in excess of those required by this act. This provision shall apply irrespective of the date that a collective bargaining agreement takes effect.

[N.J.S.A. 34:11b-14.]

The STFA did not previously cite or rely upon this statute.

N.J.S.A. 34:11b-14 does not warrant our reconsideration of

similar arguments (i.e. that the State and federal family leave laws and regulations set minimum levels of benefits, and are not a ceiling on the scope of such benefits) raised by the STFA that we previously considered and rejected. P.E.R.C. 2019-030 at 8-11.

We also find that the STFA has not met its burden for reconsideration on its arguments that N.J.A.C. 4A:6-21A(j) and 4A:6-1.3(g) may be inapplicable to State Troopers as unclassified State employees, and that even if they do apply, they are not preemptive. The former argument was not previously raised (and contradicts the STFA's own prior arguments). Again, we will not consider arguments not previously raised as grounds for reconsideration. Camden County Sheriff, et al, supra. The latter argument reiterates the STFA's prior arguments against preemption, which we considered and rejected previously. P.E.R.C. 2019-030 at 8-11. Further, the STFA concedes that its argument that Civil Service regulations may not apply to State Troopers is "at best, not certain."

Finally, we find that the STFA has not identified extraordinary circumstances and exceptional importance warranting reconsideration of its claim that the grievant's fiancée is or could be a covered family member under N.J.A.C. 4A:1-1.3. The STFA argues that the grievant's fiancée may qualify as a member of his "immediate family" if proposed changes by the CSC to

N.J.A.C. 4A:1-1.3, published in the New Jersey Register on February 19, 2019, are adopted. 51 N.J.R. 191. These proposed changes would modify the rule's definition of "immediate family" to include "any other individual whose close association with the employee is the equivalent of a family relationship."^{4/} This dispute is associated with the birth of the grievant's child in January of 2017, two years prior to the announcement of the proposed rule change. Given that the rule change at issue is at this time only proposed, has not yet been adopted, and has no retroactivity provision, it would be premature for us to find or apply any exception to the general rule that substantive changes in statutes and regulations are not applied retroactively. Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 387 (2016); Hoboken Bd. of Ed., P.E.R.C. No. 82-7, 7 NJPER 443 (¶12197 1981). As such, the STFA has not established extraordinary circumstances and exceptional importance warranting reconsideration.

^{4/} These changes are being proposed to make the definition of "immediate family" in N.J.A.C. 4A:1-1.3 consistent with the definition of "family member" in P.L. 2018, c.10, an act concerning earned sick leave which became effective on October 29, 2018.

ORDER

The motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau and Papero voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Voos abstained from consideration.

ISSUED: April 25, 2019

Trenton, New Jersey