P.E.R.C. NO. 2024-4

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-2023-036

STATE TROOPERS FRATERNAL ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey for a restraint of binding arbitration of a grievance filed by the State Troopers Fraternal Association, which contests the implementation and subsequent rescission of a policy granting female State Troopers eight weeks of paid leave after giving birth. The Commission finds that the Pregnancy Discrimination Act, NJ Law Against Discrimination, and P.L. 2020, c. 107 do not preempt negotiations over a leave benefit exclusively for temporary disability related to pregnancy.

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, Matthew J. Platkin, Attorney General, (Elizabeth A. Davies, Deputy Attorney General, on the brief)

For the Respondent, The Law Offices of Lauren Sandy, LLC, attorneys (Lauren Sandy, of counsel)

DECISION

On April 3, 2023, the State of New Jersey, State Police (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 violated the parties' collective negotiations agreement (CNA) when the State unilaterally implemented, modified and rescinded Operations Instructions (O.I.) 21-37 entitled "Pregnancy Policy," which, in relevant part, granted employees who gave birth to a child eight weeks of special paid leave for recovery time. The grievance further objects to the denial of "Recovery Time Leave" to one specific

grievant and other members yet to be identified, and the failure to negotiate over the change in policy.

The State filed a brief and exhibits.[1/] The STFA filed a brief, an exhibit and the certification of its President, Wayne Blanchard. These facts appear.

The STFA represents all Troopers in the Division of State Police but excludes Sergeants, Lieutenants, Captains, Majors, Lt. Colonels, and the Colonel. The State and STFA are parties to a CNA in effect from July 1, 2019 through June 30, 2023. The grievance procedure ends in binding arbitration.

On November 10, 2021, O.I. 21-37 was implemented unilaterally and set to expire on November 30, 2022. On June 8, 2022, O.I. 21-37 was rescinded and superceded by O.I. 22-23, which set forth an expiration date of June 30, 2023, also without notice or negotiation with the STFA. O.I. 22-23 removed the following section:

> An enlisted female member who has given birth shall be granted 8 weeks of continuous recovery leave with full pay and benefits to allow for emotional and physical recovery from giving birth. This leave **shall not** be categorized as sick leave and **shall not** be deducted from any sick leave balances.

On September 9, 2022, O.I. 22-23 was rescinded in its entirety. In response to the above actions, the STFA filed a grievance on

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1/ The State did not file a certification(s). N.J.A.C. 19:13-3.5(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

October 7 that stated:

> Grieve the Unilateral Implementation of Operations Instructions 21-37 "Pregnancy Policy" and 22-23 "Pregnancy Policy" and the Denial of "Recovery Leave Time" to Detective Jennifer Hall #7315 and other members yet to be identified.

Attached to the grievance, the STFA clarified its position with an addendum, alleging, in summary, that the State violated the CNA when it (1) unilaterally instituted the Pregnancy Policy, (2) unilaterally rescinded the Recovery Leave section of the Pregnancy Policy, (3) unilaterally rescinded the Pregnancy Policy and (4) improperly denied Recovery Leave to Detective Hall and other members.

The State denied the grievance, reasoning that "[t]he Policy poses issues with legal defensibility because it would afford pregnant workers benefits and accommodations, not afforded to others similarly situated in need for an accommodation." On November 1, 2022 the STFA filed a Request for Submission to a Panel of Arbitrators. This petition ensued.

In a scope of negotiations determination, the Commission's 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, 1983 N.J. Super. Unpub. LEXIS 11 (App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, an arbitrator can determine whether the grievance should be sustained or dismissed. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The State argues that the Pregnancy Policy pursuant to O.I. 21-37 was, in hindsight, illegal because it conflicts with Title VII of the Civil Rights Act, the NJ Law Against Discrimination (LAD) and the August 25, 2022 Attorney General Guidelines on "Protocols Regarding Pregnant Officers." Specifically, the State contends that because the Pregnancy Policy provides added

benefits to pregnant employees that other similarly situated employees do not receive, the policy had impermissibly treated pregnant employees more favorably than others, including other employees with temporary medical conditions. For these reasons, the State claims the policy at issue was neither mandatory nor permissibly negotiable and binding arbitration should be restrained.

In opposition, the STFA contends that the State misconstrues the subject matter of the grievance, which focuses on the State's failure to negotiate over the change of a policy that provided an employment benefit and the denial of leave time that certain officers were purportedly entitled to use. Further, the STFA claims that even if the Pregnancy Policy was not compliant with law, maternity leave policies are mandatorily negotiable, as are administrative leave policies, and therefore the arbitration should not be restrained.

In reply, the State argues that the STFA twists the nature of the grievance and argues that the actual subject matter of the dispute is the applicability of the now-rescinded Pregnancy Policy. Even though the grievance requests that the parties negotiate prior to the change of working conditions, the State alleges that the remedy sought is the reinstatement of a statutorily preempted workplace policy.

It is well-settled that employee leave benefits are

mandatorily negotiable unless preempted by statute or regulation, including paid or unpaid leaves of absences. See Howell Twp. Bd. of Ed., P.E.R.C. No. 2015-58, 41 NJPER 421 (¶131 2015) (sick and vacation leave mandatory subjects); West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 117 (¶23 1992) (sick leave and maternity leave deemed mandatory subjects). For the following reasons, we find that none of the statutes cited by the State preempt negotiations.

First, we find that neither Title VII of the Civil Rights Act of 1964 nor the LAD expressly, specifically and comprehensively preempt negotiations over O.I. 21-37. 42 U.S.C. § 2000e et seq; N.J.S.A. 10:5-12.11(a). Title VII prohibits covered employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex." 42 U.S.C. § 2000e-2(a). The amendments to Title VII as part of the Pregnancy Discrimination Act (PDA) expressly define the "terms 'because of sex' or 'on the basis of sex' [to] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The LAD, similar to the PDA, states that

"[i]t shall be an unlawful employment practice...for an employer, because of...pregnancy or breastfeeding...[to] discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.J.S.A. 10:5-12.11(a).

Neither statute contains language that expressly, specifically, and comprehensively addresses a temporary disability benefit exclusively for pregnant women, nor does the effect of either statute prohibit such a benefit. The United States Supreme Court addressed a similar issue to the one here in California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). The Court held that "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop--not a ceiling above which they may not rise." Id. at 285. The Court emphasized in support of its decision, that the statute at issue was "narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions." Id. at 290 (emphasis in original)[2/]. The Equal Employment Opportunity Commission, in reliance on this decision, has additionally provided guidance pertaining to employer parental leave policies, announcing that "[l]eave

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2/ We note that Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391 (2005) involved a separate question from the one here, addressing whether an employer was required to provide an enhanced leave benefit to employees who gave birth. The issue in this case is whether an employer is prohibited from providing such a benefit.

related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions." Title VII, 29 CFR § 1604 (2015) (OLC Control No. EEOC-CVG-2015-1).

Like the PDA, the LAD sets a floor, but not a ceiling, on the minimum benefits guaranteed to pregnant women and does not preempt negotiations over the Pregnancy Policy or the Recovery Leave benefit. The LAD is a remedial statute that demands "liberal construction, for the 'more broadly [the LAD] is applied, the greater its antidiscriminatory impact." Richter v. Oakland Bd. of Ed., 246 N.J. 507, 537 (2021) (quoting Nini v. Mercer Cty. Community College, 202 N.J. 98, 108 (2010)). The relevant portion of the LAD, like the PDA, contains legislative findings declaring that "pregnant women are vulnerable to discrimination in the workplace" and was enacted, in part, to "combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women." N.J.S.A. 10:5-3.1(a) to (b).

Nor does the August 25, 2022 Attorney General Guidelines entitled "Protocols Regarding Pregnant Officers" preempt negotiations over the Pregnancy Policy. These guidelines were promulgated pursuant to P.L. 2020, c. 107, which required "each law enforcement agency to establish minority recruitment and selection program[s]...to remedy past discrimination in furtherance of the goal of the agency being comprised of law

enforcement officers who reflect the diversity of the population of the community the agency is charged with protecting." N.J.S.A. 52:17B-4.10(a). The minority recruitment program mandated by the statute required that law enforcement agencies "make a good faith effort to meet specific goals for recruiting and hiring minorities and females." Id. The Attorney General was required to "develop for dissemination to law enforcement agencies and county prosecutors throughout this State those guidelines or directives deemed necessary or appropriate to ensure the uniform application of this act." N.J.S.A. 52:17B-4.12. No language in the statute authorizing the Attorney General Guidelines expressly, specifically, and comprehensively preempts negotiations over the Pregnancy Policy[3/].

ORDER

The State of New Jersey's request to restrain binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Higgins, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: August 24, 2023

Trenton, New Jersey

3/ We also note that the relevant portions of the Guidelines cited by the State largely incorporate existing legal obligations found in the PDA and LAD, which, as discussed supra, do not preempt negotiations on the Pregnancy Policy.