STATE OF MAINE

Inter-Departmental Memorandum Date April 3, 1974

To Nicholas L. Caraganis, Director Dept. Personnel

From Martin L. Wilk, Assistant Dept. Attorney General

Subject Maternity Leave - Personnel Rule 11.16

This will respond to your memorandum dated March 27, 1974, inquiring what the impact of the recent U.S. Supreme Court's decision in Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield County School Board, Nos. 72-777 and 72-1129, 42 LW 4186, Jan. 22, 1974, is upon Personnel Rule 11.16 dealing with maternity leave. You also ask, among other things, whether the decision alters our opinion of March 19, 1973, on the subject, wherewe concluded that "pending a final resolution of the question, we do not think that it would be unreasonable for you to continue to operate under revised Personnel Rule 11.16."

The LaFleur and Cohen cases dealt with mandatory unpaid maternity leave for school teachers five months and four months, respectively, before the expected childbirth. In a divided opinion (Mr. Justice Rehnquist, joined by the Chief Justice, dissenting) the majority reasoned that the regulations were constitutionally defective under the Due Process Clause of the Fourteenth Amendment "because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child," 42 LW at 4191. However, the Court was quick to point out that it was not dealing "with maternity leave regulations requiring a termination of employment at some firm date during the last fewweeks of pregnancy," and expressly declared:

> "We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records--for example, widespread medical consensus about the 'disabling' effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin."

In his concurring opinion, Mr. Justice Powell also addressed himself to the question. He observed that while the Court's language did not specify a particular prebirth cutoff point (rather it referred only to "some firm date during the last few weeks of pregnancy") and while there was no need to decide that issue in the cases then before it, he "would think that a four-week prebirth period would be constitutionally acceptable," 42 LW 4193, in light of the Court's language.

AN INFORMAL OPINION

Accordingly, while the question has not been decisively ruled upon to date, we read LaFleur and Cohen as suggesting that the kind of mandatory leave policy embodied in Rule 11.16 may be within permissible boundaries under the Due Process Clause.

This is not to say that it would not be desirable to adopt a policy which provided for some degree of individual choice in the matter of maternity leave for state employees. Indeed, such a policy would eliminate any doubt as to possible constitutional attack on Due Process grounds discussed in LaFleur and Cohen. It would also bring the state into harmony with the guidelines promulgated by the Equal Employment Opportunity Commission, 29 CFR § 1604.10, 37 Fed. Reg. 6837. However, we cannot, at this juncture, say with any assurance, that such a modification in policy is required by LaFleur and Cohen.

We trust that the foregoing satisfactorily answers your immediate questions. If we can be of any further assistance, please let us know.

MLW:mfe

cc Benjamin McGill