

P.E.R.C. NO. 2023-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Petitioner,

-and-

Docket No. SN-2023-005

CWA LOCAL 1032,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses the Township's request for a scope of negotiations determination concerning a CWA proposal to negotiate the hearing and vision standards for school crossing guards. The Commission finds that because the CWA withdrew its proposal to negotiate over the hearing and vision standards, the issue is no longer in dispute in the parties' negotiations for a successor agreement. The Commission further finds that the Township has not alleged there are any active arbitrability disputes concerning the application of the parties' current contract's hearing and vision standards and that the Township has not alleged any special circumstances warranting the exercise of the Commission's scope of negotiations jurisdiction in the absence of an active dispute.

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, O'Toole Scrivo, LLC, attorneys
(Kenneth B. Goodman, of counsel)

For the Respondent, Weissman & Mintz, LLC, attorneys
(Annmarie Pinarski, of counsel)

DECISION

On August 30, 2022, the Township of Middletown (Township) filed a scope of negotiations petition seeking a determination that an issue sought to be negotiated by CWA Local 1032 (CWA) for inclusion in the parties' successor collective negotiations agreement (CNA) is not mandatorily negotiable. Specifically, the Township asserts that the CWA's proposal to negotiate the hearing and vision standards for school crossing guards is non-negotiable because the issue falls within its managerial prerogative to set physical requirements and qualifications for the position.

The Township filed briefs, exhibits, and the certification of James VanNest, Assistant Township Manager. The CWA filed a brief and exhibit. These facts appear.

The CWA represents a negotiations unit of Township employees in the title of school crossing guard. The Township and CWA are parties to a Memorandum of Agreement (MOA) effective January 1, 2018 through December 31, 2021. The MOA extended and modified the parties' 2014-2017 CNA. The MOA added a new Article 21 to the agreement entitled "Medical Examination for Crossing Guards." The new Article 21 set forth a protocol by which unit employees would be subject to a medical examination once every three years including a physical examination and hearing and vision tests.

VanNest certifies that during negotiations for the 2018-2021 MOA, the Township introduced the "School Crossing Guard Medical Examination Job Description Form" setting forth physical, hearing, and vision standards referred to as the "Rutgers Standards" that were established by the New Jersey Crossing Guard Training and Resource Program. He certifies that, as set forth in the MOA, the CWA agreed to the Rutgers Standards except for the frequency of examinations. VanNest certifies that since the ratification of the MOA in 2018, the Township has conducted physicals of school crossing guards, including the hearing and vision standards, in accordance with the MOA.

During collective negotiations for the parties' successor agreement, the CWA sent the Township a proposal to negotiate over whether to include the Rutgers Standards in the CNA as proposed by the Township. The CWA's negotiations proposal characterized

the Township's proposal as a modification and stated it was subject to negotiations.

However, by letter of October 20, 2022, the CWA's counsel notified the Township's counsel that the CWA was withdrawing its proposal to negotiate over the medical examinations requirements for school crossing guards. The letter stated, in pertinent part:

At negotiations, CWA Local 1032 submitted a proposal to amend Article 21, Medical Examinations for Crossing Guards. Please be advised that CWA Local 1032 withdraws the following provisions from that proposal: 1. The Union rejects Management's proposal to include as part of the contract the "Rutgers standards."

The Township's August 30, 2022 scope of negotiations petition states that during collective negotiations, the CWA rejected the Township's utilization of the Rutgers Standards and contended that crossing guard hearing and vision standards must be negotiated. The Township's September 13 brief repeats that negotiations history and asserts the issue in dispute is whether the specific hearing and vision standards applied in crossing guard medical examinations are mandatorily negotiable.

The CWA's October 21, 2022 response brief asserts there is no longer a negotiations dispute concerning hearing and vision standards for crossing guards because the CWA's October 20 letter to the Township stated "that the Union is withdrawing its proposal relating specifically to the physical qualifications

necessary for the crossing guards to perform their duties.” The CWA argues that the Township’s scope petition is therefore moot.

The Township’s reply brief acknowledges that the CWA has withdrawn its proposal relating to physical standards that the Township referenced in its scope petition. However, the Township argues the issue is not moot because the union might attempt to negotiate the issue again.

N.J.S.A. 34:13A-5.4d empowers the Commission to “make a determination as to whether a matter in dispute is within the scope of collective negotiations.” N.J.A.C. 19:13-2.2(a)(4) requires that a scope of negotiations petition specify that the dispute has arisen:

- i. During the course of collective negotiations, and that one party seeks to negotiate with respect to a matter that the other party contends is not a required subject for collective negotiations;
- ii. With respect to the negotiability and legal arbitrability of a matter sought to be submitted to binding arbitration pursuant to a collectively negotiated grievance procedure;
- iii. With respect to the legal arbitrability of a dispute as to whether the withholding of an increment of a teaching staff member is disciplinary or predominately relates to the evaluation of a teaching staff member’s teaching performance; or
- iv. Other than in (a)4i, ii, and iii above, with an explanation of any special circumstances warranting the exercise of the Commission’s scope of negotiations jurisdiction; . . .

The Township filed its scope petition under N.J.A.C. 19:13-2.2(a)(4)(i) because the CWA made a proposal during collective negotiations concerning the Rutgers Standards for hearing and vision applied to school crossing guards. However, on October 20, 2022, the CWA clearly notified the Township it was withdrawing its proposal to negotiate over that issue. The CWA did not submit any counter-proposals or otherwise continue to seek to negotiate over the hearing and visions standards. Therefore, there is currently no negotiability dispute under N.J.A.C. 19:13-2.2(a)(4)(i) concerning hearing and vision standards for the parties' successor agreement. Nor has the Township alleged there are any active arbitrability disputes under N.J.A.C. 19:13-2.2(a)(4)(ii) concerning the application of the current MOA's hearing and visions standards or any special circumstances for invoking the Commission's scope of negotiations jurisdiction per N.J.A.C. 19:13-2.2(a)(4)(iv).

As there is no active dispute between the parties concerning negotiability over the issue of hearing and visions standards, a determination by the Commission would be advisory. See, e.g., Middlesex Cty. College, P.E.R.C. No. 2023-24, __ NJPER __ (¶ 2023) (scope petition dismissed as moot where the union withdrew disputed proposal following filing of scope petition); Lower Tp., P.E.R.C. No. 98-57, 23 NJPER 630 (¶28306 1997) (scope issue dismissed where alleged illegal parity clause was not the subject

of contract proposal or arbitration); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 97-69, 23 NJPER 50 (¶28034 1996) (scope petition dismissed where allegedly preempted co-pay provision was not the subject of contract proposal or arbitration). Accordingly, there being no present controversy warranting exercise of our scope of negotiations jurisdiction, we dismiss the Township's petition. The Township may always re-file a scope of negotiations petition should another negotiability dispute arise during collective negotiations.

ORDER

The request of the Township of Middletown for a scope of negotiations determination is dismissed without prejudice to the Township's filing of another scope of negotiations petition should a negotiability dispute arise during successor contract negotiations.

BY ORDER OF THE COMMISSION

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

ISSUED: February 23, 2023

Trenton, New Jersey