

P.E.R.C. NO. 2024-25

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BOROUGH OF LODI,

Petitioner,

-and-

PBA LOCAL NO. 26,

Docket No. SN-2024-018

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses the Borough's request for a scope of negotiations determination concerning a savings clause (Article 36) contained in its collective negotiations agreement (CNA) with the PBA. The Commission finds that because the parties are not in collective negotiations for a successor contract and because the clause is not the subject of a demand for binding arbitration, it will not exercise its scope of negotiations jurisdiction unless "special circumstances" exist. The Commission further finds that although there is a dispute involving Article 36 that is the subject of a pending unfair practice charge filed by the PBA, the Borough has not identified any intervening legislation or judicial or administrative decisions since the parties negotiated their current CNA that qualify as "special circumstances" to warrant scope of negotiations review. The Commission notes that the Borough may raise its scope of negotiations preemption argument as part of its defense to the unfair practice charge.

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.

P.E.R.C. NO. 2024-25

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LODI,

Petitioner,

-and-

Docket No. SN-2024-018

PBA LOCAL NO. 26,

Respondent.

Appearances:

For the Petitioner, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Adam Abramson-Schneider, of counsel; Anthony G. LoBrace, on the brief)

For the Respondent, Sciarra & Catrambone, LLC, attorneys (Christopher A. Gray, of counsel and on the brief; Frank C. Cioffi, on the brief)

DECISION

On October 17, 2023, the Borough of Lodi (Borough) filed a scope of negotiations petition seeking a determination that Article 36 of its collective negotiations agreement (CNA) with PBA Local No. 26 (PBA) is not mandatorily negotiable where the matter sought to be reopened and negotiated pursuant to Article 36 is statutorily preempted. The PBA is the exclusive majority representative of all police officers employed by the Borough, excluding Police Chief and Deputy Chief of Police. The Borough and PBA are parties to a CNA with a term of January 1, 2021 through December 31, 2025. Article 36 of the CNA is entitled

"Savings Clause" and provides:

If any provision of this Agreement or any application of this Agreement to any Employee, member or group of Employees or members is held to be invalid by operation of law, by any Court, Administrative Body or other tribunal of competent jurisdiction, then the parties agree to reopen negotiations with respect to the impact of such invalid provision consistent with law relating to negotiations and interest arbitration set forth in N.J.S.A. 34:13a-16 et seq.; however, all other provisions and applications contained herein shall continue in full force and effect, and shall not be affected thereby.

On August 30 and 31, 2023, the PBA filed an unfair practice charge and amended charge, Docket No. CO-2023-023, asserting that the Borough violated subsection 5.4a(5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq., by failing to negotiate a change in policy concerning selling back accumulated sick leave. Specifically, the charge alleges that the Borough failed to, pursuant to Article 36 of the CNA, negotiate the impact of its determination that it would no longer permit PBA officers to sell back accumulated sick leave because it violates N.J.S.A. 11A:6-19.2.

The Borough and PBA are not in collective negotiations for a successor contract and the Borough's petition does not seek to restrain a request for binding arbitration by the PBA concerning the accumulated sick leave policy. The Borough's petition noted that the dispute had arisen in response to the PBA's unfair

practice charge. On October 18, 2023 the Commission Case Administrator wrote to the Borough stating that the Borough should advise the Commission of any special circumstances warranting exercise of the Commission's scope of negotiations jurisdiction. See N.J.A.C. 19:13-2.2(a)(4). The Borough filed its position concerning the jurisdictional issue on October 26. The PBA responded on November 2.

The Borough asserts there are special circumstances warranting a scope of negotiations decision on the applicability of Article 36 to the parties' sick leave dispute because the issue of selling back accumulated sick leave for police officers hired after May 21, 2010 is preempted by N.J.S.A. 11A:6-19.2. It argues that the Commission has previously utilized its scope of negotiations jurisdiction to resolve a related unfair practice dispute. The Borough contends it had no obligation to negotiate before bringing its sick leave policies into compliance with the law. It asserts that a July 2022 State Comptroller's report regarding the proper application of N.J.S.A. 11A:6-19.2 to local government employers prompted it to modify its sick leave policy. Finally, the Borough argues that if Article 36 is found to require it to negotiate with the PBA in exchange for implementing the statute which rendered certain accumulated sick leave benefits illegal, then it would undermine the legislative purpose of N.J.S.A. 11A:6-19.2 to save municipalities money.

The PBA's response brief makes no assertions or arguments concerning whether there are special circumstances warranting the Commission's exercise of its scope of negotiations jurisdiction in this matter. Its brief addresses its subsection 5.4a(5) unfair practice claim against the Borough, asserting that Article 36 of the CNA required the Borough to negotiate over the impact of N.J.S.A. 11A:6-19.2 on the PBA.

N.J.S.A. 34:13A-5.4d provides that: "The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, 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 Borough's scope petition is not related to the negotiability of a contract provision during collective negotiations (N.J.A.C. 19:13-2.2(a)(4)(i)), a demand for binding arbitration (N.J.A.C. 19:13-2.2(a)(4)(ii)), or a teaching staff increment withholding dispute (N.J.A.C. 19:13-2.2(a)(4)(iii)). Thus, we must determine whether "special circumstances" exist pursuant to N.J.A.C. 19:13-2.2(a)(4)(iv) to warrant processing of the Borough's petition.

In Cinnaminson Bd. of Educ., P.E.R.C. No. 78-11, 3 NJPER 323 (1977), aff'd in pt., rev'd in pt., NJPER Supp.2d 15 (¶8 App. Div. 1979), pet. for certif. den., 81 N.J. 341 (1979), the Commission established its policy that N.J.S.A. 34:13A-5.4(d) does not extend the Commission's scope jurisdiction to the issuance of advisory opinions without an actual, as opposed to a potential, controversy. Cinnaminson addressed the conditions which would qualify as "special circumstances" warranting the processing of a scope petition in the absence of a demand for arbitration or a dispute over the negotiability of a contractual provision during negotiations for a successor CNA. The Commission held as follows:

Where a petitioner has made a prima facie showing that (1) a particular clause in a contract has been declared to be illegal, as opposed to a mandatory or permissive, subject of collective negotiations by an intervening

Commission or judicial decision or (2) specific legislation mandates the conclusion that a particular contractual provision is an illegal subject for collective negotiations, the Commission will assert jurisdiction over that matter and will render, where appropriate, a scope of negotiations determination on the issue or issues in dispute. If the Commission refuses to entertain scope applications of this type, the would-be petitioner in a scope proceeding may simply refuse to follow the contractual provisions at issue, often necessitating the filing of an unfair practice charge by the employee representative of the affected employees. The Commission believes that to best effectuate the purpose of the Act it is preferable under the above circumstances to work within the non-adversarial scope of negotiations process, a procedure that is considerably more expeditious than unfair practice litigation and often not as provocative.

[Cinnaminson, 3 NJPER at 325.]

The Commission has held that Cinnaminson's "special circumstances" are not met where there has been no "intervening legislation or a subsequent Commission or court decision" finding the subject CNA clause preempted. Harrison Bd. of Ed., P.E.R.C. No. 2020-15, 46 NJPER 155, 157 (¶37 2019); see also Middlesex Cty. College, P.E.R.C. No. 2023-24, 49 NJPER 350 (¶83 2023); Livingston Tp. Bd. of Ed., P.E.R.C. No. 86-135, 12 NJPER 451 (¶17170 1986) (no special circumstances where "no relevant court case or legislation has intervened"); and Teaneck Bd. of Ed., P.E.R.C. No. 2005-40, 30 NJPER 483 (¶162 2004) (where relevant Commission cases finding clause preempted "were issued before the

start of the parties' current agreement" there were no special circumstances and scope petition was dismissed).

Here, the statute (N.J.S.A. 11A:6-19.2) alleged to be preemptive of the accumulated sick leave issue in dispute and, therefore, the re-opener clause requiring impact negotiations, was effective on May 21, 2010. See P.L. 2010, c.3. As the parties have since negotiated collective negotiations agreements, including the current 2021-2025 CNA, P.L. 2010, c.3 was not intervening legislation that the Borough did not know about or could not have known about during collective negotiations. We do not find that the July 2022 Comptroller's report concerning application of that sick leave legislation throughout the state constitutes an intervening judicial or administrative decision as comprehended in Cinnaminson for purposes of exercising our scope jurisdiction. Any negotiability dispute the parties had concerning the legislation's effect on their CNA should have been resolved through the filing of a scope of negotiations petition during the course of collective negotiations, pursuant to N.J.A.C. 19:13-2.2(a)(4)(i). Similarly, should a dispute over the application of that legislation to the CNA become the subject of binding grievance arbitration, a scope of negotiations petition may be filed pursuant to N.J.A.C. 19:13-2.2(a)(4)(ii).

We note that the Borough recently availed itself of the Commission's scope of negotiations jurisdiction involving this



same statute in Borough of Lodi, P.E.R.C. No. 2024-23, \_ NJPER \_ (¶ 2023), decided at the Commission's November 21, 2023 meeting. In that case, the Borough asserted that N.J.S.A. 11A:6-19.2 preempted it from making any supplemental sick leave payments for employees hired in the interim period of the effective date of the statute (May 21, 2010) but before the expiration of the then in force CNA which contained a supplemental sick leave provision that allowed payments beyond the limitations of the statute. Relying on Atlantic City, 2017 N.J. Super. Unpub. LEXIS 2366 (App. Div. 2017), the Commission held that, while the statute generally applies its limitations to employees hired after May 21, 2010, the statute was not preemptive for employees hired in the collective negotiations unit between May 21, 2010 and the expiration of the CNA. This is due to the statute's limiting language about collective negotiations agreements in force on its effective date. Thus, the issue of supplemental compensation for accumulated unused sick leave was legally arbitrable only for the limited class of grievants in P.E.R.C. No. 2024-23 who were hired during such an interim period. The parties' assertions in this scope of negotiations petition are also predicated on the interpretation and application of N.J.S.A. 11A:6-19.2, and appear to involve a more general application of the statute to the CNA's supplemental sick leave provision. The Commission's preemption analysis in P.E.R.C. No. 2024-23 should be instructive in this

dispute.

The Borough relies on State of N.J. (OER) and CWA, P.E.R.C. No. 93-55, 19 NJPER 60 (¶24028 1992), aff'd in pt., rev'd in pt., 267 N.J. Super. 582 (App. Div. 1994), certif. den., 135 N.J. 468 (1994), for its assertion that the Commission should decide this scope petition because there is a related unfair practice charge. In State (OER), the State filed a scope of negotiations petition seeking "a declaration that it need not negotiate" with the CWA over a revised code of ethics that it had recently implemented pursuant to state law. As in this case, the union had filed an unfair practice charge alleging that the employer acted unilaterally without negotiating in violation of subsection 5.4a(5) of the Act. The Commission found there were "special circumstances" warranting exercise of our scope jurisdiction. State (OER), 19 NJPER at 62. However, in contrast to this case, the change implemented in State (OER) that precipitated the unfair practice and scope of negotiations disputes was caused by an intervening change in law. Although the general enabling statute relevant to that case, the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-23, had been in effect for many years, that statute required agencies to promulgate a code of ethics that would become effective once approved by the Executive Commission on Ethical Standards. Thus, when the employer revised its code of ethics in January 1991 pursuant to the state ethics

law, it had the effect of an intervening legislative change to the employees' conditions of employment which prompted the union to file an unfair practice charge in February 1991 and the employer to respond with a scope petition.<sup>1/</sup>

Here, while there is a dispute over the preemptive effect of N.J.S.A. 11A:6-19.2 on the parties' CNA that is the subject of a related unfair practice charge by the PBA, there has been no intervening legislative change or judicial or administrative decision that prompted the negotiability dispute since the parties negotiated their 2021-2025 CNA. Therefore, there are no "special circumstances" warranting exercise of the Commission's scope of negotiations jurisdiction. N.J.A.C. 19:13-2.2(a)(4)(iv); Cinnaminson. As the resolution of the PBA's 5.4a(5) charge will necessarily involve a scope of negotiations analysis, the Borough may raise its preemption claim as part of its defense to the unfair practice charge.

---

<sup>1/</sup> The Borough's reliance on Borough of Closter, P.E.R.C. No. 92-42, 17 NJPER 484 (¶22235 1991) is similarly misplaced. In Closter, the Commission exercised its scope jurisdiction after specifically noting that an overtime provision of the contract was allegedly "declared to be illegal by an intervening decision of the United States Department of Labor." 17 NJPER at 485. The Commission noted that the union filed the DOL complaint after the parties' 1990-1992 contract was executed and that the DOL decision was issued in 1991. Id. at 484-485.

ORDER

The Borough's request that the Commission accept and process its scope of negotiations petition is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Higgins and Papero voted in favor of this decision. None opposed. Commissioner Bonanni recused himself. Commissioner Voos was not present.

ISSUED: December 14, 2023

Trenton, New Jersey