

P.E.R.C. NO. 2024-45

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT BOARD OF  
EDUCATION,

Petitioner,

-and-

Docket No. SN-2024-026  
SN-2024-027

MERCER COUNTY SPECIAL SERVICES EDUCATION AND THERAPEUTIC  
ASSOCIATION,

-and-

MERCER COUNTY SPECIAL SERVICES SUPPORT STAFF ASSOCIATION,  
Respondents.

SYNOPSIS

The Public Employment Relations Commission dismisses without prejudice the Board's request for a scope of negotiations determination concerning binding past practices purportedly incorporated into its collective negotiations agreements (CNA) with the Associations. The Commission finds that because the parties are not in collective negotiations for successor contracts and because the past practices are 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 the past practices that is the subject of two pending unfair practice charges filed by the Associations, the Board has not identified any intervening legislation or judicial or administrative decisions since the parties negotiated their current CNAs that qualify as "special circumstances" to warrant scope of negotiations review. The Commission notes that the Board 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. 2024-45

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY SPECIAL SERVICES  
SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket Nos. SN-2024-026  
SN-2024-027

MERCER COUNTY SPECIAL SERVICES  
EDUCATION AND THERAPEUTIC ASSOCIATION,

-and-

MERCER COUNTY SPECIAL SERVICES  
SUPPORT STAFF ASSOCIATION,

Respondents.

Appearances:

For the Petitioner, Capehart Scatchard, attorneys  
(Geoffrey N. Stark, of counsel)

For the Respondents, Mellk Cridge, LLC, attorneys  
(Edward A. Cridge, of counsel)

DECISION

On January 25, 2024, the Mercer County Special Services School District Board of Education (Board) filed two scope of negotiations petitions seeking a determination that a binding past practice allegedly incorporated into the collective negotiations agreements (CNA) with Mercer County Special Services Education and Therapeutic Association (Certificated Association) and Mercer County Special Services Support Staff Association (Staff Association) is not mandatorily negotiable. On February

1, 2024, the Commission Case Administrator wrote to the parties stating that the petitions did not appear to meet the grounds for processing scope of negotiations petitions pursuant to N.J.A.C. 19:13-2.2(a). The Board submitted a supplemental filing alleging a basis for processing the petitions on February 6. The Association did not file opposition. These facts appear.

The Certificated Association is the exclusive majority representative of teachers, therapists, classroom assistants, one-on-one assistants, individual behavioral assistants, nurses, school nurses, school counselors, school social workers, school psychologists, learning disabilities teacher consultants, certified occupational therapy assistants, physical therapy assistants, crisis intervention specialists, case managers, and substance assistance counselors employed by the Board. The Board and Certificated Association are parties to a CNA with a term of July 1, 2022 through June 30, 2024.

The Staff Association is the exclusive majority representative of all full-time salaried, part-time salaried, full-time hourly and part-time hourly cleaning, clerical, custodial, grounds persons, transportation employees, and specialists and computer support technicians employed by the Board. The Board and Staff Association are parties to a CNA with a term of July 1, 2022 through June 30, 2025.

The Certificated Association filed an unfair practice charge on December 5, 2023, docketed as CO-2024-082, and the Staff Association filed a similar charge on December 19, 2023, docketed as CO-2024-093. Both UPCs contest the Board's alleged unilateral change of a binding past practice. Specifically, the Associations contend that prior to its regularly scheduled public meetings, the Board is obligated to provide the Associations with copies of the Board's meeting agenda, and the documents to be reviewed, addressed, and/or voted on by the Board at the upcoming meeting.

The Board contends that the petitions are properly before the Commission because special circumstances warrant the exercise of the Commission's scope of negotiations jurisdiction pursuant to N.J.A.C. 19:13-2.2(a)(4)(iv). The Board contends that the companion unfair practice charges require a threshold determination as to whether the alleged contractual provision is mandatorily negotiable. Because the unfair practice charges would be moot if the subject matter of the contractual issue is not mandatorily negotiable, the Board asserts that a special circumstance exists warranting disposition by the Commission.

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 Board’s petitions and supplemental filings indicate that the dispute 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 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 Board’s petitions.

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 an 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.]

"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." Cedar Grove Tp. Bd. of Ed., P.E.R.C. No. 2024-26, 50 NJPER 288 (¶68 2023) (internal quotations and citations omitted); see also Lodi Borough, P.E.R.C. No. 2024-025, 50 NJPER 285 (¶67 2023).

Here, the Board is unable meet the standard set forth in Cinnaminson to show that special circumstances exist. Whether a public employer must provide advance copies of its public meeting agendas to an employee representative is neither illegal nor has a recent change in the law affected the negotiability of such an issue. Standing alone, the existence of a related unfair practice charge does not amount to special circumstances under Cinnaminson. The issue of negotiability will be addressed as a threshold issue through the resolution of the Associations' unfair practice charges. Alternatively, if the negotiability otherwise becomes ripe pursuant to N.J.A.C. 19:13-2.2(a)(4), the Board may file a scope petition in the normal course.

#### ORDER

The Mercer County Special Services School District Board of Education's requests that the Commission accept and process its scope of negotiations petitions are denied. The Petitions are dismissed without prejudice.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Eaton, Ford, Higgins, Kushnir and Papero voted in favor of this decision. None opposed. Commissioner Bolandi was not present.

ISSUED: March 28, 2024

Trenton, New Jersey