

P.E.R.C. NO. 91-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Petitioner,

-and-

Docket No. SN-90-65

UNION CITY FMBA LOCAL 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a scope of negotiations petition filed by the City of Union City. The City sought a determination that its drug testing ordinance and a drug testing proposal withdrawn by Union City FMBA Local 12 during collective negotiations and interest arbitration proceedings are not mandatorily negotiable. Neither party has a drug testing proposal pending before the interest arbitrator. Nor has the FMBA filed a grievance or other formal challenge to the City's ordinance. No special circumstance warrants the Commission's deciding this question.

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Appearances:

For the Petitioner, Scarinci & Pelio, attorneys
(Lane J. Biviano, of counsel)

For the Respondent, Loccke & Correia, attorneys
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On April 3, 1990, the City of Union City petitioned for a scope of negotiations determination. The City seeks a determination that its drug testing ordinance and a drug testing proposal withdrawn by Union City FMBA Local 12 during collective negotiations and interest arbitration proceedings are not mandatorily negotiable.^{1/}

The parties have filed briefs and documents. These facts appear.^{2/}

^{1/} A "facilities improvement" proposal was also withdrawn and is no longer in dispute.

^{2/} We deny the City's request for oral argument.

Local 12 represents the City's firefighters. The parties entered into a collective negotiations agreement effective from January 1, 1987 through December 31, 1989. In February 1990, the City advised representatives of five separate units of City employees, including the FMBA, of a proposed drug testing ordinance. Through correspondence and the media, the president of the FMBA objected to the ordinance. The FMBA submitted its own drug testing proposal to the City. On March 26, 1990, the FMBA filed an interest arbitration petition which listed drug testing as an unresolved issue in the negotiations. The City then filed this petition. On April 17, 1990, the ordinance was passed by the City on first reading. The record does not show that it has been finally adopted.

On November 2, 1990, after briefs and supplemental briefs had been filed, the parties attended a conference held by a member of the Commission's staff. By letter dated November 27, 1990, the FMBA's counsel stated that neither the City nor the FMBA had any drug testing proposal pending before the interest arbitrator. The letter asserted that the issue was moot since no drug testing proposal was to be included in the parties' next agreement.

The City has declined our invitation to withdraw the petition and urges that we issue a negotiability determination. We decline to do so absent a current and active dispute over a specific contract proposal.

N.J.S.A. 34:13A-5.4(d) empowers us, upon the request of any public employer or exclusive representative, to determine whether a matter in dispute is within the scope of negotiations. N.J.A.C. 19:13-2.2(a)(4) requires that a 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 or matters which the other party contends is not a required subject for collective negotiations; or

ii. With respect to the negotiability of a matter or matters sought to be processed pursuant to a collectively negotiated grievance procedure; or

iii. Other than in subparagraphs i and ii above, with an explanation of the circumstances.

In Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977), we articulated the boundaries of our scope of negotiations jurisdiction. We stated:

The Commission concurs with the Association that its authority under 5.4(d) does not extend to the issuance of advisory opinions in scope of negotiations matters in the absence of an actual, as opposed to potential, controversy. The Commission recognizes that negotiability disputes requiring a Commission scope determination will normally arise in two ways. Perhaps the most common arena is at the negotiations table, where, typically the public employer will resist negotiating with respect to a given subject matter on the theory that it relates to managerial prerogatives and not terms and conditions of employment. Secondly, disputes have arisen in the context of a negotiated grievance procedure. Typically the employee representative will seek to grieve the matter, and ultimately to have the matter arbitrated, which the public employer contends is a matter of managerial prerogative and not a term and

condition of employment. In this context, the public employer will claim that the matter at issue may thus not legally be included in a contract and otherwise may not legally be submitted to an arbitrator, as the public employer's statutory management responsibilities may not be abdicated or delegated.

The Commission however concludes that in addition there are "special circumstances" that require that the Commission issue scope of negotiations determinations relating to provisions of an existing contractual agreement that may not be presently the subject of negotiations for a successor contract or the subject of an arbitration request. Where a petition 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 issues in dispute.... [Id. at 324-325; footnote omitted]

See also Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 85-9, 10 NJPER 499 (¶15227 1984); Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983); Pitman Bor., P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); Camden Cty. Freeholder Bd., P.E.R.C. No. 81-56, 6 NJPER 544 (¶11276 1980), recon. granted, P.E.R.C. No. 81-71, 7 NJPER 20 (¶12007 1980).

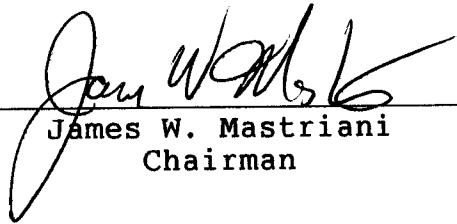
Neither party has a drug testing proposal pending before the arbitrator. Moreover, we have not been advised that the FMBA has filed a grievance or other formal challenge to the City's

ordinance. No special circumstance warrants our deciding this question.^{3/}

ORDER

The scope of negotiations petition is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: April 19, 1991
Trenton, New Jersey
ISSUED: April 19, 1991

^{3/} A recent decision, Hopatcong Bor., P.E.R.C. No. 91-60, 17 NJPER 62 (¶22028 1990), addresses the negotiability of drug testing for police.