

P.E.R.C. NO. 2024-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CEDAR GROVE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2024-020

CEDAR GROVE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses the Board's and Association's joint request for a scope of negotiations determination concerning the negotiability of the parties' past practice regarding the consecutive use of paid sick leave and unpaid FMLA leave. 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 the family leave practice is the subject of a pending unfair practice charge filed by the Association, the Board 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 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.

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Appearances:

For the Petitioner, Weiner Law Group LLP, attorneys
(Stephen J. Edelstein, of counsel; Margaret A. Miller,
on the brief)

For the Respondent, Zazzali P.C., attorneys (Richard A.
Friedman, of counsel and on the brief; Amory R. Blank,
on the brief)

DECISION

On October 31, 2023, the Cedar Grove Township Board of Education (Board) filed a scope of negotiations petition seeking a determination that the parties' past practice by which it permitted employees to use paid sick leave for periods of personal or family illness followed by a full 12 weeks of unpaid FMLA is preempted by federal regulation and therefore not mandatorily negotiable. The Board's petition states that the Board and the Cedar Grove Education Association (Association) "have agreed to file this joint Scope Petition to determine the negotiability of the substantive issues raised in the Unfair

Practice Charge docketed as CO-2023-055.” On October 31, the Commission Case Administrator wrote to the parties stating that the petition did not indicate that the dispute is the subject of a grievance arbitration or a dispute that has arisen during collective negotiations. Therefore the parties were asked to 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). On November 8, the Association filed its position concerning the jurisdictional issue, and the Board responded on November 13. These facts appear.

The Association is the exclusive majority representative of a unit of teachers, counselors, nurses, social workers, speech therapists, and other job titles employed by the Board as specified in the collective negotiations agreement (CNA) between the Board and the Association. The Board and Association are parties to a CNA with a term of July 1, 2020 through June 30, 2023.^{1/}

On October 7, 2022 the Association filed an unfair practice charge (UPC),^{2/} Docket No. CO-2023-055, asserting that the Board violated subsections 5.4a(5) and 5.4a(1) of the New Jersey

1/ This most recent CNA was included with the Association’s related unfair practice charge, but was not yet submitted as part of this scope of negotiations petition.

2/ At the time the UPC was filed, the Association indicated that the parties were in successor contract negotiations.

Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq., by failing to negotiate a change in the use of sick and family leave usage that no longer permitted employees to use paid sick leave and unpaid FMLA leave consecutively. The charge alleges that the Board claimed that a change in the law issued through a federal U.S. Department of Labor (DOL) Guidance Statement memorandum in 2019 required the Board to designate qualifying leave as FMLA leave and therefore preempted the use of paid sick leave that was not used concurrently with FMLA leave.

The Association asserts that there are special circumstances warranting a scope of negotiations decision on the parties' sick leave and FMLA dispute because the Board claims that recent DOL guidance preempts the parties' past practice, while the Association claims that a federal circuit court of appeals decision (Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236 (9th Cir. 2014)) reached the opposite conclusion. The Association argues that there are also special circumstances because this negotiability dispute is the subject of the parties' unfair practice dispute which they have agreed to resolve through this scope petition. The Association contends that resolving this dispute by utilizing the Commission's scope of negotiations jurisdiction will be more efficient for both parties than proceeding with the unfair practice charge.

The Board's response letter agrees with the Association's

assertion that the parties' sick leave/FMLA preemption dispute is best resolved through a scope petition rather than an unfair practice proceeding. The Board disagrees with the Association's substantive claims about the import of the 2014 Escriba v. Foster Poultry Farms decision as compared to the 2019 DOL guidance.

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 parties' joint scope petition indicated that it 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 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).

In Borough of Closter, P.E.R.C. No. 92-42, 17 NJPER 484

(¶22235 1991), the Commission found special circumstances to exercise our scope jurisdiction regarding whether an overtime provision had been declared illegal under the federal Fair Labor Standards Act (FLSA) by an intervening decision letter from the DOL's Director for the Northern New Jersey District. In that case, a complaint filed with the DOL prompted an investigation that revealed overtime and recordkeeping violations affecting payments to certain PBA detectives. The DOL's determination also found that the parties' contract provision allowing for a 5% stipend in lieu of overtime did not comply with the FLSA. The Commission noted that the DOL complaint was filed "[a]fter this contract was executed" and found that Cinnaminson's requirements were met because "the overtime increment provision has been declared to be illegal by an intervening decision of the United States Department of Labor." 17 NJPER at 484-485.

Here, the 2019 DOL guidance memo cited by the Board in support of its preemption argument was issued prior to the start of the parties' current July 2020 through June 2023 CNA. The 2014 judicial decision cited by the Association also predates the current contract. Therefore, there has been no intervening judicial or administrative decision that allegedly declared the parties' consecutive sick leave/FMLA practice an illegal subject of negotiations. Accordingly, we find 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.^{3/} Any negotiability dispute the parties have concerning their sick leave/FMLA practice 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).^{4/} Similarly, should a dispute over the issue 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). Although the sick leave/FMLA issue is in dispute in a related unfair practice charge, resolution of the Association's 5.4a(5) charge will necessarily involve a scope of negotiations analysis. The Board may raise its preemption claim as part of its defense to the unfair practice charge.

^{3/} The fact that this is a joint request does not provide a basis to deviate from the standards for special circumstances set forth in Cinnaminson.

^{4/} If, as indicated in the Association's unfair practice charge, the parties are still in collective negotiations for a successor CNA, either party may re-file a scope of negotiations petition if this sick leave/FMLA issue is a disputed topic in collective negotiations.

ORDER

The Board's and Association's joint request for the Commission to accept and process this scope of negotiations petition is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 14, 2023

Trenton, New Jersey