P.E.R.C. NO. 99-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and- Docket No. SN-98-70

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey (Department of Corrections) for a restraint of arbitration of a grievances filed by the Communications Workers of America, AFL-CIO. The grievances allege that DOC violated the parties' collective negotiations agreements by not providing a safe and healthful workplace. The Commission declines to restrain arbitration over the assertion that the workplace is unsafe and unhealthful. The Commission takes no position on the contractual merits. The Commission denies the restraint without prejudice to the employer's refiling its petition after an arbitration award is issued should the employer believe that any remedy ordered trenches upon its prerogative.

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, Peter Verniero, Attorney General
(Stephan M. Schwartz, Deputy Attorney General, on the brief)

For the Respondent, Weissman & Mintz, attorneys
(James M. Cooney, on the brief)

DECISION

On March 19, 1998, the State of New Jersey (Department of Corrections) petitioned for a scope of negotiations determination. The State seeks a restraint of binding arbitration of four grievances filed by the Communications Workers of America, AFL-CIO on behalf of employees in the Department of Corrections ("DOC"). The grievances allege that DOC violated the parties' collective negotiations agreements by not providing a safe and healthful workplace.

The State has filed briefs, exhibits and certifications. CWA has filed responsive letters. These facts appear.

CWA represents employees in four negotiations units: primary level supervisors unit, higher level supervisors unit, professional unit, and administrative and clerical services unit. These units are covered by collective negotiations agreements effective through June 30, 1999. The grievance procedures end in binding arbitration of contractual disputes.

Article XXXII of each agreement is entitled Health and Safety. Sections A, B, and D provide:

> A. The State shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment .... The State will set up necessary job safety and health programs for all employees covered by this Agreement and shall provide a reasonably safe and healthful place of employment for all employees.
>
> B. The parties agree to cooperate in maintaining and improving safe working conditions and health protection for the employees consistent with established safety standards and in the promotion of safety, safe working habits and good housekeeping throughout the work environment. Where reasonably possible each employee will comply with all safety rules and regulations.
>
> D. Employees shall not be required to work under conditions of work which are unsafe or unhealthful....

On December 9, 1996, CWA filed a group grievance on behalf of DOC employees in each negotiations unit. Each grievance alleged that Sections A, B and D of Article XXXII were violated as a result of the employer's decisions to charge inmates for medical services and to privatize DOC medical services. As a remedy, the grievance requested that DOC immediately return to its previous

medical services. That remedy would require abrogating a contract with a private company, Correctional Medical Services ("CMS"), to provide non-emergency medical services from April 26, 1996 to April 25, 1999.

On July 12, 1997, CWA demanded arbitration. On July 28, the Deputy Director of the Office of Employee Relations responded that arbitration was inappropriate given the proposed remedy of undoing the privatization of medical services. The Deputy Director asserted that this remedy would be illegal because privatization was a non-negotiable managerial prerogative. The Deputy Director added, however, that "the actual grievance on Health and Safety, absent the proposed remedy, should be heard at the Departmental level." He referred the matter back to DOC for a departmental hearing as to whether Article XXXII had been violated based on the facts put forward by CWA.

On October 29, 1997, a DOC employee relations coordinator conducted the departmental hearing. CWA amended its grievances to delete its request that the previous medical services be restored. The requested remedy was changed to ask that: "The State provide a healthy and safe environment for bargaining unit members."

At the hearing, CWA presented four specific complaints:

> 1. Inmates suspected of having scabies are treated with Quell but only when an outbreak occurs. There are no preventative measures taken to prevent an outbreak. A scabies outbreak is of great concern to CWA.

2. Kitchen inmates are not screened for Hepatitis and other Bloodborne infections and are handling food.

3. CMS does not provide enough supervision of kitchen inmates. Inmates are preparing and serving food but are left unsupervised in the dining areas creating a health and safety risk to employees who eat there.

4. Psychiatric and medical examinations are not being performed on inmates who are responsible for the preparation of food.

CWA also presented a document listing these questions posed by its membership about mental health and medical protocols:

Mental Health

1. Does every IM arriving in the NJDOC receive a comprehensive medical examination, which would include an initial psychological interview? If so, when is this comprehensive initial medical/psychological screening completed?

2. Is every IM who has a history of psychiatric illness scheduled for an initial interview with a psychiatrist, during this intake period (prior to transfer to parent institution)?

3. Are IMs who either admit to a psychiatric HX or who are found to suffer from these illnesses seen by a psychiatrist or psychologist within 72 HRS of reception?

4. Are IMs seen by a psychiatrist or psychologist within 72 HRS of their placement in DET and ACSU?

5. Are IMs in DET & ACSU status seen by a psychologist every ten (10) days, as stipulated in the private company's proposal?

6. Are IMs who are prescribed psychotropic medications seen within (30) days by a psychiatrist.

7. Does every IM who receives psychotropic medication possess a Treatment Plan?

8. Are IMs with Special Needs (such as developmental disabilities, mental retardation, physical disabilities, etc.) provided access and opportunity for treatment?

9. Does there exist backlogs for psychological evaluations?
initial evaluations?
reduction in custody status?
pre-parole evaluation?
community release evaluations?
in-depth evaluation for SPB?

NOTE: A negative response to any of these questions increase[s] the chance that an IM, who suffers from a psychiatric disorder or who has been delayed for parole [due to a missing psychological report] could become a danger to a civilian or custody officer.

MEDICAL

1. When an IM submits a written complaint, is he provided a face-to-face interview with an employee of the private company (whether nurse, MD, psychologist or dentist) to investigate his complaint? Does the IM receive a written response?

2. Are IMs who suffer from certain chronic illnesses, such as cardiac problems or diabetes seen every (90) days for special clinics, as stipulated in the CMS proposal.

3. Is doctor call provided every day? In ACSU? How often are DET IMs seen by a nurse? doctor?

4. How often must IMs wait for a consult (to a specialist) to be approved?

5. Does every IM who places his name on nurse triage list get to be seen by a nurse? How could this be proved?

> 6. If an IM does not report to nurse triage, do medical staff make any effort to locate that IM and have him brought to the hospital?
>
> NOTE: A negative response to any of these questions increase[s] the chance that an IM, who suffers from a medical problem and has not received adequate care, could become a danger to a civilian or custody officer.

CWA's representative argued in summation that DOC is responsible for caring for inmates and employees could suffer injuries and illnesses if it does not do so.

DOC's representative stated that the questions about mental health and medical protocols were unfounded and should have been addressed to DOC or CMS personnel.

On January 9, 1998, the hearing officer denied the grievances. She found that CWA had not substantiated any violations of Article XXXII.

CWA renewed its request for arbitration. This petition ensued. An arbitrator has been appointed.

On May 26, 1998, CWA's attorney wrote the State's attorney a letter confirming that CWA would not ask the arbitrator to rescind privatization or end inmate co-payments. He reiterated that CWA was seeking as a remedy that "The State provide a healthy and safe environment for bargaining unit members." He stated that CWA would present to the arbitrator the complaints and questions presented at the departmental hearing and quoted above.

Because it is not asking the arbitrator to rescind privatization or end inmate co-payments, CWA asserts that the scope-of-negotiations petition should be dismissed as moot.

The State disagrees. It asserts that the amended grievance does not comply with grievance procedure requirements that relevant facts be specified and that the complaints raised at the departmental hearing center on non-negotiable medical protocols. It concludes that its petition is not moot because CWA is still challenging its prerogative to determine how to deliver medical services to inmates.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of these grievances or any contractual defenses the State may have. We specifically decline to consider the State's assertions that the grievances were not timely or specific enough.

Clauses seeking to protect the health and safety of employees are mandatorily negotiable. See, e.g., City of Perth

Amboy, P.E.R.C. No. 98-146, 24 NJPER 311 (¶29148 1998); State of New Jersey, P.E.R.C. No. 92-55, 18 NJPER 35 (¶23011 1991); State of New Jersey (Greystone Park Psychiatric Hosp.), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985). See also Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322 (1989). But decisions as to how to deliver medical services to inmates are within DOC's statutory responsibility pursuant to N.J.S.A. 30:1B-3 and within its prerogative to make governmental policy decisions under Local 195, IFPTE v. State, 88 N.J. 393 (1982). CWA does not contest the State's assertion that its decisions to privatize medical services and require inmate co-payments are non-negotiable.

Consistent with the precedents cited, we decline to restrain arbitration over CWA's assertion that the workplace is unsafe and unhealthful and that a declaration to that effect is warranted. We reiterate that we take no position on the contractual merits. We also caution that, if a contractual violation is found, the arbitrator may not order any remedy that would impair the employer's decisions as to how to deliver medical services to inmates. Should the employer believe that any remedy ordered trenches upon its prerogative, it may refile this petition and ask us to consider the negotiability of the remedy. See, e.g., Essex Cty. College, P.E.R.C. No. 98-115, 24 NJPER 175 (¶29087 1998).

ORDER

The request of the State of New Jersey (Department of Corrections) for a restraint of arbitration is denied, without prejudice to the employer's refiling its petition after an arbitration award is issued.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999