P.E.R.C. NO. 92-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and- Docket No. SN-91-90

COMMUNICATIONS WORKERS OF AMERICA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of grievances filed by the Communications Workers of America against the State of New Jersey. The grievances assert that the employer violated the safety articles of its collective negotiations agreements with CWA. The Commission finds that the Worker and Community Right to Know Act, N.J.S.A. 34:5A-1 et seq., does not preempt arbitration.

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Appearances:

For the Petitioner, Robert J. Del Tufo, Attorney General (Stephan M. Schwartz, Deputy Attorney General)

For the Respondent, Steven P. Weissman, attorney

DECISION AND ORDER

On May 24, 1991, the State of New Jersey petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of grievances filed by the Communications Workers of America ("CWA"). The grievances assert that the employer violated the safety articles of its collective negotiations agreements with CWA.

The parties have filed exhibits and briefs. These facts appear.

CWA affiliates represent four negotiations units of State employees: (1) administrative and clerical employees, (2) professionals, (3) primary level supervisors, and (4) higher level supervisors. The parties' collective negotiations agreements are effective from July 1, 1989 to June 30, 1992 and contain grievance

procedures ending in binding arbitration. Each contract has a safety article. Section A of each article provides:

> 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 discharge its responsibility for the development and enforcement of occupational safety and health standards to provide a safe and healthful environment. 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.

Each safety article further states: "[e]mployees shall not be required to work under conditions of work which are unsafe or unhealthy."

In the Spring of 1989, CWA learned that the Department of Health planned to install carpets on the seventh floor of its Trenton offices. On April 26, 1989, a shop steward sent a memorandum to a management official registering CWA's concern about potential health problems and stating that problems had arisen before when carpeting was installed. Employees also sought information about the carpet adhesive to be used. At CWA's urging, the department asked that ventilation be increased. The memorandum accompanying the department's request stated:

> Installation of carpet and partitions is often associated with a variety of health complaints received from the occupants of the affected area. The adverse health effects are due to a spectrum of gaseous organic chemicals released from new carpets and partitions and materials used for installation.

A September 27, 1989 memorandum from Rana Abbas, a research scientist, suggested health problems which might arise from using Chapco 317 in the installation:

> 1. The petroleum distillate includes naptha VM & P (Varnish Makers and Painters) and a small percentage of aromatics such as toluene. According to them there was no benzene present.
>
> 2. The preservative used is an antibacterial (liquid form) and is a minor component. According to them the product does not contain alcohol or formaldehyde. They declined to give the name of the compound.
>
> 3. During installation it is possible that the "wet" adhesive could react with carpet backing, if the carpet backing is latex.
>
> 4. Generally, 24-48 hours should be sufficient for the carpet "to cure" (i.e., to get all moisture and water out). However, depending on room conditions the "leaching effect" could last a little longer.
>
> 5. The company has received calls from people using this product complaining about "eyes burning, headaches, etc."
>
> 6. It is important to have "fresh air" in the building to flush out the chemicals otherwise the contaminants may recirculate in the building (i.e., if we are using central air).

On September 29, 1989, the carpet was installed. Several employees complained of illness. Two completed accident reports.

On October 16, 1989, CWA filed group grievances on behalf of the four negotiations units. The grievances allege that the safety article was violated and state:

> Management did not make reasonable provisions for the health of its employees in that they failed to determine the chemical hazards to which we would be exposed during renovations on the 7th floor. Management failed to determine the chemical names of hazardous materials which could

> be given off by the carpet adhesive, new carpeting and partitions. They failed to specify and choose products with low toxicity. They failed to choose vendors who would provide information required under the N.J. Right to Know Act. They failed to challenge undocumented trade-secret claims.

The grievances seek this relief:

> Management will make provisions for the Health & Safety of its employees as is required by both the Union contract and the law, including determination of the chemical hazards employees are exposed to and their chemical names and will make this information available to all affected employees immediately. Management will specify and choose products with the lowest possible toxicity and choose vendors who will provide information required under the New Jersey Worker and Community Right to Know Act and will comply with all requirements of that Act within the appropriate time limits.

On June 29, 1990, a department hearing officer denied the grievances. Addressing the question of whether the employer had done enough to protect employees from exposure to hazardous substances and chemicals during the carpet installation, he concluded:

> There was no testimony presented assessing whether those afflicted by the renovations were hypersensitive for whom no unlimited amount of changes or resources would have made a difference or whether they were representative of persons of average sensitivity. Nor was information presented that action by management represented the state of the art.
>
> While information presented by both parties is nonetheless not convincing, the burden of proof rested with the grievant to convincingly substantiate the claim. That burden was not met.

On July 20, 1990, the management representative at the next step of the grievance procedure concurred with the hearing officer's findings and conclusions. The representative stated that the grievants had failed to establish a causal relationship between the renovations and the alleged illnesses.

On August 16, 1990, CWA demanded binding arbitration. This petition ensued.

The employer contends that the Worker and Community Right to Know Act, N.J.S.A. 34:5A-1 et seq., ("WCRK") preempts arbitration and requires that any alleged statutory violations be resolved by filing a complaint with the Commissioner of Labor. CWA responds that health and safety issues are mandatorily negotiable; WCRK establishes minimum standards only; and any statutory review mechanism does not preclude arbitration.

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. [78 N.J. at 154]

We thus do not consider the contractual merits or arbitrability of the grievance.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), states the tests for determining negotiability: A subject is negotiable if:

> (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. [Id. at 404]

The parties agree that health and safety issues are mandatorily negotiable in general. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 332 (1989); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985). The only question we need address is whether WCRK preempts arbitration.

The employer asserts that three WCRK sections are preemptive. N.J.S.A. 34:5A-14 requires employers to ensure that every container with a hazardous substance bear a label indicating the chemical name and Chemical Abstracts Service number of the hazardous substance or the trade secret registry number assigned to the hazardous substance. N.J.S.A. 34:5A-15 sets forth the criteria and procedures for asserting trade secret claims. N.J.S.A. 34:5A-16 requires employers to provide employees or their representatives, upon written request, with copies of workplace surveys, hazardous substance fact sheets, and environmental surveys; if an employer does not honor such a request, the employee may refuse to work with a hazardous substance and may file a complaint with the Commissioner of Labor. The Commissioner must investigate the allegations and may order a hearing before the Office of Administrative Law. If a

violation is found, the Commissioner shall initiate a civil action by summary proceedings pursuant to the penalty enforcement law, N.J.S.A. 2A:58-1 et seq., and the employer will be liable for a penalty of not less than $2500 for each offense.

Preemption will not be found unless a statute or regulation sets a term or condition of employment expressly, specifically, and comprehensively, thus eliminating the employer's discretion to grant a particular benefit. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). A statute or regulation which confers a minimum level of benefits does not preempt a negotiated agreement which confers more generous benefits. State Supervisory at 81. Statutes and regulations covering terms and conditions of employment are incorporated by reference into public sector contracts. Id. at 80; West Windsor Tp. v. P.E.R.C., 78 N.J. 98, 107 (1978).

WCRK does not preempt arbitration. WCRK entitles employees to certain information, but does not protect them against being exposed to toxic substances or ensure that they will have, in the words of the safety article, "a reasonably safe and healthful place of employment." CWA's grievances thus seek to enforce contractual provisions which allegedly give the employees more protection than WCRK's minimum information standards. Further, to the extent the grievances allege a violation of WCRK's provisions, those allegations may be resolved through arbitration since they involve negotiable terms and conditions of employment rather than managerial

prerogatives. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 15 (1983); West Windsor; State Supervisory. Contrast Teaneck (statutes implicating prerogatives may not be enforced through arbitration); CWA v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984) (no binding arbitration of disciplinary disputes which may be resolved through alternate statutory appeal procedures). Nothing in N.J.S.A. 34:5A-16 suggests that its procedures were intended to be the exclusive remedy for alleged failures to disclose information or that employees were to be foreclosed from pursuing parallel contractual claims. Cf. State Supervisory at 80, n.6; Fair Lawn Bor. Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (App. Div. 1980).

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: November 25, 1991
Trenton, New Jersey
ISSUED: November 26, 1991