P.E.R.C. NO. 2005-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TEANECK BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2005-013

TEANECK TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a scope of negotiations petition filed by the Teaneck Board of Education. The Board seeks a mid-contract determination that a workers' compensation provision in its collective negotiations agreement with the Teaneck Township Education Association is illegal and unenforceable. The Commission will not exercise its scope of negotiations jurisdiction in the absence of a dispute that has arisen during negotiations for a successor agreement or during the processing of a demand for arbitration. The Commission concludes that no special circumstances warrant issuing a mid-contract advisory scope opinion.

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, Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys (Christopher B. Parton, on the brief)

For the Respondent, Springstead & Maurice, attorneys (Harold N. Springstead, on the brief)

DECISION

On August 23, 2004, the Teaneck Board of Education petitioned for a scope of negotiations determination. The Board seeks a mid-contract determination that a workers' compensation provision in its collective negotiations agreement with the Teaneck Township Education Association is illegal and unenforceable.

The parties' collective negotiations agreement is effective from July 1, 2002 through June 30, 2005. Article XI.K is entitled Workers' Compensation Injury. Section 3 provides:

> An injured employee may use a doctor of his/her choice in the event of injury, subject to the qualification that, if in the

> opinion of the insurance carrier a doctor appears to be dragging out or continuing a case beyond its normal limits, as determined by a separate doctor, the insurance carrier may decline in the future to accept the use of said doctor for any further case.

On December 23, 2003, the Board's attorney wrote to an Association representative that section 3 would be unlawful if interpreted to prevent the Board from requiring that a claimant see a doctor approved by the Board's insurance carrier or plan administrator. The letter explained that in recent years, two employees had asserted that section 3 allowed them to refuse to be examined by approved physicians. Their claims were rejected and the employees submitted to examinations as required by the plan administrator. No grievances were filed. The letter continued that the Board has been exploring alternative ways to provide workers' compensation through insurance pools, and that the pools have stated that they will not do business with the Board if employees cannot be required to submit to examination by approved doctors. The letter stated that the attorney had advised the Board's business administrator that the district is under no legal constraint that would prevent it from agreeing to the insurance pools' conditions for coverage.

The attorney also sent the Association representative a copy of his letter to the Board's business administrator. That letter states that nothing in section 3 prevents the Board from entering into any agreement that would give an insurance carrier or self-

insurance group authority to require claimants to be examined by plan-approved doctors and that if the Association were to challenge that requirement through the contractual grievance procedure, the Board should file a scope petition. The letter to the administrator also recommended that if the matter was not litigated during the term of the parties' contract, the Board should move in successor contract negotiations to amend the language to a form more consistent with the statutory requirements to avoid further confusion.

On January 20, 2003, the Association's attorney responded that the Board has the right to make the initial choice of physician or hospital in fulfilling its obligation to furnish medical services to an injured employee, but that the statute does not require an employer to direct that an employee must use a particular doctor or hospital. The Association's attorney added that all the contract states is that an injured worker may use a physician of his choice at the Board's expense which must be reasonable and necessary as required by statute.

On August 25, 2004, the Commission Case Administrator wrote to the Board explaining that the Commission will normally not make a negotiability determination about an existing contract clause absent a dispute that has arisen during negotiations for a successor agreement or during the processing of a demand for binding arbitration of a grievance alleging that a clause has

been violated. The Board was given ten days to advise us why it believes we should exercise our scope jurisdiction.

On September 1, 2004, the Board responded. It argues that there are special circumstances under N.J.A.C. 19:13-2.2(a)(4)(iii) triggering our jurisdiction because insurance pools have been rejecting its applications to join due to the financial uncertainty arising out of the contract language. The Board contends that Commission case law issued subsequent to the parties' agreement preempts and invalidates section 3; specific workers' compensation legislation provides that the employer is vested with the right and obligation to select physicians for diagnosis and treatment for compensation claims; and a workers' compensation judge has stated that an employee's failure to accept treatment from professionals selected by the employer could result in the dismissal of a compensation petition.

On September 14, 2004, the Association responded that there are no special circumstances warranting a scope determination. It contends that the Board confuses the obligation to furnish medical treatment with the obligation to select the treating physician and asserts that the Division of Workers' Compensation has never considered this issue.

N.J.A.C. 19:13-2.2(a)(4) requires that a scope 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.

The first two subparagraphs do not apply. The question is whether special circumstances warrant our considering the Board's contention that the workers' compensation provision is illegal.

In Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977), we explained that special circumstances permitting a scope determination absent negotiations or a grievance would exist:

> 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. . . .

There are no special circumstances that warrant our issuing a mid-contract advisory scope opinion. The Board argues that there is relevant Commission case law arising subsequent to the parties' agreeing upon the disputed language. The cases it cites, however, were issued before the start of the parties'

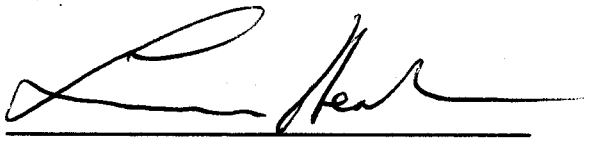
current agreement. See City of Perth Amboy, P.E.R.C. No. 97-138, 23 NJPER 345 (¶28159 1997), aff'd 24 NJPER 531 (¶29247 App. Div. 1998); West Orange Tp., P.E.R.C. No. 85-75, 11 NJPER 60 (¶16031 1984). In the transcript of a workers' compensation proceeding the Board has submitted, the judge informed an employee that her claim would be dismissed if she did not submit to treatment by the employer-selected physician. That proceeding did not address the negotiability of the disputed contract language. Finally, we know of no relevant court case or legislation that has intervened between the completion of negotiations over the 2002-2005 contract and the filing of this petition. See Livingston Tp. Bd. of Ed., P.E.R.C. No. 86-135, 12 NJPER 451 (¶17170 1986). We note that the parties' contract expires this coming June and that successor contract negotiations will be commencing soon.

Under all these circumstances, we dismiss the Board's petition. The Board may file a new scope petition should a negotiability dispute arise during successor contract negotiations or if a grievance is filed regarding the disputed provision.

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. Commissioner Mastriani was not present. None opposed.

DATED: November 23, 2004
Trenton, New Jersey
ISSUED: November 24, 2004