

P.E.R.C. NO. 2017-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY HOSPITAL (UMDNJ),

Petitioner,

-and-

Docket No. SN-2017-008

TEAMSTERS LOCAL 97,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of University Hospital for a restraint of binding arbitration of grievances contesting the Hospital's failure to provide the grievants with additional compensation for alleged out-of-title work. The Commission found that contract clauses requiring additional compensation for out-of-title work are mandatorily negotiable and legally arbitrable and that issues of contractual arbitrability are beyond the purview of a scope of negotiations petition.

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, Aloia Law Firm, LLC, attorneys
(Victoria A. Lucido, on the brief)

For the Respondent, Mets Schiro McGovern &
Paris, LLP, attorneys (David M. Bander, of
counsel and on the brief)

DECISION

On August 9, 2016, University Hospital (UMDNJ) (Hospital) filed a scope of negotiations petition seeking a restraint of binding arbitration of three grievances filed by Teamsters Local 97 (Local 97). The grievances contest the Hospital's failure to provide the grievants with additional compensation for out-of-title work.

The Hospital filed a brief, exhibits, and the certification of its Administrator of Compensation and Labor Relations (Labor

Relations Administrator). Local 97 filed a brief and exhibits. The Hospital also filed a reply brief. These facts appear.^{1/}

Local 97 represents licensed practical nurses and clerical, health care, operations, and maintenance staff employed by the Hospital. The Hospital and Local 97 were parties to a collective negotiations agreement (CNA) in effect from July 1, 2010 through June 30, 2014. The grievance procedure ends in binding arbitration.

Article XIX of the parties' CNA, entitled "Preservation of Rights," provides:

Notwithstanding any other provision of this Agreement, the parties hereto recognize and agree that they separately maintain and reserve all rights to utilize the processes of the Public Employment Relations Commission and to seek judicial review of/or interpose any and all claims or defenses in legal actions surrounding such proceedings as unfair practices, scope of negotiations, enforcement or modification of arbitration awards, issue of arbitrability and specific performance of the Agreement.

Grievant #1 submitted a request for out-of-title pay and never received a response from the Hospital. On April 14, 2016, Local 97 filed a grievance on her behalf. On April 22, the Hospital denied the grievance stating that Local 97 "fail[ed] to

^{1/} Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall . . . [r]ecite all pertinent facts supported by certification(s) based upon personal knowledge." However, Local 97 did not file a certification in this matter.

state a contractual article as being violated." On May 12, Local 97 requested a more thorough response. On June 2, the Hospital responded that there was "no specific language contained in the [CNA] to support the grievance" and therefore the grievance was "denied and dismissed with prejudice."

Grievant #2 also submitted a request for out-of-title pay and never received a response from the Hospital. On April 14, 2016, Local 97 filed a grievance on her behalf. On April 22, the Hospital denied the grievance stating that Local 97 "fail[ed] to state a contractual article as being violated." On May 12, Local 97 requested a more thorough response. On June 2, the Hospital responded that there was "no specific language contained in the [CNA] to support the grievance" and therefore the grievance was "denied and dismissed with prejudice."

On April 14, 2016, Local 97 filed a grievance on behalf of grievant #3 claiming that her "job description was changed by [UMDNJ] and . . . the changed job description included duties of other job classifications, which were combined."^{2/} Local 97

^{2/} Neither party raised grievant #3's current job title or description as an issue in this scope petition. However, the Commission has held that "an arbitrator may interpret a contractual recognition clause and determine whether an employee is covered by [an] agreement." Mt. Olive Bd. of Ed., P.E.R.C. No. 2013-71, 39 NJPER 474 (¶150 2013); see also, Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 88-110, 14 NJPER 342 (¶19130 1988) ("[a]n arbitrator may determine whether [an employee] is performing a job represented by the [employee organization] and whether he is (continued...)

requested that the Hospital provide grievant #3 with additional compensation for out-of-title work. On April 22, the Hospital denied the grievance, asserting that the parties' CNA "states that decisions made by Compensation Services are final" and contending that Local 97 did not have standing to file a grievance given that grievant #3's "current title [did] not fall under [Local 97]." On May 12, Local 97 requested a more thorough response. On June 2, the Hospital responded that there was "no specific language contained in the [CNA] to support the grievance" and therefore the grievance was "denied and dismissed with prejudice."

The Hospital's Labor Relations Administrator certifies that Local 97 did not seek to negotiate an out-of-title pay provision during contract negotiations and that the parties' CNA is silent on this issue. She also certifies that any out-of-title work must be approved by the Human Resources Compensation Services Office prior to the work being performed. In this matter, however, she certified that the asserted out-of-title work was not approved before requests for compensation were submitted by the grievants.

2/ (...continued)
covered by the recognition clause").

On June 16, 2016, Local 97 filed a Request for Submission of a Panel of Arbitrators (AR-2016-695) on behalf of all three grievants. This petition ensued.

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 the grievance or any contractual defenses the employer may have.

The New Jersey Supreme Court articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[A] subject is negotiable between public employers and employees when (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. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer.

When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

We must balance the parties' interests in light of the particular facts and arguments presented. *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 574-575 (1998).

The Hospital argues that Local 97 cannot compel arbitration or demand compensation for out-of-title work on behalf of its members because the parties' CNA does not include an out-of-title pay provision. Moreover, even if the parties' CNA does include an out-of-title pay provision, the Hospital maintains that the grievants failed to have their out-of-title work approved before submitting requests for compensation.

Local 97 argues that the Hospital has raised issues of contractual arbitrability that are beyond the Commission's jurisdiction in this scope petition. Given that out-of-title pay is mandatorily negotiable, Local 97 maintains that the instant grievances must proceed to arbitration.

In reply, the Hospital concedes that out-of-title pay is mandatorily negotiable. However, the Hospital argues that Article XIX of the parties' CNA requires the Commission to "step into the role of the Superior Court and determine the parties' contractual obligation to arbitrate."

The abstract question before us is whether out-of-title pay is mandatorily negotiable. "The Commission has consistently held that contract clauses requiring additional compensation for work performed in a higher title or different job category are mandatorily negotiable and legally arbitrable." West Caldwell Tp., P.E.R.C. No. 2016-52, 42 NJPER 361 (¶102 2016). "Employees have a strong interest in receiving additional pay for performing work of a higher level or different nature than that on which their standard compensation is based" and "[i]n general, those compensation claims do not significantly interfere with governmental policymaking." Passaic Valley Water Commission and CWA Local 1032, P.E.R.C. No. 2005-66, 31 NJPER 121 (¶51 2005), aff'd 32 NJPER 139 (¶64 App. Div. 2006), certif. den. 188 N.J. 356 (2006). Accordingly, we decline to restrain arbitration in this case.

Turning to the assertion that Article XIX of the parties' CNA requires the Commission to "step into the role of the Superior Court and determine the parties' contractual obligation to arbitrate," the Hospital has not cited any authority suggesting that the Commission may determine issues of contractual arbitrability. With respect to substantive arbitrability, New Jersey courts and the Commission have held that:

The duty to arbitrate springs from contract, and the parties can only be compelled to

arbitrate those matters which are within the scope of the arbitration clause of their contract. When there is a dispute as to whether a grievance falls within the terms of the arbitration clause of the contract, it is the duty of the courts to determine whether the matter is arbitrable. However, in determining whether a matter is arbitrable, the court is limited to ascertaining whether the party seeking arbitration is making a claim which, on its face, is covered by the contract and within the arbitration clause. The court may not, in any way, pass upon the merits of the actual dispute. If the arbitrator is found to have jurisdiction over a matter, the court must send it to arbitration, even though the court may think the dispute is patently frivolous.

[Bd. of Educ. v. Bloomfield Educ. Ass'n, 251 N.J. Super. 379, 384 (App. Div. 1990)
(citations omitted)]

See also, Pascack Valley Reg'l H.S. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489, 496-497 (2007)

(holding that if the question to be decided is whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate, then it is a matter of substantive arbitrability for a court to decide); accord Ridgefield Park Ed. Ass'n, 78 N.J. at 153-156; Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2016-59, 42 NJPER 447 (¶121 2016).

With respect to procedural arbitrability, New Jersey courts and the Commission have held that:

"Procedural" arbitrability questions entail, on the other hand, "whether procedural conditions to arbitration have been met."

The grievance process itself is used to decide matters of procedural arbitrability and, so, arbitrators are the decision-makers for those concerns. The distinction's premise - that courts ought not to intrude in the merits of an issue that the parties have agreed would be determined through the arbitration process - pragmatically reflects that ordinarily procedural problems in arbitrations cannot be answered without consideration of the merits of the dispute, in which a court should not become involved, and that undesirable delay and fragmentation would result from carving up the same dispute between a court and the arbitration forum when the substantive subject matter is arbitrable. Procedural disagreements should be regarded not as separate disputes but as aspects of the dispute which called the grievance procedures into play.

[Amalgated Transit Union, Local 880 v. New Jersey Transit Bus Operations, 200 N.J. 105, 116 (2009) (citations omitted)]

See also, Atlantic City Bd. of Ed. and Atlantic City Ed. Ass'n, P.E.R.C. No. 2012-31, 38 NJPER 257 (¶87 2011), aff'd 39 NJPER 431 (¶139 2013), certif. den. 215 N.J. 487 (2013) ("[w]hether a grievance or demand for arbitration was properly raised in the early stages of the grievance procedure is a procedural arbitrability question to be decided by the arbitrator").

Consistent with these cases, "we will not construe an arbitration clause, a just cause clause, a tenure clause or any other contractual provision in determining whether a restraint of arbitration should be granted under N.J.S.A. 34:13A-5.4(d)." Linwood Bd. of Ed., P.E.R.C. No. 2004-26, 29 NJPER 492 (¶155

2003). Therefore, we do not decide whether UMDNJ agreed to arbitrate contractual disputes involving out-of-title pay.

ORDER

The request of University Hospital (UMDNJ) for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: December 22, 2016

Trenton, New Jersey