

P.E.R.C. NO. 2022-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY VOCATIONAL-TECHNICAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2021-038

UNION COUNTY VOCATIONAL-TECHNICAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Union County Vocational-Technical Board of Education's request for a restraint of binding arbitration of the Union County Vocational-Technical Education Association's grievance. The grievance asserts that the Board violated the parties collective negotiations agreement when it allegedly did not allow an Association representative to fully participate in a member's American with Disabilities Act accommodations meeting, including not providing the Association representative with requested information and engaging in intimidating behavior. The Commission finds that the Association's grievance does not implicate Weingarten rights. The Commission further finds that the predominate issue of the Association's grievance is whether the Board impermissibly restrained the Association representative and denied her requested information at the ADA accommodations meeting, and that issue is mandatorily negotiable and legally arbitrable.

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, Florio Perrucci Steinhardt Cappelli
Tipton & Taylor, LLC, attorneys (Afshan T. Ajimiri
Giner, of counsel and on the brief; Lena K. Kim, on the
brief)

For the Respondent, Caruso Smith Picini, attorneys
(Nicholas Poberezhsky, of counsel)

DECISION

On April 20, 2021, the Union County Vocational-Technical Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Union County Vocational-Technical Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when it allegedly did not allow an Association representative to fully participate in a member's Americans with Disabilities Act (ADA) accommodations meeting, including not providing the Association

representative with requested information and engaging in intimidating behavior.

The Board filed briefs, exhibits and the certification of its Superintendent of Schools, Gwendolyn Ryan. The Association filed a brief and the certifications of its Grievance Chair, Colleen Prince, and its counsel, Nicholas Poberezhsky. These facts appear.

The Association is the exclusive representative of the Board's employees, including the titles of Coordinators of Cooperative Education/Place/Apprenticeship, Counselors, Guidance Counselors/Recruiters, Nurses, School-to-Work Coordinator, Secretaries, Office Staff, Social Workers, and Teachers. The term of the parties' CNA is July 1, 2017 through June 30, 2020. The grievance procedure ends in binding arbitration.

Ryan certifies that, upon an employee's request for reasonable accommodations for a disability under the ADA, the Board has consistently initiated and engaged in an interactive process in order to determine appropriate accommodations in compliance with the ADA. She certifies that, as part of the ADA accommodations process, the Board has participated in interactive process meetings with employees to discuss accommodations that are reasonable given the employees' specific medical needs and/or disability and that allow the employees to continue performing their essential job functions.

Ryan further certifies that due to the sensitive nature of the ADA accommodations meetings, where an employee's confidential medical information and needs are discussed, the Board has neither shared the meeting information with nor invited any unauthorized individuals to the meetings. However, Ryan certifies that the Board has never prohibited employees from inviting other individuals to the ADA accommodations meetings, including Association representatives. Ryan further certifies that during ADA accommodation process meetings attended by an Association representative, the Board has never restrained the representative from requesting information, asking clarifying questions, or otherwise participating in the meeting.

Prince certifies that, on February 10, 2021, she attended an ADA accommodations meeting in her official capacity as an Association representative on behalf of an employee, which was held by the Board's Human Resources Director, Michele Dorney. Prince certifies that, at the start of the meeting, Dorney stated that Weingarten rights do not apply to an ADA accommodations meeting.^{1/} Prince further certifies that she asked a few

^{1/} An employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right. It applies in the New Jersey public sector as well. UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 (continued...)

clarifying questions regarding a new version of a medical release form utilized by the Board, but that Dorney refused to answer her questions and told her that if she spoke again she would end the meeting. Prince certifies that she immediately stopped talking and remained silent for the duration of the meeting, as instructed by Dorney. Prince also certifies she acted professionally at all times during the meeting, was not disruptive, and did not speak to Dorney in a threatening, hostile, or intimidating manner. Through its counsel's certification, the Association claims that the employee who was the subject of the ADA accommodations meeting corroborated Prince's account of what occurred at the meeting.

On February 11, 2021, the Association filed a grievance to Ryan's office, alleging:

Members of the UCVTEA have a right to Union representation during the interactive process meeting with the employer. Michele Dorney,

1/ (...continued)
NJPER 167 (¶32056 2001). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984). If an employee is to be interviewed as a witness, whether the employee has a right to representation will be based upon an application of traditional Weingarten principles to the specific facts of the case. State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative.

HR continues to not share meeting information upon request by the member to have representation present with the UCVTEA representation and has threatened to end the interactive process meetings when representation asks a question.

Clarifying questions are routinely part of association representation. By taking a threatening and hostile tone Ms. Dorney has intimidated members and demonstrated an anti-union bias.

The Association sought the following remedy:

Allow the UCVTEA representation in all meetings and allow for proper representation in the meetings by sharing meeting times and taking questions. Cease intimidating association members and engage in an appropriate manner to foster a safe and collegial process.

Ryan denied the grievance on the grounds that it failed to meet the CNA's definition of a grievance; that ADA accommodation requesters are not entitled to Association representation at ADA accommodations meetings under Weingarten; and that Dorney did not act hostilely at the February 10 meeting, but rather Prince acted hostilely. On March 2, 2021, the Association moved the grievance to arbitration. 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 merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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.

[Id. at 404-405.]

The Board argues that the Association's grievance seeking that all employees be entitled to Association representation at their ADA accommodations meetings is not mandatorily negotiable or legally arbitrable. The Board argues that such a right to Association representation at ADA accommodations meetings is

inconsistent with the Weingarten. The Board asserts ADA accommodations meetings, which are intended to benefit employees, are unlike investigatory interviews that may lead to employee discipline where employees are entitled to union representation under Weingarten. The Board further argues that given the confidential information discussed at ADA accommodations meetings, it cannot allow Association representation without the employee's authorization. Nonetheless, The Board maintains that it has always granted an employee's request to have Association representation at their ADA accommodations meetings and has never prevented Association representation from participating in such meetings. The Board further denies that it acted with any hostility towards the Association's representative at the February 10 meeting. Lastly, the Board argues that the Association's grievance did not comport with the CNA's grievance procedure and it should have been brought in an appropriate forum.

The Association argues that its grievance is mandatorily negotiable and legally arbitrable because it challenges the Board's misconduct and anti-union animus towards the Association representative at the February 10 meeting. The Association claims that its grievance is not contending that every ADA accommodations meeting triggers employees' rights to Association representation under Weingarten. Nonetheless, the Association

argues that an employees may be entitled to Weingarten rights at ADA accommodations meetings because discussions in such meetings could serve as a precursor to discipline, especially where an employee is at risk of discipline for excessive absenteeism due to their disability. The Association argues that Prince was authorized to attend the ADA accommodations meeting but was restrained from fully participating and refused information she was requesting, which is violative of the CNA and the First Amendment, and interferes with protected union activity under N.J.S.A. 34:13A-5.4(a)(1). Lastly, the Association argues that the Board waived its right to pursue the instant scope of negotiations determination because an arbitrator has been selected by mutual consent of the parties pursuant to the CNA and hearing dates have been scheduled.

In its reply brief, in addition to reiterating its previous arguments, the Board responds that the Association's grievance is indeed seeking that all Association members be entitled to Association representation at their ADA accommodations meetings. The Board claims that the issues raised by the Association regarding Dorney's alleged misconduct at the February 10 meeting arose after the Association's grievance was filed, and thus, those issues are outside of the scope of the original grievance. While admitting that, under N.J.S.A. 34:13A-5.4(a)(1), the Board is not permitted to restrain or otherwise interfere with the

Association's authorized representation at an ADA accommodations meeting, the Board maintains that same statute preempts negotiations and that the Association's grievance raising such issues of anti-union animus should have been brought in another forum rather than arbitration. Lastly, the Board asserts that it did not waive, but rather preserved, its right to pursue a scope of negotiations petition in its March 16, 2021 letter to the Association offering a list of arbitrators.

Here, we find the Association's grievance does not implicate Weingarten rights. Indeed, the Association repeatedly asserts that its grievance is not attempting to establish a right to Association representation at all ADA accommodations meetings. The Association speculates that ADA accommodations meetings could potentially be a precursor to discipline, thereby triggering the need for Association representation. However, the Association asserts no facts that the specific member who was the subject of the February 10 accommodations meeting requested Association representation because of a reasonable belief that they could be subject to discipline from participation at that meeting. Thus, Weingarten did not apply to this specific employee at the February 10 meeting.

The Board allowed Association representation at the February 10 meeting upon the consent and authorization of the employee requesting accommodations. Additionally, the Board certifies it

has granted all such similar requests for Association representation in the past. Given the requesting employee's consent to the Association representation at the accommodations meeting, we find the Board's concerns over disclosing confidential information at such meetings to be not at issue. However, at issue is the Association's claim that Association representation was restrained from full participation and denied requested information at the February 10 meeting. We have held that an employer must supply information if there is a probability that the desired information is relevant and that it will be of use to the union in carrying out its statutory duties and responsibilities. Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶ 12105 1981); Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, P.E.R.C. No. 2010-11, 35 NJPER 298 (¶ 104 2009).

Here, the Board concedes that "during interactive process meetings in which an employee has invited and brought a union representative with the employee so that the representative may act in his or her official capacity, the Board is not permitted to restrain or otherwise interfere with the Association representative's official function to act on behalf of the employee." (Board's Reply Brief at 6). We find that whether the Board impermissibly restrained the Association representative and denied her requested information at the February 10 meeting

is the predominate issue of the Association's grievance, as repeatedly asserted by the Association. Thus, the Association's claims that the Board violated the CNA when it interfered with the Association's ability to properly represent the employee at the February 10 meeting are contract violation claims that may be reviewed by an arbitrator.

We find unpersuasive the Board's argument that the plain language of the Association's grievance is clearly seeking that Association representation be allowed at all ADA accommodations meetings. We interpret the Association's requested relief in context with the majority of the grievance that speaks to Dorney's alleged denial of requested information and intimidating behavior. Moreover, the Commission determines scope of negotiations petitions not only based on the grievance documents, but rather, based on the totality of the certified facts and arguments raised by the parties and has often acknowledged that a dispute becomes more sharply focused as the grievance proceeds and professional assistance is received at higher levels of the grievance process. See North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707, n.3 (¶16245 1985); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Union Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 81-16, 6 NJPER 388 (¶11200 1980).

We also find unavailing the Board's argument that the Association's grievance is preempted by N.J.S.A. 34:13A-5.4(a)(1) and should have been raised in a proper forum rather than arbitration, such as an unfair practice charge. It is not uncommon for matters appropriate for the Commission's unfair practice charge jurisdiction to be deferred to the parties' contractual grievance procedure ending in binding arbitration. See Cty. of Mercer, P.E.R.C. No. 2013-32, 39 NJPER 209 (¶69 2012); Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). Claims that we have found legally arbitrable are within the scope of negotiations and an arbitrator's jurisdiction to review the contractual merits of those claims should not be displaced simply because our unfair practice jurisdiction could be invoked to review an aspect of those claims. See Manville Bd. of Ed., P.E.R.C. No. 94-58, 19 NJPER 605 (¶24288 1993). Lastly, the Board's contention that the Association's grievance does not comply with the parties' CNA is an issue of contractual interpretation to be determined by an arbitrator.

ORDER

Union County Vocational-Technical Board of Education's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: September 30, 2021

Trenton, New Jersey