P.E.R.C. NO. 97-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY BOARD
OF CHOSEN FREEHOLDERS,

Petitioner,

-and-

Docket Nos. SN-96-117
SN-97-14

CWA LOCAL 1044,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Burlington County Board of Chosen Freeholders for restraints of arbitration of two grievances filed by CWA Local 1044. The grievances assert that unsafe working conditions violated the parties' collective negotiations agreement and that employees who were made ill are contractually entitled to have their medical expenses paid and their sick leave days recredited. The Commission finds that arbitration over these workplace safety disputes is not preempted by workers' compensation and tort claims laws.

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, Evan H.C. Crook, Burlington County Solicitor (Craig D. Bailey, Assistant County Solicitor, of counsel)

For the Respondent, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION AND ORDER

On April 24 and August 21, 1996, the Burlington County Board of Chosen Freeholders petitioned for two scope of negotiations determinations. The employer seeks restraints of binding arbitration of two grievances filed by CWA Local 1044. CWA asserts that unsafe working conditions violated the parties' collective negotiations agreement and that employees who were made ill are contractually entitled to have their medical expenses paid and their sick leave days recredited.

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

Local 1044 represents full-time County employees in certain titles. The parties entered into a collective negotiations agreement with a grievance procedure ending in binding arbitration. Article XIX is labelled "Worker's Compensation, Safety & Health." Section B states:

> B. The Employer shall at all times maintain safe and healthful working conditions, and shall provide employees with OSHA equipment once every two (2) years, as necessary, and with any additional wearing apparel, tools or devices reasonably necessary in order to insure their safety and health.

<u>SN-96-117</u>

Yolanda Forbes is a certified hospital attendant at Buttonwood Hospital. On May 5 and May 23, 1995, Forbes was allegedly given protective gloves treated with powder. The treated gloves allegedly caused a skin reaction that forced her to take several days of sick leave.

CWA filed grievances asserting that the employer had a supply of untreated gloves and that giving Forbes treated gloves violated Article XIX.B. The grievance sought reimbursement for time lost and restoration of sick leave used during Forbes' absences. No claim for medical expenses or for pain and suffering was made.

On July 21, 1995, a County hearing officer denied the May 5 grievance. On August 22, 1995, the same hearing officer denied the May 23 grievance. On July 31, 1995, CWA demanded arbitration. This petition ensued.

SN-97-14

On August 31, 1995, employees of the County's Emergency Management Service were allegedly exposed to toxic fumes at the Public Safety Building. The fumes were allegedly produced by a contractor's renovation of a County building.

A CWA representative requested a "Step I Group Grievance Hearing" to resolve a grievance on behalf of "D" shift employees. The letter and the attached grievance asserted that management officials failed to respond promptly to the chemical release and needlessly exposed the workers to the toxic fumes. The grievance alleged a violation of Article XIX.B and requested that the employees be reimbursed for medical expenses and that any sick leave days used be restored. No claim for pain and suffering was made.

On December 28, 1995, an internal hearing officer issued a report denying the grievance and finding that the employees' remedy lay in workers' compensation laws. On January 25, 1996, CWA demanded 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 County's assertion that the claims do not fit within the contract's definition of a grievance or any other contractual arbitrability issue. Nor do we determine the merits of any contractual claims.

The County does not assert that Article XIX.B is not mandatorily negotiable. It asserts instead that workers' compensation and tort claims laws preempt arbitration. It relies on Old Bridge Bd. of Ed., P.E.R.C. No. 87-132, 13 NJPER 352 (¶18143 1987), aff'd in pt., rev'd in pt. NJPER Supp.2d 188 (¶166 App. Div. 1988), and the discipline amendment to N.J.S.A. 34:13A-5.3 prohibiting arbitration of disciplinary grievances where an alternate statutory appeal procedure provides a right of appeal.

CWA asserts that grievances seeking enforcement of safe workplace guarantees are legally arbitrable. See Hunterdon Cty. and CWA, 116 N.J. 322, 332 (1989); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16119 App. Div. 1985); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979); Hillside Tp., P.E.R.C. No. 78-59, 4 NJPER 159 (¶4076 1978). CWA also notes that the employer's concern about potential remedies is premature and can be raised, if necessary, by post-arbitration review of an award. See, e.g., State of New Jersey; Deptford Tp., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981). CWA also asserts that unlike the Old Bridge grievance, which pressed an individual employee's tort-based damages claim (payment for "humiliation, injury and disgrace" based on infliction of emotional distress), its grievance seeks to enforce a

contractual pledge protecting the safety of all employees. CWA also argues, citing Ramos v. Browning Ferris Inds., 103 N.J. 177, 183 (1986), that the workers' compensation laws do not bar an employer from providing negotiated health or disability benefits beyond those provided by statutory compensation schemes and similar to sick leave injury benefits available to State employees by statute. N.J.S.A. 11A:6-9.

As a rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." IFPTE Local 195, IFPTE v. State 88 N.J. 393, 403-04 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978).

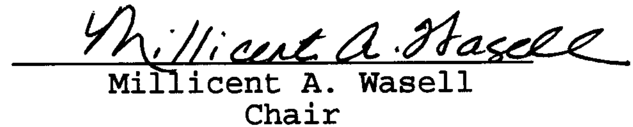
Arbitration over these workplace safety disputes is not preempted. It is undisputed that Article XIX, Section B is mandatorily negotiable. We perceive no basis for restraining arbitration altogether since at least some possible remedies -- e.g. the declaration of a contractual violation and the direction not to use treated gloves if dangerous -- are indisputably within the scope

of negotiations. Moreover, the workers' compensation statutes rest on the premise that an employer is insulated from an employee's tort actions in exchange for assuming strict liability for workplace injuries and do not foreclose a majority representative's efforts to enforce a contractual safety clause on behalf of all employees and seeking contractual remedies concerning sick leave and sick benefits. See New Brunswick Bd. of Ed., P.E.R.C. No. 86-8, 11 NJPER 453 (¶16159 1985); see also Atchison, Topeka & Santa Fe R.R. v. Buell, 480 U.S. 557 (1987) (breaches of duty to provide safe workplace may be remedied through grievance arbitration as well as through action under Federal Employers' Liability Act). Cf. Fair Lawn Bd. of Ed., P.E.R.C. No. 79-88, 5 NJPER 225 (¶10124 1979), aff'd 174 N.J. Super. 554, 559-560 (App. Div. 1980)(representative's right to process grievance to vindicate contractual guarantee not affected by individual's pursuit of private remedy). These disputes are distinguishable from Old Bridge because none of the grievances seek tort-based damages for pain or suffering; and they are not covered by the discipline amendment since they do not involve any form of discipline. Moreover, it is premature to consider whether an arbitration award would conflict with the workers' compensation laws. Post-arbitration review pursuant to N.J.S.A. 2A:24-8 is available to ensure that any award is consonant with statutory requirements as well as the public interest and welfare. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208 (1979). We will therefore deny the requested restraints of arbitration.

ORDER

The requests of the Burlington County Board of Chosen Freeholders for restraints of arbitration are denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: January 30, 1997
Trenton, New Jersey
ISSUED: January 31, 1997