P.E.R.C. NO. 94-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-90

HOTEL, RESTAURANT & CAFETERIA
EMPLOYEES UNION LOCAL 3, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Hotel, Restaurant & Cafeteria Employees Union Local 3, AFL-CIO against the Newark Board of Education. The grievance alleges that the Board violated a provision in the parties' collective negotiations agreement concerning podiatry care. The Commission finds that whether or not the level of benefits and the administration of the podiatry plan have been changed in fact must be resolved through the parties' negotiated grievance procedures.

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Appearances:

For the Petitioner, Marvin L. Comick, General Counsel
(Samuel M. Manigault, Associate Counsel)

For the Respondent, Szaferman, Lakind, Blumstein, Watter & Blader, P.C., attorneys (Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On April 2, 1993, the Newark Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by Hotel, Restaurant, & Cafeteria Employees Union Local 3, AFL-CIO. The grievance alleges that the Board violated a provision in the parties' collective negotiations agreement concerning podiatry care.

The parties have filed a certification, exhibits, and briefs. These facts appear.

Local 3 represents the Board's cafeteria employees. The parties entered into a collective negotiations agreement effective from March 1, 1992 through February 28, 1995. Article XIII is

entitled Fringe Benefits. Section 4(A) requires the Board to pay in full for podiatry care. Section 5 provides:

> (A) The Board and Union shall jointly select the administrator(s) to provide the benefits described in Section 4A above....
>
> (B) If the Board and the Union disagree on who the administrator should be, then the previous administrator shall continue to be the administrator.

The contractual grievance procedure ends in binding arbitration.

For 18 years, the Board contracted with podiatrist Dr. Bruce Stern on a closed plan basis. The Board paid for his services fully and directly. According to Local 3's business agent, Dr. Stern has developed a close relationship with many employees, some of whom continue to need podiatric care. Dr. Stern's location in Newark and his office hours are also convenient.

In 1992, the Board solicited bids for a three-year podiatry contract. Dr. Stern submitted a bid which Local 3 supported. The contract, however, was awarded instead to the American Medical Analyst Group ("AMAG"). According to the Board, AMAG was the lowest responsible bidder. The Board cancelled its contract with Dr. Stern.

On January 7, 1993, Local 3 filed a grievance. It asserted that the contract prohibited the Board from unilaterally selecting a new podiatry care provider and required it to continue to use Dr. Stern. This petition ensued.

On June 1, 1993, a Board hearing officer upheld the grievance. He found that the Board had violated Section 5 of Article XIII and he directed the Board to discontinue its contract with AMAG and to rebid the podiatry contract.

According to Local 3's business agent, AMAG has not provided any podiatry service and neither it nor the Board has supplied AMAG's purported plan to Local 3. Dr. Stern has continued to treat his previous patients and some other employees, but has not been paid by the Board.

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 this grievance. We also do not consider whether the Board properly terminated its contract with Dr. Stern, an issue hinted at in Local 3's brief.

The level of health care benefits is mandatorily negotiable. But the identity of the insurance carrier is, in the abstract, only permissively negotiable because that issue, while not involving a substantial question of governmental policy, in theory affects employees only indirectly. See City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981); see also Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985); Borough

of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985). However, in reality the identity of the carrier sometimes changes the level of health care benefits and the administration of the health plan. In these cases the public employer has to negotiate over that issue as well. See Borough of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986); City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). When a change in insurance carrier allegedly changes the level of contractual benefits, an unfair practice charge will be deferred to arbitration. Cape May Cty. Sheriff, P.E.R.C. No. 92-105, 18 NJPER 226 (¶23101 1992); Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989); Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987).

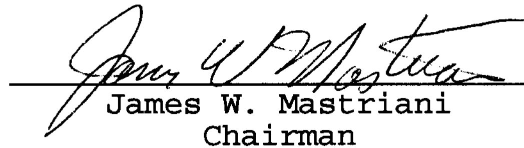
Under these precedents, we hold that the parties' dispute is within the scope of negotiations. Local 3 has alleged that the level of benefits has changed as a result of the selection of a new podiatry provider -- indeed, it alleges that no benefits have been provided since January 1, 1993. And it appears that neither the employer nor AMAG has supplied Local 3 with a contract specifying what benefits AMAG may or may not provide in the future. Further, Local 3 has alleged that the administration of the plan has been changed in ways affecting employees. Whether or not the level of benefits and the administration of the plan have been changed in

fact must be resolved through the parties' negotiated grievance procedures.

ORDER

The request of the Newark Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo and Smith voted in favor of this decision. None opposed. Commissioner Regan abstained from consideration. Commissioner Wenzler was not present.

DATED: November 15, 1993
Trenton, New Jersey
ISSUED: November 16, 1993