

P.E.R.C. NO. 83-164

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OCEAN  
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-83-40

TOWNSHIP OF OCEAN  
TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a scope of negotiations petition seeking to have an arbitration award declared null and void. The Commission holds that in the absence of a proceeding to confirm, modify, or vacate an award under N.J.S.A. 2A:24-7 and a referral of any scope of negotiations questions from a court, it will not decide post-arbitration award scope of negotiations petitions.

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Appearances:

For the Petitioner, Shebell & Schibell, Esqs.  
(Peter Shebell, of Counsel)

For the Respondent, Hayden L. Messner, UniServ  
Representative, New Jersey Education Association

DECISION AND ORDER

On November 17, 1982, the Township of Ocean Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks to restrain implementation of a September 3, 1982 grievance arbitration award in favor of the Township of Ocean Teachers Association ("Association"). The grievance alleged that the Board violated its collective negotiations agreement when it improperly denied a teacher's request for extended sick leave benefits under N.J.S.A. 18A:30-6<sup>1/2</sup>

1/ N.J.S.A. 18A:30-6 provides:

When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

(continued)

Both parties have filed briefs and accompanying exhibits. The following facts appear.

The Board and the Association are parties to a collective agreement covering the period of July 1, 1981 to June 30, 1983. The contract includes a grievance procedure which ends in binding arbitration.

In June, 1982, a teacher applied to the Board for five days extended sick leave in which to undergo surgery to correct nasal blockage. She had already used up her accumulated sick leave benefits. Her request was denied because of "the non-emergency nature of [your] surgery." She was docked five days pay for absence taken to have the surgery. The Association then grieved the denial of extended leave, alleging that the Board had not equally applied the criteria it had established to evaluate individual employee requests for extended leave. When the parties were unable to resolve the dispute at the lower levels of the grievance procedure, the Association demanded binding arbitration. The Board did not file a scope petition at this juncture.

On August 24, 1982, arbitration hearings were held. At that time the parties argued on both the merits and the negotiability/arbitrability of the controversy.

On September 3, 1982, the arbitrator issued an award finding the grievance arbitrable, holding that the Board improperly

1/ (continued)

The parties' collective negotiations agreement at Article X, II C states, in pertinent part:

...For any additional days due to illness beyond the accumulated sick leave the Board of Education may grant additional sick days as may be determined in each individual case less substitute's pay as provided in N.J.S.A. 18A:30-6.

denied the request for additional sick leave, and ordering the Board to pay the grievant for the days it docked her. Neither party filed a petition to vacate, modify, or confirm the arbitration award. The Board instead filed the instant petition.

The Board argues that under N.J.S.A. 18A:30-6, it must decide whether or not to grant extended sick leave on a case-by-case basis and its decision cannot be reviewed through binding arbitration. Bd. of Ed. of Piscataway v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977) ("Piscataway Maintenance"). It also argues that only the Commission, not the arbitrator, has jurisdiction to decide whether an issue is arbitrable. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) ("Ridgefield Park"); Piscataway Twp. Bd. of Ed. v. Piscataway Twp. Ed. Ass'n, App. Div. Docket No. A-624-81T2 (11/22/82) ("Piscataway Ed. Ass'n"); Plainfield Ass'n of School Administrators v. Bd. of Ed. of the City of Plainfield, 187 N.J. Super. 11 (App. Div. 1982) ("Plainfield"). The Board, therefore, requests we find the arbitrator's award null and void.

The Association argues that the parties did not negotiate extended sick leave, but merely included Section 18A:30-6 as part of their collective agreement and, that the Board is estopped from litigating the issue of negotiability after the arbitration award has been rendered and after it had arbitrated similar disputes in the past without challenging the negotiability of the subject matter. Piscataway Ed. Ass'n; Mainland Teachers Ass'n v. Mainland Reg. H.S. Dist., App. Div. Docket No. C-3707-80 ("Mainland").

We first consider whether exercising our scope of negotiations jurisdiction would be appropriate in this case.

We conclude it would not and dismiss the petition.

N.J.S.A. 34:13A-5.4(d) provides that the Commission "...shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations." (Emphasis supplied). Under N.J.A.C. 19:13-2.2(a), a Petition for Scope of Negotiations Determination must provide:

4. A statement 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 Commission has dismissed petitions when the petitioner has failed to demonstrate that a concrete dispute exists. See, In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); In re Camden County Board of Chosen Freeholders, P.E.R.C. No. 81-56, 6 NJPER 544 (¶11276 1980), mot. for reconsideration granted, P.E.R.C. No. 81-71, 7 NJPER 20 (¶12007 1980). See also, In re Cinnaminson Twp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977).

In the instant case, it is clear that there is no dispute within the meaning of N.J.A.C. 19:13-2.2(a)4 i since the question concerning negotiability has not arisen in the

context of successor contract negotiations or pursuant to a contract reopener. It is also clear that there is no dispute within the meaning of N.J.A.C. 19:13-2.2(a) 4 ii since the parties have already exhausted the grievance process and an arbitration award has been rendered. The question which we must now consider is whether we will entertain under N.J.A.C. 19:13-2.2(a) 4 iii a scope of negotiations petition filed after an arbitration award has been rendered and in the absence of a referral from a court considering a petition to vacate, modify, or confirm an award.

The appellate courts have made it quite clear that challenges to the legal arbitrability of a grievance should be raised through a scope petition filed with this Commission before the arbitration is held, as N.J.A.C. 19:13-2.2(a) 4 ii so clearly contemplates. Thus, in Ridgefield Park, our Supreme Court outlined the procedure for resolving scope of negotiations disputes:

Of course, where the existence of a contractual obligation to arbitrate is not contested, the parties need only go to PERC for a ruling on whether the subject matter of the dispute whose grievability is contested is within the scope of collective negotiations. PERC can then afford complete relief. If PERC concludes that the dispute is within the legal scope of negotiability and agreement between the employer and employees, the matter may proceed to arbitration. Where PERC concludes that a particular dispute is not within the scope of collective negotiations, and thus not arbitrable, it must issue an injunction permanently restraining arbitration. See Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975). Moreover, we agree with the decision in Bd. of Ed. of Englewood v. Englewood Teachers, supra, that PERC is empowered to order that arbitration proceedings be suspended during the pendency of a scope-of-negotiations proceeding. Where necessary, PERC may go to the Appellate Division to seek an appropriate order to compel compliance with its orders in scope proceedings. N.J.S.A. 34:13A-5.4(f). Where a party disagrees with PERC's determination on the scope question, an appeal to the Appellate Division is expressly authorized. N.J.S.A. 34:13A-5.4(d).  
Supra at pp. 154-155.

Accord, Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 315-316 (1979); Camden Cty. Voc. Sch. Bd. v. CAM/VOC Teachers, 183 N.J. Super. 206, 214 (App. Div. 1982); Piscataway Ed Ass'n; Mainland. Pre-arbitration decisions finally resolving scope of negotiations issues are necessary in order to avoid a waste of time and money and the frustration of the arbitration process and the parties. Bd. of Ed. of Englewood v. Englewood Teachers' Ass'n, 135 N.J. Super. 120 (1975); Mainland; In re Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1983).

A statutory procedure already exists for the review of arbitration awards. N.J.S.A. 2A:24-7 governs proceedings for the confirmation, vacation or modification of an arbitration award. It provides, in part:

A party to the arbitration may, within 3 months after the award is delivered to him, unless the parties shall extend the time in writing, commence a summary action in the court aforesaid for the confirmation of the award or for its vacation, modification or correction. Such confirmation shall be granted unless the award is vacated, modified or corrected.

N.J.S.A. 2A:24-8 provides the following grounds for vacation of an award:

The court shall vacate the award in the following cases:

- a. Where the award was procured by corruption, fraud or undue means;
- b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
- c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

An arbitrator's award in the public sector must be consonant with the public interest and welfare and based on at least a reasonably debatable interpretation of the contractual language. Such an award should not be cast aside lightly. Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 217, 221 (1979).

The enforceability of public sector grievance arbitration awards has been considered in a number of court cases initiated pursuant to N.J.S.A. 2A:24-7. To date, no case has held that the failure of an employer to file a pre-arbitration scope of negotiations petition, standing alone, automatically precludes a post-arbitration challenge to an arbitration award based on scope of negotiations considerations. Some cases have held, however, that an employer may equitably estop itself under certain circumstances from raising a post-arbitration scope of negotiations challenge.

In Plainfield, a judge of the Chancery Division of the Superior Court confirmed a public sector grievance arbitration award, despite the employer's contention that the dispute was not legally arbitrable. The judge observed that the board should have filed a scope of negotiations petition with this Commission if it wanted to contest the issue of arbitrability. The Superior Court reversed, found that the award interfered with the board's managerial prerogatives, and concluded that the award should be vacated. Thus, under Plainfield the mere failure to file a pre-arbitration scope of negotiations petition does not



necessarily bar an arbitrability attack after the award.<sup>2/</sup> See also Bridgewater-Raritan (Chancery Division with jurisdiction over confirmation proceedings refers post-arbitration scope of negotiations dispute to Commission after determining employer was not estopped from filing petition).

In Piscataway Ed. Ass'n, a judge of the Chancery Division confirmed a public sector grievance arbitration award, despite the employer's contention that the dispute was not legally arbitrable. The Superior Court affirmed and refused to consider the legal arbitrability issue because the Board had failed to file a pre-arbitration scope of negotiations petition and had failed to appeal two pre-arbitration Chancery Division orders to arbitrate. The Court stated:

Thus there were two sets of procedural deficiencies here. First was the failure to obtain a ruling from PERC on the question of arbitrability; both the court and the arbitrator lacked jurisdiction to decide that issue. Were that the only irregularity, this court might choose to proceed in spite of it and address the issue itself. For example, in Bernards Tp., 79 N.J. at 317, the Court tolerated the deviation, concluding that "remand to PERC at this late date would serve no salutary purpose," and proceeded to decide the issue. But see Camden Cty Voc. Sch. Bd. v. CAM/VOC Teachers, 183 N.J. Super. at 214, in which this court chose to remand to PERC.

<sup>2/</sup> Ordinarily, scope of negotiations disputes should be initially referred to the Commission for application of its special expertise in this area. Ridgefield Park. In Plainfield, however, the Superior Court decided the scope question directly because there had already been long delays resulting from numerous judicial, administrative, and arbitration hearings. See also Bernards Township. The question of which forum -- this Commission or the courts -- should initially decide a scope of negotiations question is, of course, different from the question of whether a post-arbitration scope of negotiations defense should be considered at all.

In this case, however, there is the additional circumstance of plaintiff's failure to appeal two final Chancery Division orders that the arbitration might proceed. To permit plaintiff to raise this issue now would permit it to subvert established appellate practice and the principle of finality of judgments. Plaintiff appealed neither order in favor of arbitrability; it elected to take its chances during the arbitration on the merits. Had it won in that forum, it would not be arguing this issue. Having lost, however, it now asserts what it should have raised via direct appeal before the arbitration was held. We do not believe that the Board should be permitted to forego an appeal on arbitrability in order to gamble on winning on the merits during arbitration, then resurrect the arbitrability issue when its gamble fails.

(Slip opinion at pp. 8-9)

In Mainland, Judge Gibson of the Chancery Division confirmed a public sector grievance arbitration award pursuant to N.J.S.A. 2A:24-7 and 8. The award required the board of education to pay additional compensation for increased pupil contact time; the board argued that the award interfered with its managerial prerogative to shift from single sessions to double sessions and vice-versa. The Court held that the Board was equitably estopped from asserting this argument because it had withdrawn a pre-arbitration scope of negotiations petition with prejudice, had agreed with the Association to the withdrawal of unfair practice charges which would have resolved the scope question, and had agreed with the Association that the arbitrator would decide the arbitrability dispute as a threshold issue. The Court stated:

Although there exists a "general reluctance" to apply equitable estoppel against a governmental agency, it may be appropriate where the interests of "justice, morality and common fairness dictate that course." Miller v. Teachers' Pension & Annuity Fund, supra at 477. The interests of justice compel that conclusion here. The framework within which this type of dispute

should be resolved contemplates minimal disruption for all participants, including the parties, administrative agencies and the courts. Ridgefield Park made it clear that the process anticipates that where there is a threshold issue of whether the subject matter of the grievance is within the scope of collective negotiations, that determination should be made by PERC before the matter reaches arbitration. Here the Board first went to PERC, but then had the issue withdrawn. It proceeded to arbitration with full exploration of the issues. To now raise the issue of "negotiability" as part of the review of the arbitration award would frustrate the process and require a duplication of effort. Given the inability of this court to make an initial determination on the "scope" issue, State v. State Supervisory Employees Association, supra at 83, that question would necessarily be returned to PERC. Such a procedure would undermine the framework of N.J.S.A. 2A:24-8 and deprive a successful petitioner of relief otherwise available. Had the school board not withdrawn its scope petition in the first place the teachers would naturally have pursued their unfair labor practice claim and this matter would have been resolved prior to arbitration. If the Board had prevailed, there would have been no arbitration; nor would a proceeding be necessary before this court. Cf. N.J.S.A. 34:13A-5.4.

It is the opinion of this court, therefore, that the defendant is equitably estopped from asserting "managerial prerogative" as a basis for overturning the arbitrator's award. Given this conclusion, there is no need to resolve the issue of whether such a claim may properly be considered in a confirmation setting absent estoppel.<sup>3/</sup>  
(Slip opinion at pp. 10-11).

Based upon Plainfield, Bridgewater-Raritan, Piscataway, and Mainland, we conclude that a board of education may in some, but not all cases be barred from arguing that an arbitration award

<sup>3/</sup> Earlier in its opinion, the Court concluded that a public employer could not "waive" a managerial prerogative, although it could equitably estop itself from asserting such a prerogative.

is outside the scope of negotiations. The courts will apparently consider estoppel arguments on a case-by-case and fact-by-fact basis.

The instant case, however, is distinguishable from all of the post-arbitration award cases we have discussed. Here, unlike each one of those cases, neither party has commenced a proceeding to vacate, modify, or confirm the award pursuant to N.J.S.A. 2A:24-7. Instead, the Board has sought to displace the statutorily prescribed route for seeking to vacate arbitration awards with this scope petition in which it seeks a Commission determination that the award is null and void. In the absence of a proceeding under N.J.S.A. 2A:24-7, and given the compelling public policies in favor of pre-arbitration scope of negotiations determinations, we believe it is inappropriate to entertain a post-arbitration award scope of negotiations petition at this juncture. In effect, the absence of a timely proceeding to vacate, modify, or confirm an arbitration award pursuant to N.J.S.A. 2A:24-7 eliminates the presence of the "dispute" necessary to trigger our scope of negotiations jurisdiction.<sup>4/</sup>

<sup>4/</sup> We recognize that In re Fairview Board of Education, P.E.R.C. No. 79-34, 5 NJPER 28 (¶10019 1978) held that the Commission would entertain post-arbitration scope of negotiations challenges because an employer could not waive its managerial prerogatives under Ridgefield Park. We specifically noted (footnote 1) the absence of any labor relations cases concerning the application of estoppel and waiver doctrines to negotiability questions. Since Fairview, a body of cases has arisen addressing these issues. Our decision today is consistent with that body of recent case law and ensures that the appropriate judicial forum will have the opportunity to consider estoppel and waiver arguments in addition to any other grounds appropriately raised under Kearny and N.J.S.A. 2A:24-8. Accordingly, we overrule Fairview to the extent it would require the assertion of our jurisdiction in the absence of a pending proceeding to confirm, modify, or vacate an arbitration award.

This analysis is consistent with our holding in In re Matawan Reg. Bd. of Ed., P.E.R.C. No. 77-61, 3 NJPER 163 (1977) where we dismissed an unfair practice charge which had alleged that the employer had refused to comply with a grievance arbitration award. We reasoned that such a contention must be litigated in a proceeding to confirm or enforce the arbitration award pursuant to N.J.S.A. 2A:24-7.

If an employer wishes to preserve a "dispute" over the legal arbitrability of an arbitration award, it should commence proceedings to vacate or modify the award under N.J.S.A. 2A:24-7 and then ask the Chancery Division to transfer the scope of negotiations question to the Commission for resolution pursuant to Ridgefield Park. This procedure will also allow the Chancery Division to rule on any equitable estoppel arguments the employee representative may have before transferring the matter, if it sees fit, to us. In addition, this procedure will insure that the courts have an opportunity to consider the validity of the award under Kearny and the grounds for attack set forth in N.J.S.A. 2A:24-8 and to consider any other questions which under Ridgefield Park are outside our scope of negotiations jurisdiction. Id. at p. 154.<sup>5/</sup> We will, of course, entertain any scope of

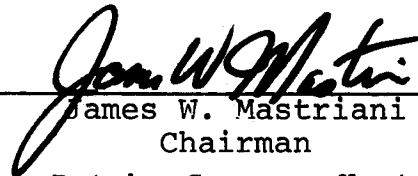
<sup>5/</sup> For example, in the instant case, the Association contends that the Board should be equitably estopped from contesting the arbitrability of this grievance because it had submitted previous disputes concerning extended sick leave to binding arbitration and had not complained about arbitrability until it lost. That question is appropriately addressed to a court. Ridgefield Park.

negotiations questions which a court refers to us as part of a statutory proceeding to review an arbitration award. Bridgewater-Raritan.<sup>6/</sup> In the absence of such a proceeding or referral in this case, however, we dismiss the Board's petition.

ORDER

The scope of negotiations petition filed by the Township of Ocean Board of Education is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett and Suskin voted in favor of this decision. Commissioners Hipp and Newbaker abstained. None opposed.

DATED: Trenton, New Jersey  
June 24, 1983  
ISSUED: June 27, 1983

<sup>6/</sup> In particular, if a proceeding under N.J.S.A. 2A:24-7 is filed in this case and permitted to proceed despite the passage of more than three months since the arbitration award, we would be prepared to render a prompt determination on the scope of negotiations question.